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VIRGINIA, THE SUPREME COURTS OF NORTH  
CAROLINA AND SOUTH CAROLINA, AND  
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<sup>1</sup> Resigned October 12, 1907.

<sup>2</sup> Became Presiding Justice October 12, 1907.

<sup>3</sup> Became Judge October 12, 1907.

<sup>4</sup> Resigned October 1, 1907.

<sup>5</sup> Became President October 15, 1907.

<sup>6</sup> Became Judge October 15, 1907.



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liberally construed, and its provisions are sufficiently comprehensive to be applicable to the present case.

But, apart from the statute, the ruling was free from error. The general doctrine is thus clearly stated in 11 Enc. of Law, 427-429: "As a general rule, an estoppel may arise from silence as well as words; but this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances requiring him to speak, keeps silent, or, in other words, where his silence amounts to a fraud, actual or constructive. This doctrine proceeds upon the ground that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent. It is not necessary that the duty to speak in such case should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. It arises whenever the principles of natural justice require the disclosure. It may be stated as a general rule that, if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he consents to its being committed, he cannot afterwards be heard to complain of the act. This, it has been said, is the proper sense of the term 'acquiescence,' which in that sense may be defined as 'quiescence' under such circumstances as that assent may be reasonably inferred from, and is no more than an instance of the law of estoppel by words or conduct. Thus, it has been held that, if the owner of the goods stands by and voluntarily allows another to treat them as his own, by which means a third person is induced to purchase them bona fide, the former cannot recover them from the purchaser." After the plaintiff placed his mortgage on record, he did not owe any further duty to persons having dealings concerning the horse, other than not to mislead them by his conduct. He did not owe them the duty of giving them that information which the record of the mortgage disclosed, and the testimony does not show that he failed, in any other duty.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 393)

**KAYLOR et al. v. HILLER.**

(Supreme Court of South Carolina. July 17, 1907.)

**JUDGMENT—COLLATERAL ATTACK—PRESUMPTION—SERVICE OF PROCESS.**

Where a minor was living with the executor of the mother's estate, service of summons on such minor in action by the executor with-

out proof of service on the parent, or without any showing in the proof of service as to absence of the father from the state, raises a presumption of jurisdiction of the minor which cannot be brought in question collaterally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 933, 936.]

Appeal from Common Pleas Circuit Court of Richland County; Memminger, Judge.

Action by Felicita Rosetta Kaylor and others against Louis Paul Hiller. Judgment for defendant, and plaintiffs appeal. Affirmed.

De Pass & De Pass and Bellinger & Welch, for appellants. W. S. Monteith and Lyles & Macmahon, for respondent.

GARY, A. J. This is an action to recover the possession of certain lands described in the complaint. Lewis H. Trevett died in 1878, leaving a will, whereby he devised his whole estate to his wife during the term of her natural life, and after her death then to be divided into four equal parts, one-fourth of which was settled in trust upon each of his granddaughters, Felicita Embleton and Josephine Embleton. After Trevett's death an action was instituted by Louis Paul Hiller, the executor of the will, seeking to marshal the assets and to sell the real estate to pay debts, alleging that the estate was insolvent. To this action both Felicita and Josephine Embleton were made parties. They were then minors under 14 years of age. Their mother was dead, but there was testimony that their father then lived in the city of Columbia. The return of service on the summons was as follows:

"Personally came John McCabe, who, being duly sworn, sayeth on oath that he served Louis H. Embleton, George W. Embleton, Felicita Rosetta Embleton and Josephine Embleton, Martha Hiller and Mary Trevett each with copies of this summons personally, and left the same with them.

"John McCabe.

"Sworn to and subscribed before me, July 10, 1878.

"[L. S.]

W. S. Monteith.

"Notary Public."

On the 6th of July, 1878, a petition was filed for the appointment of a guardian ad litem for said infants, in which it was stated that they had no general or testamentary guardian, and that they resided with L. P. Hiller, the plaintiff in that action. The present action was commenced in May, 1904, 26 years after the land described in the complaint was sold by order of the court.

After quoting authorities in support of his ruling, his honor, the presiding judge, thus stated his reasons for directing the jury to render a verdict in favor of the defendant: "This is not a direct action to try to set aside the decree on the ground of fraud or irregularity in the decree, but it is for the possession of real estate in which these parties seek to establish title to real estate as not

being bound by this decree, as not having bound the parties to the action by reason of alleged irregularity, appearing on the face of the record. Now, in this case it appears in the record that the service was complete; that is, complete and proper service, such as is recognized by the court as proper service, was made. The only question upon which that service is sought to be shown to be improper is that the absence from the state of South Carolina of the father does not affirmatively appear on the record. The record is silent on the point whether the father was in the state or not. As a complete service is shown in the absence of the father from the state, and the record being silent upon the point whether he was absent or not, and the other facts stated throughout the record tending to show that the father must have been absent from the state, I think the law will come in and presume that the father was absent from the state, and that the service was complete. It seems to me from these circumstances and the record before me that complete service on these minors is shown, that they were proper parties to the action, that they were represented before the court, that the case was carried through the usual course before the master, who reported upon it, and a decree rendered, and they are barred from recovery in this action; therefore, there is nothing to submit to the jury. The foreman will come forward and write the verdict, 'We find for the defendant the land in dispute.'

The record shows that a copy of the summons was served upon each of the said infants; that they had no general or testamentary guardians, and resided with L. P. Hiller; and that he was the plaintiff in that action. As he was the plaintiff, and the infants resided with him, it was not necessary to serve a copy of the summons on him. *Kennedy v. Williams*, 59 S. C. 378, 38 S. E. 8. If it appeared from the record that the infants did not have a father or mother, or that neither was in the state, there would have been a complete compliance with the requirements of the section of the Code regulating the mode of service on infants as it stood in 1878, which is identical with section 155, subd. 2, of the present Code of 1902, which is as follows: "If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed." But in this case the record is silent as to the alleged jurisdictional defect upon which the appellants rely.

In *Ex parte Gray*, 48 S. C. 566, 569, 26 S. E. 786, the court says: "All presumptions must be indulged in favor of the jurisdiction of a court of general jurisdiction. To avoid such a judgment for want of jurisdiction, the jurisdictional defects must appear affirmatively on the record." The rule is thus stated

in 1 Greenleaf on Ev. § 19. "Conclusive presumptions are also made in favor of judicial proceedings. Thus, the records of a court of justice are presumed to have been correctly made, a party to the record is presumed to have been interested in the suit, and after verdict it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record, provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment." In the case of *Clemson College v. Pickens*, 42 S. C. 511, 518, 20 S. E. 401, 404, Mr. Chief Justice McIver says: "The practical inquiry is whether the record as set forth in the 'case' shows on its face that the court did not acquire jurisdiction of the person of defendant, and not whether such record is defective in showing that all of the steps necessary to acquire jurisdiction had been taken." The court, in the case of *Galpin v. Page*, 18 Wall. (U. S.) 850, 21 L. Ed. 959, says: "The presumptions which the law requires in support of the judgment of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence respecting the facts presumed." The following language is used in the case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742: "Undoubtedly, if the record was silent as to what was done in respect to some material matter, we will presume that what ought to have been done was done. If there is no proof of what was done in obtaining service in the record, we will presume that legal service was in fact made." The foregoing language from the last two cases was quoted with approval in the case of *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209.

The presumption is that those facts existed, without which the court could not have rendered judgment. Therefore the jurisdictional defect relied upon by the appellants, to wit, that it does not appear upon the face of the record that the father was absent from the state, cannot be sustained. When it does not so appear, it cannot be brought in question collaterally, but the party relying upon the defect must have recourse to a direct proceeding. *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 870)

#### MARTIN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 13, 1907.)

#### 1. CARRIERS—INJURY TO PASSENGERS—WANTONNESS.

In an action for injuries to a passenger, where the evidence showed that the conductor promised a young girl that he would assist her when her station was called, that at her station her father asked the conductor if any passen-

gers were aboard for that station, and that he said he did not know, and that the train was not stopped at the usual stopping place and passengers were not instructed to get out, it is sufficient to carry the case to the jury on the question of wantonness.

## 2. SAME—CONDUCT OF TRAIN—STATIONS.

A railroad is bound to stop its train at the usual stopping place and for sufficient time; but, if there were other circumstances requiring extra care, then the carrier was bound to give such extra care to a passenger, and if it failed to do that, and some volunteer attempted to aid the passenger in her efforts to alight, and, while exercising ordinary prudence in so attempting with the aid of such volunteer, the passenger was injured, yet if the negligence of the carrier in failing to stop its train at the proper place, or for a sufficient time, or to render assistance, was the cause of plaintiff's injury, then the carrier would be liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1224, 1228, 1232.]

## 3. SAME—EVIDENCE—QUESTIONS FOR JURY.

Where a carrier fails to stop its train at the usual stopping place for passengers, it should suppose that a passenger would attempt to alight from the moving train if he could do so prudently; and, when a stranger assists the passenger in so doing and the latter is injured, it is for the jury to determine whether the negligence of the company or that of the assisting person was the proximate cause of the resulting injury.

## 4. SAME—NEGLIGENCE.

Failure to stop a passenger train at the usual place for letting off passengers is *prima facie* negligence.

Appeal from Common Pleas Circuit Court of Fairfield County; Klugh, Judge.

Action by Elizabeth B. Martin, by guardian, against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. E. McDonald, for appellant. Buchanan & Hanahan, for respondent.

POPE, C. J. Elizabeth B. Martin, by her guardian ad litem, Milo B. Martin, brought this action to recover damages of the defendant railway company for personal injuries alleged to have been caused by the negligent, reckless, and wanton conduct of the defendant in failing to stop its train at the usual stopping place at Dawkins, a station in Fairfield county, and put her off. The facts are as follows: On December 2, 1904, plaintiff, a girl of 13 years of age, being in Spartanburg attending school and wishing to go home for the holidays, purchased a ticket for Dawkins, her home, and boarded defendant's train. As the conductor was taking her ticket she requested him to help her off at her destination. He instructed her to keep her seat until the station was called, and promised then to see her off. When the train reached Dawkins it went into a side track to allow the up train to pass. It then came back on the main line, and, according to plaintiff's testimony, stopped some distance above the regular stopping place. Here one or two passengers alighted, and as many got on. Plaintiff, thinking the train would stop at the regular place, kept her seat. Her father, who was at the station to meet her, asked the

conductor if there were any passengers for that place, and on being motioned to the car nearby which the conductor was standing he boarded it. On failing to find his daughter, according to his testimony, he again asked the conductor if there were any passengers for Dawkins, and he responded that he did not know. Soon after the train began to move away, and plaintiff, who was in an extra car behind the one her father had entered, seeing her father and recognizing that the train was not going to stop again, jumped or was pushed off and injured. The defendant denied that it was negligent, and for a defense alleged contributory negligence on the part of the plaintiff. The case was tried at the March, 1906, term of court for Fairfield county, and resulted in a verdict of \$1,000 for the plaintiff. Judge J. C. Klugh, the presiding judge, having refused a motion for a new trial, the defendant appealed.

1. The first exception alleges error on the part of the circuit judge in refusing to charge the jury that there was no evidence in the case tending to show wantonness, willfulness, or recklessness on the part of the defendant. Could such a charge have been made? The testimony was uncontradicted that the plaintiff asked the conductor to help her to alight from the train at Dawkins. He admitted himself that he told her to keep her seat until the station was called and he would then help her off as best he could; that he was approached by plaintiff's father and asked as to passengers for Dawkins. The overwhelming weight of the testimony was that the train stopped from 80 to 90 yards from the regular stopping place. From these facts the jury might infer that there was such a disregard of plaintiff's rights as to amount to recklessness; that the conductor's mind adverted to his duty, and he failed to perform it. It is possible that the crowded state of the train might have led him to forget for the time his promise to the plaintiff, a matter as regards which he did not testify, but we are unable to think it at all probable that he could honestly have failed of his duty after being questioned repeatedly concerning it. The question was properly submitted to the jury.

2. The circuit judge charged the jury as follows: "The defendant was bound, not only to stop its train at the usual place, and for sufficient time, but if there were other circumstances which required extra care, even beyond that, on the part of the defendant, then the defendant was bound to give such extra care to the plaintiff, and, if the defendant failed to do that, and some volunteer, attempting not to perform the duties of the defendant, but attempting to aid the plaintiff in her efforts to alight from the train, and in that way, the plaintiff, while exercising the prudence that the circumstances required of her, and that a person of her situation, of her condition, would ordinarily exercise, was attempting to alight from the train, if you find

that some person, whether it was a stranger or passenger, or who, was attempting to aid her in her own efforts to do what, under the circumstances of the situation, she thought was proper and prudent for her to do, then, although that conduct on the part of the stranger along with the conduct of the plaintiff herself may have led to her getting off the train and suffering injury, yet if the negligence of the defendant brought about that state of things, and if the negligence of the defendant in failing to stop its train at the proper place, or for a sufficient time, and in failing to render any extra assistance, if it was required by the circumstances of the case, if that was still the direct and proximate cause of the plaintiff's injury, then the defendant would still be liable, notwithstanding the fact that some other person may have also intervened and aided the plaintiff in her efforts to get off of the train." Defendant objected to this charge, on the ground that it in effect instructed the jury that the act of a third person in putting plaintiff off of the train could not be the proximate cause of her injuries if defendant failed to stop its train at the usual place, and for a sufficient time, or did not render the assistance required, and that by such charge his honor made the standard of plaintiff's negligence, or contributory negligence, to depend entirely upon "what under the circumstances of the situation she thought was proper and prudent for her to do," instead of the standard prescribed by law. Reference to the charge will clearly show that the last objection cannot be sustained. The circuit judge was very thorough in his charge as to contributory negligence. He charged that the law requires of every person ordinary care, the care that a person of ordinary prudence under the circumstances would exercise; that the law does not hold a person of immature years to the same rule of measurement that it does a mature person; that if a child is a mere infant that it is not capable of negligence, but if it is advanced in years and developed in intelligence to such an extent that it is capable of exercising some degree of care, then the law requires of such child the exercise of such a degree of care as a child of ordinary intelligence, ordinary development of a similar age, would naturally or usually exercise; that in this case, if the jury find that the plaintiff was a child of immature years, and that for a child of that degree of development she exercised the ordinary care that a child of such age would exercise, then the negligence could not be imputed to her under the circumstances; that if she did not exercise such care, then she could not recover. This was the tenor of the judge's entire charge. That the propositions of law laid down by him are correct is too evident to require citation of authority.

3. The other question is fraught with more difficulty. It is well settled that before recovery can be had for negligence it must be

shown that the injury was the proximate result of that negligence. If there be an intervening cause, and the prior cause do nothing more than give rise to the circumstances under which the injury occurs, then such prior cause cannot be said to be the proximate cause. There may be, however, a succession of causes, and the first be the proximate cause. *Cooper v. Richland Co.*, 78 S. C. 202, 56 S. E. 958; *Mayrant v. City of Columbia*, 57 S. E. 857. The above charge sought to convey to the jury that if a third person aided the plaintiff in doing what under the circumstances she would have done without such aid, then his act could not be the proximate cause of her injury. It was perfectly natural for the defendant to suppose that if it failed to stop its train at the usual place at Dawkins that plaintiff, if she thought she could prudently do so, would endeavor to get off. If she were injured in getting off, provided she exercised ordinary care, then the failure to stop would be the proximate cause of her injury. Now, if a third person helps her to do what she intended doing on account of the negligence of the defendant, it seems perfectly clear that the act of such third person was not necessarily the proximate cause, but merely an aid in carrying out the result which would inevitably have followed from her own independent act. The distinction between this case and the cases cited by the appellant is that there is evidence from which the jury might infer the plaintiff was about to alight without respect to the interference of the third person, while in those cases the result took place merely from a condition brought about by the third persons, without whom it would not have happened. Take, for instance, the case of *Snyder v. Railway* (Colo. Sup.) 85 Pac. 686, where the conductor on a crowded train pushed a passenger against another, who pushed him off of the train. There no injury would have resulted had it not been for the act of the passenger. If the plaintiff had no intention of alighting from the train, but was pushed off by a third party, there would be room to assign the act of such third party, and not the negligence of the defendant, as the proximate cause. But, inasmuch as in this case there is evidence from which the jury might infer the defendant was negligent, and that the plaintiff could have undertaken to alight from the moving train in the exercise of ordinary prudence, and would have done so of her own volition, the fact that an outsider aided and accelerated her act of alighting would not be sufficient to take from the jury the consideration of what was the proximate cause. In this view of the case we think the circuit judge was correct, and properly submitted it to the jury to say whether the defendant's act was the proximate cause of the injury.

The consideration of these questions disposes of the motion for a new trial which was made upon the grounds: (1) That there was

no evidence of wantonness or recklessness; (2) that the injuries were caused by the act of a third person. There being evidence on both of these issues, this court cannot interfere. *Miller v. Railway*, 69 S. C. 116, 48 S. E. 39; *Wilson v. Assurance Co.*, 51 S. C. 549, 29 S. E. 245, 64 Am. St. Rep. 700.

4. The fifth exception alleges error on the part of the circuit court in charging that it is prima facie negligence on the part of a carrier to fail to stop its cars at the usual stopping place. It is the duty of railroads to stop their trains at their stations. Civ. Code 1902, § 2134; *Cooper v. Railway*, 61 S. C. 345, 39 S. E. 543. It has been held in a number of cases that failure to give the signals at crossings as required by statute is negligence per se. *Bowen v. Railway*, 58 S. C. 223, 36 S. E. 590; *Smith v. Railway*, 53 S. C. 121, 30 S. E. 697. We are unable to see that this statute is more mandatory than the one now under consideration, or that one duty is superior to the other. Hence the only logical and consistent view is that it is negligence per se for defendant to fail to stop its train at its station. What is stopping at a station is a question which must be left to the jury. *Cooper v. Railway*, supra. Likewise what would constitute the usual stopping place must be a question for that body. It may include a greater or a less distance, according to the circumstances. The stopping place is the station, and if the jury find that the carrier did not stop at the station then prima facie it is negligent. This contention is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 378)

# SMITH v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 13, 1907.)

## 1. TELEGRAPHS—DELAY IN DELIVERY—NOTICE OF CLAIM.

Where a telegraph blank stipulates that a claim shall be presented in writing within 60 days, suit within that time for negligence in delivery of message is a sufficient presentation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, *Telegraphs and Telephones*, § 42.]

## 2. APPEAL—CONFLICTING EVIDENCE.

Where the evidence was conflicting as to the efforts of a messenger boy to find the addressee of a telegram, a judgment finding negligence will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, *Appeal and Error*, §§ 3935-3937.]

## 3. TELEGRAPHS—DELAY IN DELIVERY.

Where a telegram, delayed in delivery, announced a death, and requested an answer as to whether addressee could come, he has a cause of action, there being nothing to show that he could not have gone to the funeral.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, *Telegraphs and Telephones*, § 33.]

## 4. SAME.

A telegraph company is not liable for delay in delivering telegram received after closing hours, if the office hours are reasonable, and the message so received may be transmitted with-

in a reasonable time after the office is open next day.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, *Telegraphs and Telephones*, § 33.]

## 5. TRIAL — INSTRUCTIONS — REQUEST — NECESSITY.

Where, in an action against a telegraph company for negligence and wantonness in the transmission of the telegram, evidence is received as to the wealth of the company, it is not reversible error, where a nonsuit is granted as to the cause of action for wantonness, to fail to instruct not to consider such evidence on the cause of action for negligence, in the absence of a request therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, *Trial*, § 623.]

Appeal from Common Pleas Circuit Court of Kershaw County; Hydrick, Judge.

Action by C. L. Smith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Fearons and Nelson & Nelson, for appellant. Clark & Von Fresckow, for respondent.

WOODS, J. The plaintiff recovered judgment for mental anguish, alleged to have been produced by the negligent delay of the defendant in delivering the following telegram, sent by plaintiff's father, concerning the death and burial of his brother: "Apex, S. C., Oct. 4. C. L. Smith, Camden, S. C. Anderson dead; be buried here tomorrow; answer if you can. Rufus Smith." The issue of punitive damages was eliminated by an order of nonsuit, from which the plaintiff has not appealed.

1. The main contention of the defendant is that a nonsuit should have been ordered, as to the whole case, on several grounds submitted to the circuit judge. The first was the failure of the plaintiff to show that any claim for damages was presented in writing within 60 days after the filing of the message. This point might be dismissed with the remark that the stipulation relied on does not appear on the telegram as printed in the record. But as the remarks of the circuit judge, in considering the motion, show that it was before the court, we will not refuse to pass on it. The suit was brought within 60 days after the alleged breach of duty and consequent damage to the plaintiff, and the question is whether this was a sufficient compliance with the requirement that the claim should be presented within 60 days. While the requirement that the claim for damages shall be presented within 60 days has been held valid, because essential to the proper investigation of claims, nothing should be added to the meaning of the language which the company has itself employed in imposing the condition. The general rule is that the liability attaches by operation of law as soon as damage to the plaintiff results from the negligence of the defendant, and there is nothing in the stipu-



lation to the contrary. The stipulation is, if the person injured fails to make claim under the liability within 60 days, the liability which had been incurred comes to an end and the cause of action is gone. But the suit is a presentation of the claim in writing, and under the stipulation preserves the liability. The defendant's counsel relied on the case of *Western Union Telegraph Company v. Yopst (Ind.)* 11 N. E. 16, in which the court takes his view; but the weight of authority supports the conclusion we have reached. *Phillips v. Telegraph Co.*, 95 Tex. 641, 69 S. W. 63; *Telegraph Co. v. Trumbull*, 27 N. E. 313, 1 Ind. App. 121; *Telegraph Co. v. Mellon*, 33 S. W. 725, 96 Tenn. 66; *Telegraph Co. v. Henderson*, 18 Am. St. Rep. 148, 89 Ala. 510, 7 South. 419; *Bryan v. Telegraph Co.*, 45 S. E. 938, 133 N. C. 603; *Shearman and Redfield on Negligence*, § 554; *Thompson on Elec.* § 256.

2. The defendant relied on two additional grounds in the motion for nonsuit: "Because there is no evidence which shows or tends to show any damage, actual or nominal, of which the failure to deliver the telegram in question was the proximate cause, which would entitle the plaintiff to recover under the mental anguish act; \* \* \* because the testimony does not show any negligence on the part of the defendant in its efforts to deliver the telegram." The message was received at Camden at 2:47 p. m., and delivered the next day. There was undisputed evidence of great diligence on the part of the operator to locate the plaintiff and deliver the telegram. The negligence, if any, was on the part of the messenger boy. The plaintiff was living with Mrs. Joyner, two blocks from the telegraph office; and the operator in the afternoon directed the messenger to try to find plaintiff there. He failed to go to the Joyner house, saying he could not find it, but the witness McCain testified that he told him where it was. The messenger denied McCain's statement, but clearly the evidence made a question of fact for the jury as to his negligence. The position that there was no evidence of actual damage to the plaintiff was equally untenable.

3. When plaintiff received the belated telegram, he replied: "Message received too late; wife sick; will come to see you as soon as she is better." There is nothing in this message to indicate that plaintiff would not have gone to the funeral of his brother, notwithstanding his wife's illness, had he received the message in time; and he testified he would have gone.

4. The defendant next contends the circuit judge erred in not charging the following request, without modification: "If the jury find the defendant used due diligence and could not locate the plaintiff, C. L. Smith, and asked the sender for some address, and such address was not received

until after closing hour, then the company was under no duty to deliver the message until within a reasonable time after the opening hour the next day, provided such opening and closing hours were reasonable. And if the company should, under such state of facts, deliver the message within a reasonable time after the opening hour next morning, then the jury should find for the defendant." After reading the request to the jury, the circuit judge said: "Now, with regard to that request, I charge you this, that the telegraph company has the right to establish reasonable rules for the conduct of its business, has the right to establish reasonable office hours, and, if the office hours established as shown by the testimony are reasonable, then the company is not bound to either deliver, send, or receive a message after office hours, unless, by a course of dealing, by a custom, it has so conducted itself as to have waived the office hours which it established. That is a question of fact for the jury. I will read it to you. If the office hours established for an office are reasonable, the company is under no duty to transmit messages except during such hours, and a message offered for transmission, after the close of such office, at the office of destination, may be transmitted within a reasonable time after the office is open next morning. The failure of the agent to observe the office hours when habitual may be shown in evidence as indicating that no rule on the subject prevails or was enforced; but proof merely of the occasional transmission or delivery will not be sufficient to establish waiver of the regulation. You see, an occasional violation of office hours, sending, receiving, or delivering messages out of office hours, occasionally, would not be sufficient proof to show waiver of office hours; but it must be habitual, and it is for the jury to say whether or not it is so habitual as to amount to waiver of office hours." The charge was in accord with the opinion expressed in *Bonner v. Telegraph Co.*, 71 S. C. 303, 51 S. E. 117, and *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119.

5. The defendant charges the circuit judge erred "in not instructing the jury that they were not to consider the testimony introduced, as to the wealth of the company, in granting a nonsuit as to the cause of action based upon wilful tort, the error being that it tended to mislead the jury and to lead them to believe that they could, on account of the wealth of the company, increase their verdict for mere negligence; whereas, such testimony could only apply to the cause of action based on willfulness and wantonness, and the jury should not have been so instructed." Testimony was received as to the wealth of the defendant, which defendant's counsel concedes was competent, before the cause of action resting on the alle

gations of willfulness and wantonness had been disposed of by nonsuit. No request having been made for an instruction that this evidence could not be considered under the cause of action for negligence, the omission of the court to give instruction cannot avail defendant. *Jennings v. Manufacturing Co.*, 72 S. C. 420, 52 S. E. 113, and authorities cited.

The judgment of this court is that the judgment of the circuit court be affirmed.

(77 S. C. 385)

**STATE v. JONES et al.**

(Supreme Court of South Carolina. July 16, 1907.)

**1. DISTURBANCE OF PUBLIC ASSEMBLAGE—RELIGIOUS WORSHIP—EVIDENCE.**

Where there was evidence that a congregation was broken up by a riot about 40 feet from the church, the parties engaged therein were guilty of disturbing public worship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disturbance of Public Assemblage, §§ 1-5.]

**2. CRIMINAL LAW—DISTURBING PUBLIC WORSHIP—JURISDICTION—EVIDENCE.**

On a trial for disturbing public worship, the fact that one of the witnesses was struck by a plank is insufficient to show that weapons were actually used so as to make the offense beyond the jurisdiction of magistrate.

**3. SAME—HEARSAY EVIDENCE.**

Declarations by a participant during the progress of a riot are not hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 809.]

**4. DISTURBANCE OF PUBLIC ASSEMBLAGE.**

Evidence as to the conduct of parties arrested for disturbing religious worship by a riot after congregation has dispersed is competent.

**5. SAME—PUNISHMENT—EXCESSIVE FINE.**

Sentences of \$30 and \$17.50 for disturbing public worship are not excessive.

Appeal from General Sessions Circuit Court of Anderson County; Watts, Judge.

Berry Jones and others were convicted of disturbing religious worship. From an order modifying the judgment of a magistrate, defendants appeal. Affirmed.

Martin & Earle, for appellants. Julius E. Boggs and E. M. Rucker, Jr., for the State.

**WOODS, J.** The defendants were convicted before a magistrate of disturbing a religious congregation. The sentence of the magistrate was as follows: "Berry Jones, Andrew Jones, Adger Davis, \$50 each or 30 days. Cephas Davis, Jim Jordan, Tom Mauldin, \$25 each or 30 days." On appeal the fines of \$50 and \$25 were held excessive and reduced to \$30 and \$17.50. The other grounds of appeal were overruled. The defendants, Berry Jones, Tom Mauldin, and Jim Jordan, then appealed to this court.

1. There is no ground to ask for reversal for lack of evidence to support the charge

of willful disturbance of a religious congregation. There was evidence of a congregation engaged in worship being disturbed and broken up by a riot, about 40 feet from the church, in which each of the appellants were active participants. The disturbance was a result so certain to follow the riot that it must be held to have been within the contemplation and intention of all who participated.

2. The position is taken that the judgment should be reversed, because "the magistrate did not have jurisdiction of the offense herein; it not being affirmatively shown that no weapons were actually used and no wounds inflicted." The part taken by the appellants was detailed at length by the witnesses, and there was no evidence of the use of an instrument by any of them, which the magistrate and circuit court as a matter of law must have held to be a weapon. One of the witnesses, it is true, testified that the defendant, Berry Jones, hit him three times with "a piece of plank." The Century Dictionary gives these comprehensive definitions of the word "weapon": "(1) Any instrument of offense. Anything used, or designed to be used, in attacking an enemy, as a sword, a dagger, a club, a rifle, or a cannon. \* \* \* Any object, particular, or instrumentality, that may be of service in a contest or struggle, or in resisting adverse circumstances, whether for offense or defense. Anything that may figuratively be classed among arms." A piece of plank might be so large as to fall clearly within the definition; but obviously it might be so small as to be useless for attack or defense. As the witness said nothing of any inconvenience resulting from being hit three times with this piece, there was good reason for the magistrate and circuit court to regard it not a weapon. The position taken—the exception that the use of weapons should be presumed in order to make out the greater offense and oust the jurisdiction of the magistrate—is obviously without support.

3. Adger Davis was one of the defendants, and we are at a loss to understand on what ground his remark to Moses Chapman, made while the riot was in progress, could have been excluded as hearsay.

4. The position that testimony as to the continuation of the riotous conduct of the parties after the congregation had left the church should have been excluded cannot be sustained. Evidence as to the entire disturbance was competent to show the gravity of the crime.

So far from the reduced sentences being excessive, as the appellants allege, they have reason to be grateful for the clemency of the circuit judge.

The judgment of this court is that the judgment of the circuit court be affirmed.

(77 S. C. 399)

**DEMPSEY v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. July 23, 1907.)

**1. TELEGRAPHS—DELAY IN DELIVERY—PLEADING.**

In an action against a telegraph company for delay in delivering a telegram, allegation that "notwithstanding the defendant had every reason to know the message was important" is sufficient to apprise defendant of plaintiff's intention to prove notice of reasons why message was important.

**2. SAME.**

Whether one subjected to damage by the negligence of a telegraph company in delivering a message used all reasonable means to minimize his mental suffering is for the jury.

**3. SAME—NOTICE OF DAMAGES.**

It cannot be said, as a matter of law, that on a failure of a telegraph company to deliver a telegram "Will be to Perry on morning train; meet me there"—resulting exposure and sickness could not have been anticipated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 64, 74.]

**4. TRIAL—ERROR IN INSTRUCTION—CURE BY OTHER INSTRUCTION.**

An instruction that punitive damages could be awarded for failure to deliver a telegram is not reversible error, when followed by an instruction that it could only be given on proof of willfulness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-705, 718.]

**5. SAME—WILLFULNESS.**

Unexplained delay in delivery of a telegram for nearly 17 hours raises the question of willfulness.

**6. TRIAL—INSTRUCTIONS.**

Where the judge gave a charge in general and comprehensive terms covering the law of the case, and no requests were made for a more definite statement thereof, no error is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

Appeal from Common Pleas Circuit Court of Bamberg County; Gage, Judge.

Action by A. R. Dempsey against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Jno. R. Bellinger, for appellant. J. F. Carter, for respondent.

WOODS, J. A statement of the facts alleged in the complaint is necessary to an understanding of the appeal. December 28, 1905, was the day appointed for the marriage of plaintiff at the residence of Roland Williams near Wagner, S. C. On December 27th, while on his way from his home at Midway to meet the appointment, the plaintiff became so ill that he was obliged to stop over at Bamberg. Having then missed the only train which would have taken him direct to Wagner by the hour appointed, he delivered by the hand of his agent, G. H. Smoak, to the defendant's agent at Bamberg, for transmission, this message: "Number 1 Rx. Sent by G. Received by W. Check 10, paid. Received at 6:20 p. m. Check 12-27, 1905. Dated Bamberg, S. C.

To Roland Williams, Wagner, S. C. Will be to Perry on morning train; meet me there. A. R. Dempsey." When Smoak handed in the message, he offered to pay any extra charge for sending the message to the home of the addressee; but the agent declined the offer and agreed to deliver the message promptly. The purpose of the telegram was to get Roland Williams to meet plaintiff at Perry's, so that he might be at the appointed place at the time fixed for the marriage. The allegations as to the defendant's notice of the importance of the telegram, the failure to deliver, and the damage which ensued are thus made: "That, notwithstanding that defendant had every reason to know that the message was important, defendant willfully, wantonly, recklessly, and negligently failed to deliver said message as directed and as agreed upon, it not being delivered until the following day about 11 or 12 o'clock, and not then until plaintiff's friend called for it. That defendant had on previous occasions delivered messages to the home of the said Roland Williams without extra charges, but willfully, wantonly, recklessly, and negligently failed to deliver this message as directed and as agreed upon, and by defendant's willful, wanton, reckless, and negligent failure to deliver said message when plaintiff arrived at the town of Perry on the morning train there was not one there to meet him, and after waiting there for some time and no one having come for him, the hour having arrived when his marriage was to take place, he endeavored to get a conveyance, but after trying diligently he failed to get any conveyance whatever, and was forced to go afoot in the rain, it having been raining hard all the morning, and plaintiff was unable even to procure an umbrella. That plaintiff walked a mile or more before he succeeded in getting a horse and buggy, and was then compelled to take an open buggy, without an umbrella, and drive several miles exposed to the hard rain, not being able to reach the home of the young lady whom he was to marry until long after the hour set for the marriage. That when plaintiff arrived at the home of the young lady whom he was to marry he was wet through and through, was cold, greatly pained, and humiliated, and suffered great mental anguish on account of not being able to meet the lady at the appointed hour, and on account of his appearance, his clothes being wet through and through. That from the exposure to which plaintiff was subjected, being already in ill health, he was caused several weeks' serious illness, was confined to his bed, attended by a physician, and came very near losing his life, having not yet fully recovered and perhaps being injured for life, and having to pay a heavy doctor's bill." Damages were demanded for "mental anguish at not being able to meet the lady whom he was to mar-

ry at the appointed hour, the serious illness which he has suffered, his impaired health, and the heavy doctor's bill which his illness has cost him." Plaintiff recovered judgment, and the defendant appeals. Of the defenses set up, the appeal concerns only the general denial and the allegations that plaintiff could have avoided mental anguish and the exposure resulting in sickness by hiring a conveyance at Perry's.

1. Before entering on the trial, defendant's counsel made a motion to strike from the complaint all allegations relating to mental anguish, on the ground that the message failed to show on its face that neglect in delivering would result in mental anguish, and the complaint contained no allegation of notice to the defendant of the mission of the plaintiff. The circuit judge deferred the decision of the motion until the plaintiff offered evidence of notice to the defendant's agent, and then by admitting the evidence over objection practically decided the motion. In this there was no reversible error. The allegation "that notwithstanding the defendant had every reason to know that the message was important" is objectionable for indefiniteness. But it was sufficient to apprise the defendant of intention of the plaintiff to bring home to defendant notice of the reasons why the message was important. The remedy was a motion to make the allegation definite and certain. *Wingo v. Inman Mills*, 76 S. C. 552, 57 S. E. 525.

2. The plaintiff offered evidence tending to establish every allegation of his complaint. It is true it was his duty to use all reasonable efforts to hire a conveyance and to use all other practicable methods to prevent or minimize the mental anguish or other suffering resulting to him from defendant's negligence. But this rule cannot avail the defendant, for the plaintiff testified that he did make considerable effort to hire a conveyance. Whether he used reasonable diligence in his efforts was a question for the jury.

3. It cannot be said, as a matter of law, the exposure and sickness were results which could not have been contemplated by the parties, which the defendant could not have reasonably anticipated from a failure to deliver the telegram. There was evidence that the defendant knew of plaintiff's sickness at Bamberg, and the high consideration which required him to use his utmost efforts to reach his destination by the hour appointed for his marriage. Whether reasonable prudence required the plaintiff under the circumstances to wait until he could obtain a conveyance which would have protected him from the weather, and whether the exposure and sickness was due to the dereliction of the defendant as a proximate cause, were questions for the jury. The case is quite different from *Jones v. Telegraph Co.*, 75 S. C. 208, 55 S. E. 318; *Carter v. So. Ry. Co.*, 75 S. C. 355, 55 S. E. 771; and *Keys v. Telegraph*

*Co.*, 76 S. C. 301, 56 S. E. 962. In these cases the exposure and sickness were not made necessary by the negligence of the defendant, but arose from the choice of the plaintiffs to undergo hardships which the defendant's negligence did not make necessary. Here, on the contrary, the evidence tended to show the exposure became unavoidable on account of defendant's negligence. The case, therefore, falls within the principle of *Toale v. Telegraph Co.*, 76 S. C. 257, 57 S. E. 117; *Machen v. Telegraph Co.*, 72 S. C. 256, 51 S. E. 697; *Pickens v. Railroad Co.*, 54 S. C. 498, 32 S. E. 567.

4. The circuit judge, at the request of plaintiff's counsel, did erroneously, and no doubt inadvertently, charge the jury that primitive damages might be recovered for mere negligence. But subsequently the mistake was corrected by instruction so explicit that the jury could not fail to understand that punitive damages could not be recovered for negligence, but only on proof of willfulness.

5. The defendant did not attempt to explain the conduct of the operator at Wagner in making no effort whatever to deliver the telegram for about 17 hours. It was therefore for the jury to say whether he wantonly or willfully withheld it. *Young v. Telegraph Co.*, 65 S. C. 93, 43 S. E. 448; *Willis v. Telegraph Co.*, 73 S. C. 385, 53 S. E. 639.

6. There are numerous exceptions setting forth propositions of law which it is alleged should have been charged. The circuit judge made a charge to the jury covering in general and comprehensive terms the law bearing on the cause. The defendant made no request for elaboration or a more definite statement of these general propositions, and hence he cannot be awarded a new trial on this ground.

The judgment of this court is that the judgment of the circuit court be affirmed.

(77 S. C. 404)

KIRBY et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 23, 1907.)

1. TELEGRAPHS—DELAY IN DELIVERY—SPECIAL DAMAGES.

A message: "Your mother is dead; come to-night"—would not lead the telegraph company to infer that delay in delivery would cause the addressee to miss a comfortable conveyance sent for her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, *Telegraphs and Telephones*, § 65.]

2. EVIDENCE—OPINION EVIDENCE.

A witness not an expert should not give an opinion of a person's physical condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, *Evidence*, § 2235.]

3. TELEGRAPHS—DELAY IN DELIVERY—NOTICE.

Where the addressee of a telegram, because of failure to deliver it, was compelled to sit in a cold waiting room at night, she having no mon-

ey to pay hotel bill, she cannot recover damages therefor, unless the carrier had notice.

#### 4. SAME—DELIVERY.

"Deliver," as applied to a telegram, means "transmit and deliver."

#### 5. EVIDENCE—OPINION EVIDENCE.

It is within the discretion of the trial judge to allow a telegraph messenger to testify what would be a reasonably quick delivery of a telegram.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2193.]

#### 6. TELEGRAPHS—DELAY IN DELIVERY—EVIDENCE.

An addressee of a telegram, in an action for damages, makes out a case by proving long delay in delivery and damages resulting therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 63.]

#### 7. TRIAL—ARGUMENTS OF COUNSEL.

Statement of attorney for plaintiff, in action against telegraph company for failure to deliver message, that if the telegram had been sent to any prominent man in the city "the company would fall over itself" to deliver it, was prejudicial and ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 803.]

Appeal from Common Pleas Circuit Court of Union County; Memminger, Judge.

Action by Mamie G. Kirby and Wm. F. Kirby against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Geo. H. Fearons, Evans & Finley, and J. Ashby Sawyer, for appellant. S. Means Beaty and De Pass & De Pass, for respondents.

POPE, C. J. Plaintiffs, Mamie G. Kirby and her husband, William F. Kirby, brought this action against the defendant telegraph company to recover actual damages alleged to have resulted from the negligent delay in delivering the following telegram sent to the plaintiff Mamie G. Kirby by her father, J. E. Kinsey: "Your mother is dead; come to-night." The message, according to the testimony, was received by the agent at Branchville, the home of J. E. Kinsey, between 7 and 8 o'clock on the morning of the 3d of March, 1904, and was delivered to the plaintiff at Union about 2 o'clock p. m. of the same day. Plaintiff alleges that by reason of the delay it was impossible for her to reach Branchville that day, the noon train, the only day train south, having already gone; that she was compelled to leave Union at 9 o'clock that night, and arrived at Columbia at 11 o'clock, where she was forced to remain in the depot all night, suffering much from the severe cold; that upon reaching Branchville, and learning that it was about time for the funeral, being unable to obtain other conveyance, she was forced to take passage with a mail carrier who proved very obnoxious to her; that she arrived too late for the interment; that she suffered much mental anguish by reason thereof; and as a result of her stay in the depot and her ride through the country in the uncomfortable vehicle of the carrier she took cold and became sick, and was put to much

inconvenience and expense. Defendant denied that it was negligent, and sought to show that, even if it was, its negligence was not the proximate cause of plaintiff's damage. The case was heard at the November, 1904, term of the court for Union county, and resulted in a verdict of \$500 for the plaintiff. Judge Memminger, the presiding judge, having overruled a motion for a new trial, the defendant appeals.

1. The first exception alleges error: (1) In admitting the testimony of the witness J. E. Kinsey that he sent a comfortable buggy by one of his sons-in-law to meet plaintiff at Branchville about 6 o'clock in the afternoon, expecting her to be there about that time in response to the telegram. (2) In allowing said witness to state the physical condition of the plaintiff at the time she reached his house from the cemetery. We think this exception should be sustained. There are a number of cases recently filed by this court holding that the plaintiff can recover only for damages such as the defendant had notice of, or as a reasonable person should have known would result from delay in delivery. *Doster v. Telegraph Co.*, 57 S. E. 671<sup>1</sup>; *Du Bose v. Telegraph Co.*, 73 S. C. 220, 53 S. E. 175; *Arial v. Telegraph Co.*, 70 S. C. 418, 50 S. E. 6. The telegram here under consideration on its face contained nothing that could put defendant on notice that, if it was not delivered promptly, plaintiff would be deprived of the convenience of a comfortable buggy in which to make the trip to her father's. Such a result was not in the contemplation of the parties, and therefore defendant cannot be held responsible. Evidence tending to show damage resulting therefrom was, hence, incompetent.

2. As to the second ground of the exception, it was not shown that the witness was in a position to testify as to the physical condition of the plaintiff. It does not appear that he was a physician or an expert in such matters. His opinion was, therefore, not admissible. He could have stated the facts from which the jury might have inferred plaintiff's condition. 17 Cyc. 25.

3. The second exception alleges error in allowing plaintiff to testify that she stayed in the waiting room because she did not have money to pay hotel expenses and was a stranger in Columbia. Damages resulting from these causes could not be other than special damages, and for them it is well settled the defendant cannot be held responsible, unless notice is given. *Jones v. Tel. Co.*, 75 S. C. 208, 55 S. E. 318.

4. The circuit judge instructed the jury that by delivery here was meant transmission and delivery. The defendant contends that delivery does not include transmission. We think the circuit judge was correct. To deliver means to hand over. To transmit is to communicate; to send from one person to another. The terms imply to some extent the same idea; the distinction being that the lat-

<sup>1</sup> 76 S. C. 56.

ter implies separation of the actors. There is nothing to lead to the conclusion that while a message is passing over the wire it is being transmitted, and while in the possession of the messenger boy, being carried to its destination, it is being delivered. We think the whole constitutes one transaction, the passage of the message between the sender and the person to whom it is sent.

5. The fourth exception alleges error on the part of the circuit court in refusing to permit the witness J. R. Mathis, a messenger boy, to testify as to what would be a reasonably quick delivery in this case. The admission of such testimony is largely in the discretion of the trial judge, and will not be ground for reversal, except where it is clearly harmful to the appellant. 17 Cyc. 28; *Watts v. Railway*, 60 S. C. 70, 38 S. E. 240; *Tinsley v. Telegraph Co.*, 72 S. C. 352, 51 S. E. 913. That the exclusion here could not have been harmful is very evident. The witness was allowed to state the facts, and from these the jury could form their own opinion.

6. The circuit judge charged the jury that unreasonable delay created the presumption of negligence; that the defendant was called upon to relieve itself of the presumption, and, if it failed, then they must inquire whether Mrs. Kirby had shown that she suffered by reason of that negligence. Defendant contends that this relieved the plaintiff from proving her case by the preponderance of the evidence. It is well settled in this state that long, unexplained delay gives rise to the presumption of negligence. *Poulnot v. Telegraph Co.*, 69 S. C. 545, 48 S. E. 622; *Hellams v. Telegraph Co.*, 70 S. C. 83, 49 S. E. 12; *Arial v. Telegraph Co.*, 70 S. C. 423, 50 S. E. 6. Therefore, if such delay is shown, and it is not explained, clearly the preponderance of the evidence is that the company was negligent. If the plaintiff then go further and show that she suffered by reason of that negligence, then certainly her case is made out. This contention cannot be sustained.

7. The eighth exception alleges error on the part of the circuit court in permitting the plaintiff's counsel to use the following language in his argument to the jury: "If a telegram were to be sent to Mr. Duncan, Mr. Nicholson, or Mr. Farr, that the telegram would go to them with arms open, and the company would fall over itself to deliver the message to any prominent man in Union." And also: "That the newspapers of the state were constantly publishing, from New York to St. Augustine, articles about South Carolina juries not doing their duty when trying criminal cases, and that Mr. Sease, the solicitor, had remarked about it last week." In the case of *State v. Robertson*, 26 S. C. 118, 1 S. E. 443, it is said: "That it is most certainly proper, and especially in criminal cases, that counsel, in addressing a jury, should keep themselves strictly within the record." In 2 Ency. of P. & P. 752, it is said: "Very

many abuses in argument may be sufficiently counteracted by instructions of the court to the jury, and a large discretion as to the refusing of new trials because of such violations of propriety is accorded to the trial courts. The appellate court will frequently condemn the language or conduct of counsel, and at the same time affirm a judgment denying a new trial, on the ground that under all of the circumstances the rights of the defeated party were not materially prejudiced, or that the action of the trial court in the premises was effectual to restore to the proceedings the fairness of which they had been divested." Let us, then, inquire whether the rights of the defendant here might have been materially prejudiced. It will be borne in mind that there was not a cause for punitive damages. Only actual damages were sought. Another fact which must not be overlooked is that there seems to be a tendency at the present day to hold corporations to strict accountability for their acts. Any language which tends to fan this natural feeling into greater fury, "flights of oratory" though it be, certainly has its weight and should be avoided. Courts are for the purpose of dispensing justice, and, were this kind of advantage allowed, in many cases that purpose might be defeated. Where the record does not sustain the remarks made, if it is evident that harm does result from them, it seems that this court should exercise its power and grant a new trial. We think the language here used was highly prejudicial to the defendant, and therefore sustain the exception.

The last exception raises the point that a new trial should have been granted because there was no evidence to show that the delay in the delivery of the telegram caused Mrs. Kirby any damage whatever. It being already decided that a new trial should be granted, we do not consider it necessary to pass upon this question.

It is the judgment of this court that the judgment of the circuit court be reversed.

GARY, A. J., concurs in the result. JONES, J., concurs in the result, and thinks the eighth exception should be overruled, citing *State v. Williamson*, 65 S. C. 249, 43 S. E. 671.

(77 S. C. 328)

LYON v. CHARLESTON & W. C. RY.  
(Supreme Court of South Carolina. July 10, 1907.)

# 1. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE.

In an action for injuries to a flagman while attempting to uncouple cars, evidence held insufficient to show negligence on the part of the master.

## 2. SAME—FELLOW SERVANTS.

A flagman who had been instructed to obey the orders of conductors and engineers while the conductors are in charge of trains, while obey-

ing the orders of such conductors is a fellow servant of the engineers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.]

### 3. SAME—NEGLIGENCE—PROXIMATE CAUSE.

Where failure of a railroad company to have the cars equipped with air brakes operated from the engine, as required by act of Congress, was not the proximate cause of the injuries to a flagman, such failure cannot be assigned as negligence on the part of the railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 162, 257-263.]

### 4. APPEAL—REVIEW—NEW TRIAL.

It is the duty of the court, on appeal, to reverse a judgment against a master for injuries to an employe and grant a new trial, where the evidence in its opinion admits of no other inference than that plaintiff's own negligence contributed to his injury as a matter of law.

### 5. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a flagman was injured while uncoupling cars under the order of the conductor, which duty was within his employment, he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 550, 648-651.]

Gary, A. J., dissenting

Appeal from Common Pleas Circuit Court of Greenwood County.

Action by A. B. Lyon against the Charleston & Western Carolina Railway. Judgment for plaintiff, and defendant appeals. Reversed.

See 56 S. E. 18.

S. J. Simpson and McGhee & Richardson, for appellant. Grier & Park, for respondent.

WOODS, J. The vital question in this case is whether the circuit judge erred in refusing a motion for a nonsuit and for new trial.

The plaintiff, a flagman on defendant's freight train, while attempting to uncouple a moving car, fell on the track and had his leg crushed. He brought this action for damages and recovered judgment, alleging the accident was due to the defendant's negligence. Without taking up the exceptions in detail, we consider whether there is evidence to support any one of the several charges of negligence as a proximate cause of the injury. The case depends principally on the testimony of the plaintiff, who gave this account of the accident on his direct examination: "What did you do? We went and unloaded all of the freight that was for Hampton, and the conductor got out of the car and signed the engineer ahead, and the train rolled off at the rate of about three or four miles an hour. He ordered Stephen New, the brakeman, and myself, to cut the flat car loose, and let the rear of the train trail behind and roll clear of the siding, put the flat car in the side track, and come back to the main line and get the train and go on to Brunson to meet 41, a passenger train. Stephen New went and caught hold of the lever on the cattle car to cut it loose from

the flat. The lever was hard to work, and it seemed like it was impossible for him to cut the car, and I knew I could not, and I crossed over to the corner of the flat car and pulled the lever, and a jerk from the car threw me under the rolling train behind. There was no air on the train. What happened when you fell under there? The front trucks of the cattle car rolled over me, broke my leg, fractured my hip and ankle, broke my collar bone, and bruised my shoulder, and cut a gash in my head." On cross-examination he says: "Just state again how it happened; where were you and what were you undertaking to do, to carry out the conductor's orders. Just tell what you were doing. Stephen New, when we got orders, he went over and caught hold of the lever on the outside, without going in between the lever on the cattle car so that you could stand on the outside, without going in between the cars and uncouple it, one of those iron automatic levers? Yes, sir; it don't set outside the car, it sets in between. You can stand outside of the car without going in between them? Yes, sir. And you intended to turn that lever over and raise the peg up and uncouple the car? That was Steve New's idea, and it seemed he could not work his lever. When Steve New caught hold of that lever, where were you? On the flat car. Why did you get on the flat car? I was going down with the train, and when it got near the siding I was going to get on the top of the cattle car and apply the brakes, as ordered to do. How were you going to get across the gap between the flat car and the cattle car? Several ways. I could have got down on the ground and got up, or I could have reached over and got the ladder. You knew that Steve New was going to separate them as soon as he could? He was getting pretty close to the clear post, and he had not got them loose, and I just pulled the lever on the flat car. When Steve New first caught hold of the lever, where were you? I was on the flat car. You got on the flat car? I was already on the flat car. I just got up to ride on down. There was not any need of my trotting beside it. You got on the flat car the first thing you did, before Steve New caught hold of the lever? That is true, is it not? I don't recollect about that. You knew that as soon as Steve New worked that lever, if it worked all right, the cars would separate? Yes, sir; but as I cut the car I was expecting to give my own signals, but it was done before I could do it. I thought you said that Steve New was going to cut the car off? I said he was trying to pull it up and it looked like he could not get the lever to work, and I pulled the lever on the flat car. But, when you went on the flat car, you did not intend to have anything to do with the lever? I was going to carry out the orders of the conductor. Didn't you, when you got on the flat car, think that Steve New would operate the

lever so as to separate the cars? I knew that was his intention, sir. And at that time you did not intend to have anything to do with uncoupling the cars? I was going to carry out the orders of the conductor, and I could not have done it otherwise. But, when you got on the flat car, your intention was that Steve New should do the uncoupling, and then you were to get over on the other car and put on brakes? Yes, sir; but, when he could not do it, there was but one lever on his side, and I was compelled to pull the lever. And, when he had difficulty in uncoupling, you undertook to help him? Yes, sir."

1. Negligence as a proximate cause of the injury is charged against the conductor, in that he "ordered, required, and directed this plaintiff to get upon and uncouple the said cars while in motion, and get upon and apply the brakes to the trailing cars while in motion, and in leaving the train without seeing that his orders were carried out and the train operated with due care, without a sudden increase of the speed of the train." The plaintiff's own account shows clearly the accident was due to his act of leaning over the corner of the moving car and uncoupling it by pulling a lever at the side; but there is no evidence whatever that the conductor ordered the plaintiff to get upon the moving car and uncouple it from that position, or even saw him when he did it. There is evidence of an order from the conductor to uncouple the moving car, but a lever was provided on each side of the car as a means of uncoupling from the ground. That the plaintiff, as well as New, understood the order to mean that the lever should be used from the ground, is conclusively shown by his evidence that they went about the uncoupling in that manner; New handling the lever and the plaintiff mounting the car in order to leap over on another car and put on the brakes as New uncoupled. New, the brakeman, made an unsuccessful effort to use the lever on his side from the ground, and then the plaintiff, without giving any signal to stop the train or attempting to use the lever on the other side from the ground, or even reporting to the conductor or receiving any order from him, of his own volition, without even giving notice to any one in control of the motion of the train of his intention, attempted the perilous feat, of stooping over from the moving car and pulling the lever below him. There is no ground for saying the order of the conductor required or contemplated such peril. Without doubt, when an order is given, it is the duty of the servant to take the safe way of carrying it out, if one is provided; and, if that fails, he cannot, except, perhaps, in cases of emergency arising from the fault of the master, charge the master with the result of using a dangerous method not in the purview of the order. If the order of the conductor could in any reasonable view be regarded as

suggesting to the plaintiff to stand on the flat car and uncouple from that position, then there might be ground for saying that the defendant could not escape liability for a condition of things produced by its order to him, in which on a sudden impulse he took a dangerous course, resulting in his injury. But it would be beyond all reason to say the order contemplated mounting a flat car as the plaintiff did, with the intention of stepping or leaping from that to the following car, in order to apply the brakes to that car, or the attempt to use the lever while stooping from the end of the flat car. Here, then, was a general order from the conductor to uncouple, and there was a lever provided for the purpose to be used from the ground, and, if it had been used as intended by the defendant, the plaintiff could not have been injured by falling from the car. This distinguishes the case from *Carson v. Railway*, 68 S. C. 55, 68, 46 S. E. 525, 529; for in that case the court said: "It was shown, or rather there was testimony offered tending to show, that the conductor ordered this servant, the plaintiff, to couple those cars; that such conductor in this matter represented the master; that the servant called to such conductor to hold fast the train until he signaled; that this servant did not signal the conductor to move the train; that it was under these circumstances the train was moved so that the two cars bumped against each other, thus causing his injuries; that, when the cotter pin was out of its place, it would be necessary for a servant to go between the cars to arrange it; that it was necessary to go between the cars to open the instrument by which the coupling was made." The conductor's position at the time of the accident does not appear from the evidence, and therefore there could be no finding of negligence on the ground that he was not present to direct the details of the uncoupling and the movements of the train. The plaintiff's testimony shows that he clearly understood the manner in which the lever was to be used, without any instruction or direction. That the master is not liable for any injury which results from the use of a safe appliance in an unsafe and dangerous manner not contemplated by him seems too obvious to require a particular citation of authority. The cases will be found collected in 20 Am. & Eng. Ency. 141. No authority has been cited, and we think there is no foundation in reason, for the proposition that, though the plaintiff knew fully the safe and proper way to use this safe appliance, it was nevertheless the duty of the conductor to stand by him and see that, whenever ordered to uncouple cars, the plaintiff should use with due care the safe means provided, and should not take the peril of an improper use of such means. The evidence of the plaintiff shows beyond doubt that he knew the safe way, and chose the dangerous.

2. The plaintiff further charged "that



the said defendant was further negligent, careless, and reckless in the said engineer in charge of the said engine, who was a superior officer and agent to the said plaintiff, and who had the right to direct the services of the said plaintiff, and who was in charge of the said train in the absence of the said conductor, gave the said train a sudden and violent lurch and start forward, without warning to the said plaintiff or signal from him, and while the said plaintiff was engaged in carrying out the directions and orders of the said defendant, and was in a dangerous position, which negligence, carelessness, and recklessness was a direct and proximate cause of the said injuries." The general rule in this state and elsewhere is that an engineer is not ordinarily the representative of the master, but is the fellow servant of the train hands; all being under the orders of the conductor as the representative of the master. The plaintiff in this instance testified, however, that at the time of his employment as a flagman he was told by the train master that he must obey the orders of the conductor or the engineer, and that accordingly he did obey, to use his own words, "the conductor when he needed my services and the engineer when he needed my services." The Constitution provides: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by the law to other persons by law who are not employees, when the injury results from the negligence of a superior agent or officer, or a person having a right to direct or control the services of a party injured, and also when the injury results from negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about another piece of work." Under this constitutional provision, in view of the plaintiff's evidence as to obeying the orders of the engineer, the question arises whether in this case the engineer was a superior agent or officer, or person having the right to control or direct the services of the plaintiff. Under a constitutional provision identical with ours, the Supreme Court of Mississippi held an engineer not to be a person having the right to control or direct the services of a brakeman. *Evans v. Railway*, 12 So. 581, 70 Miss. 527. In this state the rule adopted is thus clearly stated in *Brabham v. Tel. Co.*, 71 S. C. 58, 50 S. E. 716, and is quoted and approved in *Martin v. Royster Guano Co.*, 72 S. C. 237, 243, 51 S. E. 680, 682: "In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having the power to control and direct the services of the other, but the test is in the

character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant. In the case under consideration there was no duty resting upon the defendant to give notice to the plaintiff, as the danger was not hidden or unusual, and the plaintiff had knowledge thereof." Assuming that the engineer was the offending servant, through whose negligence the plaintiff was injured, the whole evidence shows that, in accordance with the well-understood custom, the master had intrusted to the conductor, and not the engineer, the duty of giving orders for the shifting and coupling of cars, and there was no evidence that the conductor was absent and the train in the charge of the engineer. Therefore, in carrying out the conductor's orders, the plaintiff was not at the time under the engineer, as a person having the right to direct or control his services, but was under the conductor, and hence was a fellow servant of the engineer on the same train. But, in addition to this, we do not see how negligence can be imputed to the engineer as the proximate cause of the injury. The plaintiff, it is true, testified he fell on account of a sudden jerk of the train, but jerks are inevitable and are to be expected in movements of freight trains (*Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756); and there is nothing in the evidence indicating the engineer had any reason to suspect the plaintiff was attempting to uncouple the cars while stooping over the corner of a moving car, or in any other position of danger. If the plaintiff had been on the side of the train uncoupling the car by the use of the lever from the ground, it would have been impossible for a sudden jerk to have precipitated him from the car under the wheels.

3. Another specification of negligence alleged as a proximate cause of the injury was a failure to have a sufficient number of cars "equipped with power driving wheel brakes and appliances, commonly known as air brakes, as is required by law, and have air properly working for the operation of said brakes on said cars." The sections of the federal statute (Act March 2, 1893, c. 196, §§ 1, 2, 8, 27 Stat. 531, 532 [U. S. Comp. St. 1901, pp. 3174, 3176]), relating to interstate trains on which this allegation of negligence rests are as follows:

"Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after

said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand-brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars."

"Sec. 8. That any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

This statute was amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603], section 2 of the amendment being: "That whenever as provided in said act any train is provided with power air-brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and to more fully carry into effect the objects of the said act, the Interstate Commerce Commission may, from time to time after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train-brakes which must have their brakes used and operated as aforesaid; and the failure to comply with any such requirement of the said Interstate Commission shall be subject to the like penalty as failure to comply with any requirement of this section." This last section is the one most important to this discussion. Construing the original statute and the amendment together, it seems manifest under the amendment that Congress meant to establish the rule that railroads would comply with the provision of section 1 of the original act requiring the train to be under the control of the air brakes operated by the engineer of the locomotive, and would not be liable under this act if they had 50 per cent. of the cars equipped with power brakes used in operating by the engineer from the locomotive and all other cars on the same train and associated with these cars which might have been equipped with power brakes also under like control of the engineer. The statute does not require all cars which may be equipped with power brakes to be coupled or associated together but only fifty per cent. of

such cars, but it does require all that may have been equipped with power brakes and actually associated with 50 per cent. to be controlled by the engineer from the locomotive. The statute contemplates and allows that there may be cars in the train equipped with air brakes and not associated with the 50 per cent. operated from the engine. The word "associated," as here used, manifestly means the cars immediately connected with the 50 per cent. equipped with power brakes and operated from the engine; and those associated cars are also required to be operated from the engine. But the terms of the statute not only fail to require all cars of the train to be equipped with air brakes operated from the engine, but impliedly excludes such requirement, by expressing the requirement that such cars when associated with the minimum number of cars shall be so equipped.

The number of deaths and physical injuries of railroad employees in this country had become so appalling as to shock the sensibilities of all civilized people, and the object of this legislation was to require the railroads to use the means prescribed in the statute as a reasonable precaution against such casualties; and as has been shown with great force by Chief Justice Fuller, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, courts should give the statutes a broad interpretation, having in view the beneficent object of the legislation. Nevertheless the statute fixes 50 per cent. as the proportion of the cars required to be equipped with air brakes operated from the engine, and in the face of this provision the court would be going very far to hold it to be evidence of negligence under the statute not to have all the cars so equipped. On this train there was a dummy—that is, a car not equipped with brakes—somewhere near the middle of the train, and the evidence made an issue of fact as to whether 50 per cent. of the cars of this train were so associated together as to have their brakes operated from the engine, as required by the statute. If we assume, however, the defendant had not complied with the law, and 50 per cent. of the cars of the train were not so associated as to have the brakes operated from the engine, this omission to have 50 per cent. of the cars so operated had no connection with the plaintiff's fall and injury, for the train consisted of from 14 to 16 cars, and all but 5 of these were between the engine and the flat car from which plaintiff fell, so that, if the brakes of the 8 cars connected together immediately behind the engine had all been operated from the engine, the car which ran over plaintiff's leg would not have been included in the number. Hence the plaintiff's evidence that, if the car which he uncoupled had been equipped with air brakes working from the engine, it would have been stopped from running on him after

he fell by the automatic action of the brakes the instant it was uncoupled, cannot avail him. The statute did not require this car to be operated from the engine because it was not associated with the 50 per cent. required to be so operated, and the failure to have the 8 associated cars next to the engine so operated had no connection with the accident. The presence of air brakes operated from the engine could not have prevented the accident, and the absence of such equipment on these cars could have contributed nothing to it.

This case is entirely different from *Schlemmer v. Buffalo, etc., R. R. Co.*, 27 Sup. Ct. 407, 51 L. Ed. 681, where the deceased was ordered by his superior to do the precise act in the doing of which he lost his life. The inadvertent placing his head above the coupling and its being caught were results likely to occur from the peril the deceased was required by the master's representative to take contrary to law. In the present case, as we have pointed out, the servant was injured in doing a negligent act not demanded or called for by the conductor, and which he well knew was not intended by the order he had received. This was therefore clearly contributory negligence as distinguished from assumption of risk. *Bodie v. Railway Co.*, 61 S. C. 478, 39 S. E. 715; *Barksdale v. Railway Co.*, 66 S. C. 211, 44 S. E. 743; *Schlemmer v. Railway Co.*, supra.

We express no opinion as to the constitutionality of the federal statute, as that point is not made in the exception. Aside from the statute, however, there was evidence that the safe and proper place for a dummy was at the rear of the train next to the cab, and that, if it had been so placed, the air brakes on the car uncoupled by the plaintiff would have worked automatically, so as to bring it to an almost instant stop, and thus probably would have prevented it from running over plaintiff when he uncoupled it and fell. If full credence and force be given to this evidence as tending to show that there was negligence on the part of the defendant in the management and arrangement of its cars and that such negligence was a proximate cause of the injury, the facts as stated by the plaintiff himself admit of no other inference than that his own negligence contributed to the injury as a proximate cause, without which it could not have been received. Knowing the cars to be arranged as they were, that hardly anything short of a miracle could save him from injury if he fell between the moving cars, that it would be impossible for him to be so injured if he uncoupled by using the lever from the ground, he balanced himself in a stooping or kneeling posture on the corner of the moving flat car, and uncoupled by reaching down to the lever. No reasonable man could fail to see the extreme peril, or doubt that it was extreme negligence to

take it; and it is too plain for difference of opinion that this negligence contributed to the injury as a proximate cause, and that without it the injury would not have been received. Taking the view of the evidence most favorable to the plaintiff, it cannot be doubted the facts conclusively show contributory negligence, and therefore, under the principles laid down in *Jarrell v. Railway*, 58 S. C. 491, 36 S. E. 910, the plaintiff could not recover.

4. The general rule that it is the province of the jury to determine whether the evidence shows negligence on the part of the defendant or contributory negligence on the part of the plaintiff is universally recognized. Issues of negligence and contributory negligence are not different in this respect from other issues of fact between litigants. The rule is that all issues of fact in law cases are for the jury. Yet the rule is no less familiar and no less generally recognized that, where there is a total failure of evidence on the part of the plaintiff to establish his case or full establishment of a complete defense by plaintiff's evidence, there is no longer an issue of fact, and it becomes the duty of the court to adjudicate the matter as on issue of law by granting a nonsuit or directing a verdict or ordering a new trial. To illustrate: If A. sues B. on a contract for the payment of money and makes proof of existence of the obligation, but introduces evidence which admits of no other inference than that the obligation had been discharged, could the proposition be entertained for a moment that the court would not have the power to dispose of the cause by nonsuit just as if the plaintiff had failed completely to offer evidence tending to prove that an obligation ever existed? In *Hutchinson v. Noland*, 1 Hill, 222, the court says: "The general rule certainly is that the plaintiff is not to be nonsuited on what constitutes the defendant's defense, but the rule applies only where the decision goes on the defendant's evidence. In such case the jury alone can decide. But, if the defendant's defense be established by the plaintiff's witness, then the objection does not apply." *Pool v. Railroad Co.*, 23 S. C. 289; *Slater v. Railroad Co.*, 29 S. C. 100, 6 S. E. 936. The principle is the same in issues of negligence. This court has never hesitated to hold a nonsuit proper where the plaintiff failed completely to offer evidence tending to prove negligence as a proximate cause of alleged injury. *Carrier v. Dorrance*, 19 S. C. 32; *Hale v. Railway Co.*, 34 S. C. 292, 13 S. E. 537; *Glenn v. Railroad Co.*, 21 S. C. 470; *Davis v. Railroad Co.*, 21 S. C. 103; *Pickens v. Railroad Co.*, 54 S. C. 509, 32 S. E. 507. In *Hooper v. Railroad Co.*, 21 S. C. 548, this language is quoted with approval: "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether,

from these facts, when submitted to them, negligence ought to be inferred. The relevancy of evidence, and whether any exists which tends to prove, or is capable of proving, negligence, is for the court."

We can see no possible ground on which the power and duty of the court to grant a nonsuit can be distinguished and denied where plaintiff proves the negligence of the defendant as a proximate cause and at the same time makes good the defense of contributory negligence by introducing evidence which admits of no other inference than that his own negligence contributed to the injury as a proximate cause. It is true in *Carter v. Railroad Co.*, 19 S. C. 24, 45 Am. Rep. 754, the circuit court was held to be without power to grant a nonsuit on proof by plaintiff of contributory negligence, and the authority of this case is recognized in *Darwin v. Railroad Co.*, 23 S. C. 537, 55 Am. Rep. 32; *Petrie v. Railroad Co.*, 29 S. C. 322, 7 S. E. 515; *Carter v. Oil Co.*, 34 S. C. 215, 13 S. E. 419, 27 Am. St. Rep. 815; *Whaley v. Bartlett*, 42 S. C. 468, 20 S. E. 745; *Hankinson v. Railroad Co.*, 41 S. C. 19, 19 S. E. 206. A careful review of these cases suggests that the leading idea in the mind of the court was that the court could not under the Constitution hold a particular act or omission, such for instance as a failure to look and listen, to be under all circumstances proof of contributory negligence as a matter of law. Be that as it may, in the subsequent case of *Jarrell v. Railroad Co.*, 58 S. C. 495, 36 S. E. 912, the court states the rule, applying the well-recognized general principles to contributory negligence: "We may also say that, while contributory negligence is ordinarily a matter of defense, yet if the complaint shows contributory negligence by plaintiff, that would render the complaint demurrable for insufficiency, since it contained allegations that would defeat the cause of action alleged, or prevent a recovery thereon." This case has been cited and approved in *Elkins v. Railway Co.*, 64 S. C. 561, 43 S. E. 19; *Creech v. Railway*, 66 S. C. 533, 45 S. E. 86; *Hunter v. Railway Co.*, 72 S. C. 337, 51 S. E. 860, 110 Am. St. Rep. 605. The question in the *Jarrell* Case arose on a demurrer, but on this point there is no ground for distinction between a demurrer and a motion for a nonsuit. It would not only be illogical, but inconceivable in any system of jurisprudence that a court should have power to dismiss an action on the grounds that plaintiff has stated no cause of action, or stating it had also stated as a verity and a complete defense to it, assuming all his allegations of fact to be true, and yet should be without power on proof of the truth of the same allegations to adjudge as a matter of law that proof by the plaintiff of the facts alleged constituted a complete defense to his actions. Cases in other jurisdictions laying down the principles which we have stated will be found collected in *Shearman and Redfield on Negligence*, § 114. There is no dif-

ference in the application of the rule to the plaintiff and the defendant. If the defendant makes out the plaintiff's cause of action either in contract or tort by evidence which admits of no other inference than that the plaintiff is entitled to recover, it is the duty of the court to direct a verdict for the plaintiff, leaving it to the jury if the damages are unliquidated to fix the amount only. This is the principle applied to waiver in *Hollings v. Bankers*, 63 S. C. 193, 41 S. E. 90. There are strong reasons for the great caution which this court has always exercised in the use of its power to reverse a judgment of the circuit court refusing a nonsuit or a new trial, or the direction of a verdict, on the ground that the evidence admits of no other inference than that there has been a complete failure of proof to make out the plaintiff's alleged cause of action, or that there had been complete proof by the plaintiff of a defense set up in the answer. But the court may not avoid the responsibility when a case like this arises calling for the exercise of this power. Juries try issues of fact. When the evidence makes no issue of fact, it is the duty of the court to announce the conclusion of law which the evidence requires.

5. Another ground on which responsibility for the injury was imputed to the defendant was set out in the twelfth paragraph of the complaint: "That the said duties and work assigned to the plaintiff on the occasion above described were not those plaintiff was ordinarily required to do in the scope of his employment as a flagman, but were unusual and outside of the ordinary duties of his employment, which, on the occasion in question, he was required to perform by the said defendant." The plaintiff testified he contracted to work as a flagman, his ordinary duties being to protect the rear of the train, to see that the lanterns and flags were placed, and the torpedoes and fuses were kept and used when needed, and to keep the cab clean; but he also testified that, when he was employed, he was charged by the train master to obey the conductor or the engineer, and he regarded it within the scope of his employment to perform other labor, such as unloading freight and uncoupling cars, when so directed by the conductor. It is clear from the evidence that in uncoupling cars the plaintiff was not acting within the scope of the duties he had contracted to perform without directions from the conductor, but it is also clear he was acting within the scope of duties he had undertaken when directed by the conductor to perform them. The general rule is well established that the servant does not take upon himself risks which he would not reasonably expect to encounter because not within the scope of his contract of hiring. But, in order for this rule to be available, it must be shown that the servant was transferred to essentially new duties and that the order under which he acted was negligent. This is the view presented in *Labatt on Master and Serv-*

ants, §§ 465-468, and it will be found very difficult to state a more accurate test, for from the nature of the subject each case must be decided on its own facts, whether the service required was essentially new and whether the order given was negligent are ordinarily questions of fact to be decided by the jury. But there are cases, and we think this is one of them, where it cannot be said there was any testimony upon which a finding could rest that the duty of uncoupling a car was essentially new and not within the capacity of the plaintiff and not contemplated by his employment. The plaintiff had been employed on the freight train about three months and for some time before had been on the railroad bridge force; and his testimony already quoted shows that he had full knowledge of the purpose for which the lever was provided and that he used it in a way not contemplated by the company in placing it or by the conductor in giving his order, and the great and necessary danger of the method of use adopted by the plaintiff could not fail to be obvious to any reasonable man.

The conclusion is irresistible that the plaintiff's injury was due, not solely to his own negligence, certainly to his contributory negligence, in taking unnecessary hazards to carry out the order of the conductor.

We do not deem it necessary to refer separately to the errors alleged in the charge and in the admission of the testimony, as the foregoing discussion practically disposes of all the material questions made in the case which arose either on the motion for nonsuit or for a new trial.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

GARY, A. J. (dissenting). While there was testimony tending to show that the plaintiff was negligent, it likewise tended to prove negligence on the part of the defendant in several particulars. The testimony was susceptible of more than one inference. Therefore it cannot be said that the negligence of the plaintiff was the proximate cause of his injury, and the inference to be drawn from the testimony was properly submitted to the jury, especially when it appeared that the plaintiff did not have time for deliberation in executing the order to uncouple the cars. But there is even a stronger reason why the question of contributory negligence on the part of the plaintiff was properly submitted to the jury. This was an interstate commerce train, and the construction of the statute mentioned in the complaint involves a federal question, in which case this court is bound to follow the decisions of the United States Supreme Court. There is no difference in principle between the present case and that of *Schlemmer v. Railroad*, 27 Sup. Ct. 407,<sup>1</sup> from which we quote at length, as

it is decisive of the question under consideration. The facts in that case were as follows: "This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the Supreme Court of the state. The shovel car was part of a train on its way through Pennsylvania from a point in New York, and it was not equipped with an automatic coupler, in accordance with the act of March 2, 1893, c. 193, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. Instead of such a coupler, it had an iron drawbar fastened underneath the car by a pin, and projecting about a foot beyond the car. This drawbar weighed about 80 pounds, and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end possibly a foot, so that it should enter a slot in an automatic coupler on the caboose, and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car, and to its being so high that it would pass over those on the caboose, the car and caboose would crush any one between them if they came together, and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the shovel car. It was dusk, and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed." In reversing the decision of the state court the United States Supreme Court used this language: "It is enacted by section 8 of the act that any employé injured by any car in use, contrary to the provisions of the act, shall be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master, for the negligence of his servant, when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell v. Boston & W. R. Corp.*, 4 Metc. 49, 57, 58, 38 Am. Dec. 339. But at the present time the motion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated, when he submitted his person to them. In

<sup>1</sup> 51 L. Ed. 681.

this class of cases the risk is said to be assumed, because a person who frankly and voluntarily encounters it has only himself to thank if harm comes on a general principle of law. Probably the modification of this general principle by some judicial decisions and by statutes like section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist. Assumption of risk in a broad sense obviously shades into negligence, as commonly understood. Negligence consists in conduct which common experience, or the special knowledge of the actor, shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence, was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound." This decision shows that the United States Supreme Court regards as "shadowy" the distinction between the assumption of risk, and contributory negligence, and that it will not allow the provisions of the statute to be abrogated by a mere change of name, in the designation of the defense. But, even if these defenses must be regarded as distinct, the same result should follow in this case. In critically reviewing the case of *Schlemmer v. Railroad*, *supra*, the Central Law Journal (May 3, 1907) thus clearly points out the distinction generally recognized, between assumption of risk and con-

tributory negligence: "One has to do with the contract between master and servant, the other with the latter's own deliberate act and judgment independent of any contract requirement of the master. If a master tells a servant to do such and such a thing, and the servant sees the danger, or knows the defects of the appliances used, and the liability he is incurring, his undertaking to comply with his master's wishes is an assumption of the risks involved. It may be negligence on his part to do what he is doing, but it is negligence assumed by contract with his master, and of which his master has or ought to have knowledge. On the other hand, where a servant in the course of his employment does an act not demanded or called for by his master, and especially against the doing of which he is warned, and such act is clearly an act of negligence, the commission of such an act on his part amounts to contributory negligence, and is effective as a complete defense to a defendant in an action for damages."

Tested even by this distinction, the question whether the plaintiff assumed the risk, or was guilty of contributory negligence, was, in this case, proper for the jury. For these reasons I dissent.

(1 Ga. App. 596)

**ROSE v. STATE. (No. 247.)**

**ROSE CO. v. STATE. (No. 248.)**

(Court of Appeals of Georgia. April 11, 1907.)

**1. INTOXICATING LIQUORS—ILLEGAL SALE.**

Section 428 of the Penal Code of 1895, as amended by the act of 1897 (Acts 1897, p. 39), is by its terms made applicable only in those counties, cities, or other localities where the sale of spirituous, malt, or intoxicating liquors "is prohibited by law, high license, or otherwise."

**2. SAME.**

The sale of liquor is not "prohibited by law, high license, or otherwise," in Bartow county. Therefore, an indictment in that county for an alleged violation of the said section as amended was invalid, and a conviction thereon was contrary to law, and must be set aside.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; Fite, Judge.

Randolph Rose and the R. M. Rose Company were convicted of an illegal sale of liquors, and bring error. Reversed.

Rosser & Brandon, Ben. J. Conyers, and Neel & Peeples, for plaintiffs in error. Sam. P. Maddox, Sol. Gen., for the State.

**HILL, C. J.** In the superior court of Bartow county an indictment was returned against Randolph Rose, W. F. Baker, and R. M. Rose Company. The indictment contained two counts. The first charged a violation of section 431 of the Penal Code of 1895. The second charged a violation of section 428 of the Penal Code of 1895, as amended by the act of 1897 (Acts 1897, p. 39). The defendants Randolph Rose and R. M. Rose

Company interposed a demurrer to the second count, on the ground that it "does not allege a crime under the laws of this state, there being no law of force prohibiting, by high license or otherwise, the sale of liquors in Bartow county." The court overruled the demurrer, and the defendants excepted to that judgment. The court instructed the jury that there was no evidence that any spirituous, malt, or intoxicating liquors had been sold in Bartow county, and directed a verdict for the defendants on the first count in the indictment. The defendants were convicted on the second count of the indictment, and their motion for a new trial was overruled.

The controlling question in this case is made by the demurrer to the second count of the indictment. This count, as before stated, charged the defendants with a violation of section 428 of the Penal Code of 1895, as amended by the act of 1897. The offense is set forth in the language of the statute; it being alleged that W. F. Baker, Randolph Rose, and R. M. Rose Company, in Bartow county on the 1st day of January, 1907, did "sell, contract to sell, take orders for, and solicit, personally and by agent, the sale of spirituous, malt, and intoxicating liquors in said county of Bartow, where the sale of such liquors is prohibited by law, high license, or otherwise, said R. M. Rose Company being then and there a corporation doing business in this state, and said offense then and there having been committed within the corporate limits of the city of Cartersville, in the said county of Bartow." Was the sale of spirituous, malt, or intoxicating liquors prohibited by law, high license, or otherwise, in Bartow county at the time when the offense charged was alleged to have been committed? If such sale was not prohibited in that county, it follows that the conviction, whatever may have been the facts in the case, was unlawful, and must be set aside. By its express terms, section 428 of the Penal Code of 1895, before and since the amendatory act of 1897, makes it an offense, personally or by agent, to sell, contract to sell, take orders for, and solicit the sale of spirituous, malt, or intoxicating liquors, only in those counties in this state where the sale of such liquors is prohibited by law. Justice Cobb, in the case of *Barker v. State*, 117 Ga. 433, 43 S. E. 746, gives the legislative intent in the enactment of section 428 as follows: "The manifest purpose of this law is to prevent the sale of intoxicating liquors in a prohibition county, town, or district." See, in the same connection, *Loeb v. State*, 115 Ga. 241, 41 S. E. 575 (2). The Supreme Court in *Strauss v. Mayor of Waycross*, 97 Ga. 476, 25 S. E. 329, says: "Prior to the passage of the act of December 18, 1893 [now section 428 of the Penal Code of 1895], soliciting orders for the sale of spirituous, malt, or other intoxicating liquors, in any 'prohibi-

tion' county in this state was not indictable under any criminal statute of Georgia, but was for the first time made a state offense by the passage of that act." Section 428 of the Penal Code of 1895 was amended by the act of 1897, by inserting after the word "sell," in the second line, the words "contract to sell, take orders for." It is clear that the Legislature of 1897 thought that this section applied only to those counties wherein the sale of liquor was then prohibited by law; for the caption of the amendatory act expressly restricted its application to "where the sale [of such liquors] is now prohibited by law." In the case of *Williams v. State*, 107 Ga. 694, 33 S. E. 642, the Supreme Court holds that "the purpose of the act [section 428 of the Penal Code of 1895, as amended by the act of December 9, 1897] is to prevent whisky dealers from selling or contracting to sell, taking orders for, or soliciting, personally or by agent, the sale of intoxicating liquors in a 'dry' county, town, or district." The use of the word "dry" was intended to designate those counties where the sale of liquors is prohibited by law. It is unnecessary to multiply authorities on this point, for it cannot be doubted that the plain, manifest purpose of section 428, as amended, was to protect from the liquor traffic those counties wherein the sale of liquors was prohibited by law, and that this section is applicable only in those counties where the sale is prohibited. It therefore follows that, if there was no valid law which prohibited the sale of spirituous, malt, and intoxicating liquors in the county of Bartow at the time when the alleged offense was committed, there could have been no violation of section 428, as amended by the act of 1897, in that county; and an indictment based on that statute was invalid.

So the question recurs, was the sale of spirituous, malt, and intoxicating liquors prohibited by law, high license, or otherwise, in Bartow county on January 1, 1907, or at any time prior to that date, within the statute of limitations? Let us review the legislation on the subject of the liquor question, as applicable to Bartow county. On February 26, 1875 (Acts 1875, p. 338), a local act was passed, permitting an election in Bartow county to determine the question "whether or not spirituous, vinous, or malt liquors shall be sold, bartered, or in any way disposed of for a valuable consideration, in quantities less than one gallon." No election was ever held under this act, and it never became operative. On February 21, 1876 (Acts 1876, p. 328), this act of 1875 was amended, but there was no election under the act as amended, and it never became effective. On December 2, 1884, a local act was passed entitled "An act to submit to the qualified voters of Bartow county the question of the sale and furnishing of intoxicating, alcoholic, spirituous, vinous, or malt liq-

uors in said county, and to prohibit the same from being sold or furnished after said election, if a majority of those voting shall so determine, and to provide penalties for such sale and furnishing, and for other purposes." This act was amended October 7, 1885, forbidding the sale of domestic wines at public places, and in quantities less than one quart. Acts of 1884-85, p. 541. An election was held under this act, and it received the number of votes necessary for its adoption, and became operative. On November 6, 1901, the Supreme Court, in the case of *Griffin v. Eaves*, 114 Ga. 65, 39 S. E. 913, following the principle ruled in *Papworth v. State*, 103 Ga. 36, 31 S. E. 402, and subsequent cases, declared that the special local act of 1884 for Bartow county was in conflict with the general domestic wine act of February 27, 1887, and was violative of that clause of the Constitution which prohibits special legislation in any case for which provision has been made by an existing general law. It was further decided in the same case that the general statute making it an offense to retail or sell intoxicating liquor without license was operative in Bartow county. Since the decision of the Supreme Court declaring the special local act of 1884-85 unconstitutional, this general law is the only one that has been of force in Bartow county. This law does not prohibit the sale of liquor. It permits the sale under a license granted by the proper county authorities. This is a regulation, and not a prohibition.

It seems perfectly clear to us that it would be a legal paradox and a logical absurdity to hold that section 431 of the Penal Code of 1895, which regulates, and section 428, which prohibits, can be effective and operative at the same time in the same county or locality. We do not understand the able Solicitor General to combat the correctness of this position. He claims, on the contrary, that section 428 does apply in Bartow county, because in that county the sale of liquor is prohibited by law. He admits that such sale is not prohibited by high license, for high license does not necessarily prohibit. Neither does he claim that there is in that county any special prohibition law, or that the people of the county have prohibited the sale under the provisions of the general local option law. He supports his contention that the sale is prohibited in Bartow county by the word "otherwise," used in the act of 1897, "prohibited by law, high license, or otherwise." He contends that the act of 1874 (Acts 1874, p. 330), creating the board of county commissioners for Bartow county, gives them exclusive jurisdiction to issue licenses for the sale of spirituous liquors in that county; that, having exclusive jurisdiction, the commissioners can refuse or grant licenses at their election; and that the fact that no license has been granted shows that the policy of the county is not to legalize the sale of liquors, and therefore the sale of

spirituous liquors in that county is "otherwise prohibited by law," the "otherwise prohibited by law" consisting in the fact that the county commissioners have not granted a license to sell in the county. The syllogism of the Solicitor General proceeds in this wise: Exclusive jurisdiction is given to the county commissioners of Bartow county to grant or to refuse licenses for the sale of spirituous liquors in that county. They have not granted a license. Therefore the sale of liquor is prohibited by law. The conclusion is a palpable non sequitur from the premise. There may be many reasons for not having issued a license. No one may have applied, or no one acceptable to the commissioners may have applied. Questions of policy or expediency may have induced the commissioners to refuse those who applied. But the power to license existed, and this precluded the possibility of prohibition. The commissioners were not authorized by law to prohibit the sale of spirituous liquors, but only to regulate the sale thereof. Regulation is absolutely contradictory of prohibition. The former can never exist where the latter prevails, or vice versa. Even regulation that places the license so high that it amounts to practical prohibition does not, as a matter of law, prohibit. *Glover v. State*, 126 Ga. 594, 55 S. E. 592. According to the Supreme Court, in *Griffin v. Eaves*, *supra*, the only penal law applicable to the sale of liquor in Bartow county is that contained in section 431 of the Penal Code of 1895, and this law could not be applicable in that county if the sale of liquor was prohibited. The truth of the proposition is self-evident, and argument seems superfluous.

The words "otherwise prohibited," relied on by the state, really mean nothing in this statute. When the Legislature used the words "prohibited by law," it exhausted the subject, and the addition of the words "high license or otherwise" was "wasteful and ridiculous excess." These general words are sometimes added to specific enumeration in statutes out of abundance of caution, but they usually mean nothing. Certainly such words must be "restricted to the same genus as the things enumerated," and the use of the word "otherwise," following the words "prohibited by law," meant that the "otherwise" prohibition of the sale of liquor was to be a legal prohibition, that is, prohibited by the law of high license, or otherwise prohibited by law. But we do not think this general word means anything in this statute. Whatever it was intended to mean, it could not by any rule of logic give to the failure of the commissioners to grant licenses the force and effect of a positive enactment prohibiting the sale. The word "prohibit" is an active, transitive verb. As defined by the Standard Dictionary, it means "to forbid, especially by authority or legal enactment; interdict; as, to prohibit liquor selling, or a person from selling liquor." The word "pro-



hibit," in its legal sense, implies some legislative enactment forbidding something. "The laws of England, from the early Plantagenets, sternly prohibited the conversion of malt into alcohol." "Prohibition," in the United States, specifically means "the forbidding by legislative enactment of the manufacture and sale of alcoholic liquors for use as beverage." Giving, therefore, to the word "prohibited" its ordinary signification and its technical meaning, as applied to the particular subject-matter of the sale of spirituous liquors, it must involve some positive act done by authority. If the position of the Solicitor General is correct, there is no necessity for any general prohibition law in Georgia, and the general local option law was an entirely useless piece of legislation. All that is necessary to secure prohibition in a county is to elect county officials who will arbitrarily and at all times refuse to grant licenses. This would put it in the power of one or more county officials to give or refuse prohibition to the people. This great question in which all the people are so much interested would not be under the control of positive statute, but of the caprice or honesty of a few individuals. If such were the law, a county might be "wet" one day and "dry" the next. If the people of Bartow county want the traffic of spirituous liquors prohibited in their county, they must avail themselves of the provisions of the general local option law of the state. The Supreme Court has repeatedly held that no special local law will give the protection, and surely the failure to grant licenses by the commissioners will not furnish such protection, for, at any time, the commissioners could change their minds and issue licenses.

We conclude that the sale of spirituous, malt, or intoxicating liquors was not prohibited by law, prohibited by high license, or prohibited otherwise, in Bartow county, when the plaintiffs in error were charged with a violation of section 428 of the Penal Code of 1895, as amended by the act of 1897, and that the demurrer to the indictment on this ground should have been sustained. Let the judgment of the Superior court, refusing to grant a new trial, be reversed, the verdict in both cases set aside, and the indictment quashed. The petition of the Solicitor General to review the decision of the Supreme Court in the case of Griffin v. Eaves, 114 Ga. 65, 39 S. E. 913, is refused. The principle upon which that case was decided was approved by the Supreme Court in several cases before and since the decision of that case. As late as the case of Glover v. State, 126 Ga. 607, 55 S. E. 592, it was cited and approved. In the case of Edwards v. State, 123 Ga. 544, 51 S. E. 630, the Supreme Court cites with approval the principle of the Papworth Case, and all subsequent cases involving the same question. In view of these repeated rulings of the Supreme Court, this court is not of the opinion that the question

is one of so much doubt that it should be referred to the Supreme Court for review.

Judgment reversed.

(1 Ga. App. 697)

CUNNINGHAM v. STATE. (No. 167.)

(Court of Appeals of Georgia. April 25, 1907.)

CRIMINAL LAW — REVIEW — DISPOSITION OF CAUSE.

The constitutionality of the act of December 20, 1898 (Acts 1898, p. 60), amending section 341 of the Penal Code of 1895, by inserting therein, after the word "any," and before the word "pistol," the words "kind of metal knucks," being the only question involved in this case, and the question having been certified to the Supreme Court, and that court having held adversely to the contention of the plaintiff in error, and that said act is not unconstitutional, an affirmance of the judgment of the trial court, in overruling the demurrer based upon the contention that said amendatory act was unconstitutional, must result.

(Syllabus by the Court.)

Error from City Court of Bainbridge; Harrell, Judge.

Will Cunningham was convicted of a misdemeanor, and brings error. Affirmed.

For opinion of Supreme Court on certified questions, see 57 S. E. 90.

W. D. Sheffield, for plaintiff in error.

RUSSELL, J. Judgment affirmed.

(128 Ga. 690)

KIMBROUGH v. SMITH.

(Supreme Court of Georgia. July 12, 1907.)

WILLS—CONSTRUCTION—DEVISE OF LIFE ESTATE.

A devise of a life estate, made in distinct terms in a prior item, will not be enlarged into a fee-simple estate by the general language of a subsequent item, where the language and the general context of the will do not clearly and plainly indicate such to be the testator's purpose and intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1431.]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by S. A. Smith, administrator, against H. C. Kimbrough. Judgment for plaintiff. Defendant brings error. Affirmed.

S. A. Smith, as administrator de bonis non cum testamento annexo of John A. Smith, filed his complaint for land against Kimbrough, administrator of Thomas Wesley Smith, and the case was submitted to the judge without a jury under an agreed statement of facts. In accordance with the terms of this agreement he subsequently rendered his decision, which was in favor of the plaintiff, and the defendant filed the present bill of exceptions complaining of that decision. The agreed statement of facts shows that John A. Smith died in 1880, testate, and that his sons, S. P. and Thomas Wesley, who were named as executors in the will, duly qualified and administered the estate, and were discharged in 1883. The third item of

the will is as follows: "I give and bequeath to my beloved wife, Mary Smith, and to my son Thomas Wesley Smith, jointly, the following lots and fractions of lots of land [being the land sued for in the present case]. The lands with their appurtenances, herein mentioned, are to be held, and the rents or profits thereof enjoyed, jointly by them. If one dies before the other, the survivor shall have the share of the one who dies, and at the death of both said property shall revert to my estate, to be equally divided among my heirs at law, at that time in life; and, as the mills situated on the lands thus disposed of require repairs, I give my wife and son Thos. Wesley five hundred dollars for the purpose of making such repairs." The fourth, sixth, and seventh items of the will make bequests to his other children of lands therein specified; the estate in each instance being without any limitation. Item 5 gives certain land to his sister for life, with remainder to a named daughter. Item 8 sets out that "in making the above and foregoing bequests it is distinctly to be understood that in every instance the property so bequeathed is to go to the legatees mentioned and their lawful heirs, and in no instance to be subject to the debts of said legatees, and the same ruling to apply to the bequests that are to be made in the items that follow, and I value the lands thus bequeathed as follows, to wit: Those to my wife and Thos. Wesley jointly, \$6,000; to Nannie White, \$3,500; to Sarah E. Cleveland, \$3,942 [these two being daughters]; and to Samuel P. Smith, at \$3,805." Item 9 provides that "all the balance of my property, of each and every description, whenever and wherever it may be or consist of, I desire and direct that the same may be divided and distributed among my heirs at law hereinbefore mentioned in the foregoing items, so that the distribution may be equal, taking as a basis upon which to estimate the values I have placed on the realty bequeathed, counting my wife and Thos. Wesley as two shares; and it is to be distinctly understood that the bequest to my wife is in lieu of dower." The residue of the estate immediately after the death of the testator was appraised at \$35,000. These legacies were assented to, and the legatees took possession of the lands bequeathed to them. Thomas Wesley was born in 1832, and from his childhood had lived with his father and mother, never having married, and was so living at the time the will was made, and at testator's death. The other children had married and with their families were living apart from the testator. Thomas Wesley continued to live with his mother, unmarried, till her death in 1884, but later, in 1894, married. He continued to live upon the land devised to himself and mother after her death, and till his death, which occurred on June 13, 1904. He left surviving him a

wife and one child, who continued to live on the place after his death, and this suit is brought by the administrator de bonis non of his father's estate, against the administrator of Thomas Wesley Smith, to recover this land.

F. M. Longley, for plaintiff in error. J. R. Terrell, for defendant in error.

EVANS, J. The solution of the case presented by this record depends upon the character of the estate, whether fee simple or for life only, which Thomas Wesley Smith took in the lands devised in the third item of his father's will. If no other considerations entered into the construction of this item beyond defining the plain and unambiguous language of the testator according to its obvious legal effect, no difficulty would be experienced in declaring the nature of the estate therein created. With almost technical precision the testator devised to his wife and son Thomas Wesley an estate for their joint lives, with survivorship, and after the death of the survivor a reversion of the land devised to his estate, to be distributed among his heirs at law living at the time of the death of the survivor. But the plaintiff in error insists that the eighth item of the will is irreconcilable with item 3, and that the life estate created in the third item became absolute under the eighth item, and vested in Thomas Wesley Smith an absolute fee-simple estate upon the death of his mother. Civ. Code 1895, § 3346, provides that, "where there are inconsistent provisions in the same will, the latter must prevail." Before a posterior provision shall be given the effect of nullifying a devise previously made in the will, the conflict between the two provisions must be irreconcilable. A subsequent provision which diminishes a precedent gift, as by cutting down to a life estate a prior devise, is not so far conflicting and irreconcilable with that gift as to be in a legal sense repugnant thereto. *Broach v. Kitchens*, 23 Ga. 515; *Sheftall v. Roberts*, 30 Ga. 453; *Vaughn v. Howard*, 75 Ga. 285. In these cases the language of the posterior clause reducing the estate was in express terms, and not in general language. When the words of the will in the first instance distinctly indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provision which is inferential, and which is not equally as distinct as the former. 30 Am. & Eng. Enc. L. (2d Ed.) 687; 1 Jarman on Wills, \*438. The reason underlying this principle is equally applicable to the converse of the proposition, to wit, that, where the prior devise of an estate less than a fee is made in distinct terms, it will not be enlarged into a fee by the general language of a subsequent item, unless the language and general context clearly and unmistakably discloses such to be the testator's purpose and intent. It is familiar law that the whole

will is to be taken together, and operation to be given to every part of it, if possible, and no part should ever be rejected because of conflict with another part, except where the repugnancy is so palpable that both items can not be given effect. The language relied on in this case to create the repugnancy is the statement in the eighth item that the property bequeathed in the previous items "is to go to the legatees mentioned and their lawful heirs, and in no instance to be subject to the debts of said legatees." It is quite evident that the testator was of the opinion, from the language he used, that he could devise property to his children, and at the same time exempt it from liability to their debts. The eighth item does not remotely suggest the testator's intent to modify or annul the provisions as to survivorship between his wife and Thomas Wesley, and there could be no survivorship except that a life estate was created. We would be doing violence to the clear and distinct purpose manifested by the testator in the disposition of the land devised in the third item to hold that the clear and distinct gift of a life estate was to be converted into a fee-simple estate by the general language employed in the eighth item of his will.

Plaintiff in error further contends that the testator discloses an intention, in the eighth and ninth items of his will, to make an equal distribution among his heirs at law; that the real purpose of the testator was to divide his estate into five equal parts, giving two to his wife and Thomas Wesley, and to the three other children each an equal share. We gather from the whole will that the testamentary scheme did not comprehend equality in the estates devised. A construction which would enlarge the estate granted to Thomas Wesley in the third item into a fee simple would destroy that equality for which the plaintiff in error so earnestly contends, since Thomas Wesley, if he should survive his mother, would be given a much larger share than would pass to the other children under the terms of the will. It would seem that the testator had more in mind equality in present interest than equality of the estate devised to his several children. In his estimate of the land devised to the different legatees he values the land without reference to the estate created therein, and for the purpose of making an equal division of the residuum on the basis of such valuation. The will itself is demonstrative that this was the general testamentary scheme, and presents no ambiguity. But, even if we were of the opinion that the will raised an ambiguity, the attendant circumstances of the testator and his family, appearing in the agreed statement of facts, illustrates that the construction we place up-

on it is the correct one. The precise date of the will does not appear in the record, but it was probated in 1880. At that time Thomas Wesley was 48 years of age, living with his mother, and unmarried. The other children were married and living apart from the testator at the time of his death. It is easy to infer from these circumstances that the testator did not believe that his son Thomas Wesley would ever marry, and he desired the land specifically devised to go to his lineal heirs upon the death of the survivor named in the third item of his will. The residuum of the estate was appraised at \$35,000, approximately double the value of the land specifically devised. The record is silent as to whether this residuum consisted of personalty or realty. Both his wife and Thomas Wesley took their shares of this residuum without limitation. While we are of the opinion that the will is unambiguous, we advert to these attendant circumstances of the testator and his family, which were before the trial judge, only to show that the construction which we have given is consonant with those circumstances at the time the will was executed. The case was tried by the judge without a jury, by consent, upon an agreed statement of facts, and we agree in the judgment of the trial judge that Thomas Wesley Smith's estate in the lands devised in the third item of the will determined upon his death.

Judgment affirmed. All the Justices concur.

(128 Ga. 600)

# GEORGIA RAILROAD & BANKING CO. v. HEARD.

(Supreme Court of Georgia. July 10, 1907.)

## 1. APPEAL—REVIEW—OBJECTIONS WAIVED.

Only the general grounds of the motion for new trial were referred to or argued in the brief of the plaintiff in error. The special assignments of error which were not referred to in the brief will be treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256, 4262.]

## 2. SAME—EVIDENCE.

The evidence was sufficient to uphold the verdict.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Columbus Heard against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Jas. B. & Noel P. Park, for plaintiff in error. Miles W. Lewis, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(128 Ga. 549)

**HUMPHREYS v. SMITH.**

(Supreme Court of Georgia. June 15, 1907.)

**1. WRIT OF ERROR—RECORD—PROCEEDINGS ON MOTION FOR NEW TRIAL.**

The record contained an original motion for new trial, based upon the general grounds only, and also two amendments to the motion for new trial, containing various special grounds. It does not appear that an order was taken at or before the hearing approving the special grounds, but it does appear that a number of the special grounds are set forth in detail in the bill of exceptions, which contain an averment that "the recitals of fact contained in the motion for new trial are true and correct." *Held*, that such of the grounds as are set forth in the bill of exceptions are sufficiently verified to be considered by this court. *Starling v. Thorne*, 13 S. E. 552, 87 Ga. 513.

**2. TRIAL—INSTRUCTIONS—SUBMISSION OF MATTER NOT WITHIN ISSUES.**

The case involves simply the question as to whether the claimant was entitled to the specific performance of an alleged parol agreement for the sale of land between himself and the plaintiff's intestate; the plaintiff being an administrator who was seeking to sell the land in dispute. The pleadings and evidence were not of such character as to raise an issue of fraud. The instructions of the judge with reference to fraud, being wholly foreign to the issue, were calculated to mislead the jury, and a new trial should have been granted on account of the error committed in giving such instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-589, 591.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action between F. M. Humphreys and O. M. Smith, administrator. From the judgment, Humphreys brings error. Reversed.

F. M. Humphreys and C. S. Morgan, for plaintiff in error. O. M. Smith, for defendant in error.

**ATKINSON, J.** Judgment reversed. All the Justices concur.

(128 Ga. 596)

**GLENN v. ZENOVITCH.**

(Supreme Court of Georgia. July 10, 1907.)

**1. BILLS AND NOTES—ACTION ON NOTE—EVIDENCE—SUFFICIENCY.**

The verdict was without evidence to support it, and the court erred in overruling a motion for new trial based upon the general grounds.

**2. DEPOSITIONS—INTERROGATORIES—AGREEMENT OF COUNSEL—COMPLIANCE.**

Where counsel for both parties agreed, in regard to the execution and return of certain interrogatories, that "any disinterested party may act as sole commissioner in the execution and return of the above interrogatories, but the answers must be written by the witness personally," compliance with this stipulation was sufficiently shown when it was made to appear that the witness to whom the interrogatories were to be propounded dictated his answer to another person who wrote them out on a typewriter, and that the answers were read over to the witness, who then, having previously been duly sworn, signed the same.

**3. BILLS AND NOTES—VALIDITY—CONSIDERATION—SETTLEMENT OF SUIT.**

Where a note is given in settlement of a suit pending in court against the maker of the note, said party is bound thereby; and this is true whether the suit itself was instituted upon a just and valid claim or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 203.]

**4. SAME—ACTION ON NOTE—EVIDENCE—SUFFICIENCY.**

No error appears to have been committed by the trial judge, except as indicated in the first headnote.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by L. G. Zenovitch against N. A. Glenn. Judgment for plaintiff, and defendant brings error. Reversed.

Zenovitch brought suit against Mrs. Glenn on a promissory note, dated October 21, 1902, for the principal sum of \$300. The defendant filed a plea and several amendments, in which she alleged that said note had been obtained by fraud of plaintiff, and, "if signed by her, is totally without consideration." She further alleged, and set up in her testimony, that plaintiff is indebted to her upon two promissory notes, dated February 20, 1903, and February 21, 1903, for the principal sum of \$259 and \$150, respectively; and she prayed judgment on said notes against the plaintiff. The plaintiff testified that he had had dealings with the defendant prior to October 21, 1902, and that she had become indebted to him up to that time in the sum of \$1,673 on a note and \$200 for money loaned; that he commenced legal proceedings upon said indebtedness against her, and on October 21, 1902, they agreed upon a settlement whereby she paid him \$500 in cash and gave her note for \$300, which note is the subject of this suit. The only portion of plaintiff's testimony which can be construed as a denial of the notes set up by the defendant in her cross-petition is the following: "The only cash I received besides the \$500 was the sum of \$15 paid by her, for which I gave a note for \$15. \* \* \* I have never received since October 21, 1902, any money or other thing of value from Mrs. Glenn in settlement of this note [the note here sued on] or for any other purpose—that is, in satisfaction of any existing debt, as a gift or as a loan—except the \$15 hereinbefore mentioned, that she paid me in Tacoma in 1903." The evidence upon the other material issues was conflicting. The jury returned a verdict in favor of the plaintiff for the sum of \$300, with interest. The defendant's motion for new trial was overruled, and she excepted.

F. Roland Alston, for plaintiff in error. Moore & Pomeroy, for defendant in error.

**BECK, J.** (after stating the foregoing facts).

1. The plaintiff filed no responsive pleading to the counterclaim set up by the defendant

in her cross-petition, and we are left to gather from plaintiff's testimony what his defense, if any, was. In this connection the defendant swore: "One day he [plaintiff] asked me for \$250, and gave me his note for it. This is Mr. Zenovitch's signature [identifying note for \$250, dated February 20, 1903]. I saw him sign that paper. \* \* \* This entire note is in his handwriting. \* \* \* At that time I loaned him \$250. This note [identifying note, dated February 21, 1903, for \$150] is for money that I gave him. That is his signature. The paper is in his handwriting." It is argued in the brief of counsel for plaintiff below, defendant in error here, that "plaintiff had no knowledge of them [the notes set up by the defendant] until the plea was filed on the day of the trial; and, as his interrogatories had been taken several days before and were then in court, he had no notice of this defense, and consequently did not deny these notes specifically, but his evidence leaves no doubt that said notes were never signed by him." Under these circumstances, it would have been perfectly competent for the plaintiff to move for a continuance of the case on the ground of surprise, in order to prepare to meet the issue thus raised; but this he failed to do, relying upon his other testimony to rebut the presumption in favor of the notes (the execution of which was nowhere denied) and the direct testimony of the defendant in support of the same. It is true the plaintiff testified that he had received no "money or other thing of value" from the defendant, "as a gift or as a loan," since October 21, 1902; but this entire statement is qualified by the words, "in satisfaction of any existing debt." This averment, therefore, is altogether too loose and general to support a plea of want or failure of consideration of the notes held by the defendant, the alleged consideration of which was money loaned, not "in satisfaction of any existing debt," but as an independent transaction whereby plaintiff became indebted to the defendant. It follows from what has been said that the verdict in favor of the plaintiff, for the full amount of the note sued on by him, was without evidence to support it, and the court erred in overruling defendant's motion for a new trial based on that ground.

2. The movant complains in one of the grounds of the motion for a new trial that the court erred in admitting in evidence the interrogatories of Zenovitch; the ground of the objection being that "they were not executed in accordance with the agreement between counsel as to the manner of execution, in that the answers were not written by the witness and were not in the handwriting of the witness as provided by said agreement." The agreement above referred to was as follows: "It is agreed that any disinterested party may act as sole commissioner in the execution and return of the above interrogatories. But the answers must be written by

the witness personally and certified to by a notary public." The notary public, who acted as commissioner to execute the interrogatories, certified the same as follows: "This is to certify: That L. G. Zenovitch presented to me, William Thompson, notary public in and for the state of Washington, duly commissioned and sworn, the attached interrogatories together with the exhibits thereto attached, and that, before answering said interrogatories, I propounded an oath to the said L. G. Zenovitch, which oath he took, and said that in his said answers to his said interrogatories he would tell the truth, the whole truth, and nothing but the truth. That the answers to each and every one of said interrogatories were given in my presence, and were dictated to a stenographer upon a typewriter directly, and that the same were carefully read over to him after being written and answered, and are verified by him as being the true and correct answers as [he] dictated them. That he did not write out the answers to the interrogatories in longhand himself, for the reason that he is a slow writer, and it is only with the greatest difficulty that he can write on account of poor health and a stiff wrist. That he signed his name after the same had been carefully read over by him, and that he has taken oath before me that the answers have been correctly transcribed according as he dictated them in person." And the following affidavit of said Zenovitch is attached to the answers to the interrogatories: "That he either wrote or dictated the foregoing answers to the interrogatories. That he has carefully read the same over and the interrogatories. That he knows the contents of all of said answers, and that the same constitute his answers as dictated by him, and the same are true." It has been held by this court, and we do not desire to be understood as laying down any rule in conflict therewith, that, "to render the evidence of a witness taken by written interrogatories admissible in the first instance, the statute requires that two commissioners shall act in taking the depositions of the witness; and, if for any reason the parties waive this provision of the statute and agree that such may be taken by one commissioner, it is a compliance with the terms of the agreement which makes the execution legal, and authorizes the admission of the evidence so taken. It follows that, to bring about this result, the terms of the agreement must be strictly observed." *Rooney v. Southern Association*, 115 Ga. 400, 41 S. E. 648. In the case just cited the court said: "The terms of the agreement \* \* \* were neither strictly nor substantially observed." In the case at bar, however, the witness dictated his answers to the interrogatories just as he would have written them. The same were carefully read over to him after being written. He makes oath that they were his

answers as dictated by him, and signs the same with his signature. And we can see no reason for holding that this was not a sufficient compliance with the agreement that "the answers must be written by the witness personally."

3. Where a note is given in settlement of a suit pending in court against the maker of the note, said party is bound thereby; and this is true whether the suit itself was instituted upon a just and valid claim or not. *City Electric Ry. Co. v. Floyd County*, 115 Ga. 655, 42 S. E. 45.

4. No error appears to have been committed by the trial judge, except as indicated above, and the judgment is reversed alone for the reason stated in the first division of the opinion.

Judgment reversed. All the Justices concur.

(128 Ga. 577)

#### MCGREGOR v. BATTLE

(Supreme Court of Georgia. July 10, 1907.)

#### 1. BANKS AND BANKING — DEPOSITS — RELATION BETWEEN BANK AND DEPOSITOR.

When money is placed in a bank on general deposit, the title to the money immediately passes to the bank, and the relation of debtor and creditor is created between the bank and the depositor. The moment the deposit is made the credit of the banker is substituted for the money.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 6, Banks and Banking, § 289.]

#### 2. SAME—PAYMENT OF CHECK BY INSOLVENT BANK—LIABILITY OF DEPOSITOR.

If a bank, though insolvent, is still conducting its business and pays a check of a depositor in the usual course of business, and the depositor has no notice of the insolvency of the bank, the payment is good, and the depositor will be protected. If, however, the depositor is paid, not in the usual course of business, but at a time when he has notice or knowledge that the bank is insolvent, and that the intent of the bank is to create a preference in his favor over other creditors, the payment is not good, and such depositor is liable to repay to the bank, or its representative, such an amount as would be the difference between the amount received by him and his pro rata share of the assets of the bank upon a final winding up of its affairs.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 6, Banks and Banking, § 156.]

#### 3. TRIAL — INSTRUCTIONS — SUBMISSION OF MATTER NOT WITHIN THE ISSUES.

There was no evidence authorizing the judge to charge the jury on the law of special deposits; and the instruction on this subject was, under the facts of the case, an error of such a grave nature as to require a reversal of the judgment.

(Syllabus by the Court.)

Error from Superior Court, Warren County; B. T. Rawlings, Judge.

Action by C. E. McGregor, receiver, against B. L. Battle. Judgment for defendant, and plaintiff brings error. Reversed.

McGregor, as receiver of the Bank of Warrenton, brought suit against Battle, alleging that on February 17, 1902, and prior thereto, and especially on February 14th the

bank was insolvent or in contemplation of insolvency, and while so insolvent the bank, in collusion with the defendant, delivered to him, and he took therefrom, the sum of \$7,000 in cash, which amount was received by him under the following circumstances: On February 11th he became a stockholder in the bank, having purchased 70 shares of its capital stock of the par value of \$100, and certificates of stock were duly issued and delivered to him. On February 13th, in collusion with Allen, who was his brother-in-law and president of the bank, defendant delivered to Allen the 70 shares of stock, and Allen directed the cashier to pay to defendant \$7,000 of the cash of the bank, or to place the same to the credit of the defendant as a depositor, and on February 14th the defendant, with a full knowledge of the insolvency of the bank, drew said \$7,000 in cash therefrom. The purpose of Allen was to give the defendant a preference over the other creditors of the bank; the liabilities of the bank being at that time \$80,000 while its assets did not exceed \$10,000. At that time the bank was absolutely insolvent and known to be so by the defendant. Some of the depositors made inquiries with a view to withdrawing their deposits, when the defendant, in collusion with Allen, made a public display of the \$7,000 for the purpose of deceiving them, and they, being so deceived, allowed their deposits to remain in the bank. The assets in the hands of the plaintiff, as receiver, are not sufficient to satisfy all of the liabilities of the bank, and it is therefore necessary to recover from the defendant the amount he fraudulently received. It is charged that the payment to Battle by the bank was for the purpose of giving Battle a preference over the other creditors of the bank, and was done with the intent to delay, hinder, and defraud such other creditors, and that this intent was known to Battle. The prayer was that Battle be required to receive the certificates of stock, and that plaintiff have a judgment for the sum of \$7,000, with interest from February 14, 1902. The defendant filed an answer, alleging as follows: He was never a stockholder in the bank. He had no knowledge whatever, until within a few days before its failure, that it was insolvent or in an embarrassed condition. A week or 10 days before the failure, at the solicitation of the cashier, who assured him that the bank was solvent and its stock was a good investment, he agreed to make some investigation as to the bank's affairs with a view to taking stock therein, and, making a casual investigation, he ascertained that three named parties owed the bank large sums, but there was other large indebtedness to the bank that he did not know of. In ignorance of the indebtedness, other than that of the three persons above referred to, he agreed to take \$15,000 of stock in the event that one of such persons paid the entire indebtedness and the others

reduced theirs to a safe amount. These negotiations began about February 1st; and on February 10th he agreed to take the stock on the conditions referred to. He made arrangements by which he obtained the money, and on February 12th deposited in the bank \$7,000 which he expected to use to pay for the stock. On February 14th he happened to be in the bank, when the cashier, who had been very officious in endeavoring to induce him to take the stock, without any request from him, handed him through the window a paper, which, to his surprise, he discovered was a certificate for \$7,000 of stock. He then stated to the cashier that he was not to take any of the stock except upon certain conditions, and asked the cashier where was Mr. Allen, the president. On being informed that Mr. Allen was in his office in the rear of the bank, he immediately took the certificate to Allen, and asked him if the conditions on which he was to take the stock had been complied with. On being informed that they had not, defendant at once told Allen that he could not take the stock until these conditions had been complied with, and left the certificate of stock with Allen. It was immediately after this that the defendant drew out his money which was on deposit in the bank. It was not placed there in payment for stock, and was not passed to the stock account with the defendant's knowledge and consent. Allen agreed to release the defendant from his contract for the stock, and, in pursuance of this agreement, paid him the money which he had deposited. The trial resulted in a verdict for the defendant; and the plaintiff made a motion for a new trial, which being overruled he excepted.

A. L. Miller, S. H. Sibley, L. D. McGregor, and Davis & Miller, for plaintiff in error. E. P. Davis, for defendant in error.

CORB, P. J. (after stating the facts). 1. The liability of the defendant to the plaintiff depends upon the character of the deposit made by him when the \$7,000 were turned over to the bank. If it was a special deposit for a particular purpose—that is, to be kept by the bank intact to be used to pay for the stock if the conditions upon which he was to purchase were complied with—he would not be liable to the plaintiff for withdrawing the deposit at the time that he did. If the money was deposited with the bank for safe-keeping only, there to remain intact until called for, the defendant would have the right to call for the same at any time, and have delivered to him the parcel containing his money, without reference to the financial condition of the bank at the time that the demand for the special deposit was made upon it. In either event, no title to the money passed to the bank. *Zane on Banks & Banking*, § 162 et seq. If the money was placed in the bank on general deposit, the moment the deposit became complete title to the

money passed to the bank, and the relation of debtor and creditor was created between the parties. "The moment the deposit was made the credit of the banker was substituted for the money." *Ricks v. Broyles*, 78 Ga. 614, 3 S. E. 773, 6 Am. St. Rep. 280; *Schofield Mfg. Co. v. Cochran*, 119 Ga. 901, 47 S. E. 208. The defendant admits in his answer and in his evidence that he deposited the money in the bank. The question, therefore, is whether it was general deposit or a special deposit. The money was turned over to the officers of the bank. There was no request that the deposit should be kept separate from the other funds of the bank. It was entered upon the books as a general deposit. A certificate of deposit was issued to the defendant, which, so far as the evidence discloses, had none of the indicia of a special deposit. When the defendant sought to withdraw his money, he signed a check upon the bank—the usual manner in which general deposits are withdrawn. The transaction had all of the characteristics of a general deposit, and was entirely lacking in any of the essential elements of a special deposit. It is true that on the day following the making of the deposit, when the check drawn by the defendant was paid, he received in payment of his check a part of the identical money that he had deposited the day before, but he received other money from the bank also; the amount of money put in by him not being on that day sufficient to discharge his check in full. What he received on the day following his deposit was the money of the bank. It was true that it was his money at one time on the preceding day, but, as a legal consequence resulting from the deposit in the manner in which it was made, title to the money vested in the bank; and, when he drew his check as a general depositor, while he received back some of the very money which he had himself deposited, he did not receive it as his own money, but as the money of the bank. Some of this money, although the identical money that he had deposited on the day before, was as much the property of the bank as the remainder of the amount paid to him which came from other funds of the bank. There are respectable authorities holding that if a bank receives a general deposit at a time when it is insolvent, and its insolvency is known to the officers of the bank, but unknown to the depositor, the depositor may reclaim his deposit; no title to the money passing on account of the fraud perpetrated upon him. In some cases this doctrine seems to have been recognized in the general terms above stated. In others it has been limited to those cases where the money of the depositor could be identified and separated from the general funds of the bank. In other cases it has been held that the doctrine does not apply if the money of the depositor has become mingled with the general funds of the bank. 5 Cyc. 565; 2 Morse on Banks

(4th Ed.) § 629; Boone on Banks, § 295; Magee on Banks, § 333; Zane on Banks, § 344; 3 Am. & Eng. Enc. Law (2d Ed.) 847. The Code declares that if an insolvent bank or banker, with knowledge of such insolvency, shall receive money on general deposit, and fail to pay the depositor within three days after demand, such banker or officer in charge of the bank receiving the deposit shall be guilty of a felony. Civ. Code 1895, § 1982; Pen. Code 1895, § 207. The primary purpose of this provision is to punish the officers of a bank who receive on deposit money of others, knowing that the bank is in a condition where it cannot repay the same. It is contended that this is a recognition, by the General Assembly, of the fact that the receiving of the deposit under such circumstances is a fraud on the depositor who is ignorant of the condition of the bank, and therefore is in effect a recognition of the principle above alluded to, which authorizes a depositor to reclaim his deposit. It is to be noted, however, that the banker or officer of an incorporated bank may prevent a prosecution by repayment of the deposit within three days after demand. In the case of a private banker he may repay the same from any assets owned by him independently of those embarked in his banking business, or assets thus embarked so long as he is in a position where he can legally control the disbursement of such assets; but in the case of an officer of an incorporated bank, in order to prevent a prosecution, he must refund to the depositor the amount of his deposit out of his own assets, for the penalty of the law is placed upon him as an individual, and he has no authority, by virtue of his office in the bank, to use the assets of the bank for the purpose, unless it is done by the authority of those in control of the bank, and under the circumstances it is lawful for the bank to make such a disposition of its assets. The Code also declares that all conveyances, assignments, transfers of stock, or other contracts made by the bank in contemplation of insolvency, or after insolvency, except for the benefit of all creditors and stockholders, shall be fraudulent and void unless made to an innocent purchaser for value, without notice or knowledge of the condition of the bank, and the officers making or consenting to such conveyance or contract shall be punished as for a felony. Civ. Code 1895, § 1979; Pen. Code 1895, § 208. The purpose of this provision is to prevent the bank from preferring one of its creditors when the fact of insolvency is known to the creditor. A depositor by general deposit is a mere creditor, and if the bank makes to the depositor a conveyance, or assignment, or transfer of stock, or other contract the legal effect of which is to give to such depositor a preference over the other creditors, the transaction is void, and the officer conducting the same a felon. It is a well-settled principle that,

if one obtains the goods of another under a contract of sale as the result of a fraudulent misrepresentation as to his solvency, the seller, upon discovering the fraud, may rescind the sale and reclaim the goods in the event they are still in the possession of the buyer, and the rights of innocent parties are not affected by such reclamation. It may be therefore that where, by the fraudulent representation of the officer of a bank as to its solvency, one is induced to make a general deposit of his money, the depositor may, after the discovery of the fraud that has been perpetrated upon him, recover the money that he has deposited, provided the same can be identified and the actual money received by the bank returned to him; but, where one intending to become a depositor in a bank makes no inquiry as to its solvency, and is not induced to make the deposit as the result of any statement made by the officers of the bank, such depositor is in no better position than any other person who deals with an insolvent under the impression that he is solvent. One who sells goods to an insolvent, such sale not being brought about by any fraudulent misrepresentation, cannot, after the goods have been delivered, reclaim the same upon the ground that he has since discovered that his buyer is insolvent, even though the fact of insolvency were well known to every other person than the seller himself. Upon the same principle we think that where one deals with a bank upon the assumption that it is solvent, and intrusts his money to it as a general depositor, he has no superior claim over other creditors growing out of the fact that he was ignorant of the insolvency at the time of the deposit; there being no other fact amounting to an inducement to make the deposit other than the bank holding itself out to the world as a bank of deposit. We do not think that the mere silence of the officers of the bank as to its condition at the time of the deposit is sufficient either to authorize a depositor to reclaim his money on account of a fraud, or to give him any superior lien over other creditors in the distribution of the assets of the bank. As stated above, however, we are aware that there are respectable authorities which go to this extent.

2. If a bank is insolvent, but is still conducting its business, and pays the check of a depositor in the usual course of business, and the depositor has no notice of the insolvency, the payment is good, and the depositor is protected notwithstanding the bank is actually insolvent. In *Hill v. W. & A. R. Co.*, 86 Ga. 284, 12 S. E. 635, it was held that a depositor who draws his check on a bank and receives effects therefrom, without notice of, or reason to suspect, its insolvency, will be treated as a bona fide purchaser under the act above referred to. See, also, *Dutcher v. Importers' Bank*, 59 N. Y. 5. There is no ruling in the case in 86 Ga. 284, 12 S. E. 635, as to what would be the effect



upon the transaction if the depositor knew of the insolvency, or had reason to suspect it, at the time that he received payment of his check, when such payment was made while the bank was still in operation and the payment made in the usual course of business. It is a well-known fact that the suspicion that a bank is insolvent causes all depositors who are acquainted with the facts leading to the suspicion to rush at once and withdraw their deposits. A run on a bank is always produced by those who think they have reason to suspect that the bank is in a failing condition; and we are not prepared to hold if a bank is still in operation, open during the usual hours of business, paying its checks in the order in which they are presented, according to the custom of bankers, that a depositor who merely had reason to suspect the solvency of the bank, this being the motive for his drawing a check, would be required to repay to the bank the amount so withdrawn, less what would be his pro rata share in the assets of the bank on the day that the amount was withdrawn, in the event that the bank was afterwards forced to liquidation, and was, in fact, insolvent. Neither are we prepared to hold that one who actually knows that a bank is insolvent, but does nothing except to draw his check and present it and receive payment over the counter in the usual course of business, would be required to refund the amount so withdrawn, less his pro rata share, upon a final winding up of the affairs of the bank. As we understand this record a decision of these questions is not necessary. But, when a depositor with notice, or knowledge, or reason to suspect that a bank is insolvent, by collusion with the officers of a bank, receives payment of his check not in the usual course of business, and under such circumstances that payment to him gives him a preference over the other creditors, the depositor is guilty of a fraud upon the other creditors, and will be required to refund all of the amount so withdrawn by him, except what would be his proportion of the assets upon the winding up of the affairs of the bank. And especially would this be true in a case where the doors of a bank were closed and other depositors were not being paid and the depositor receiving his money was singled out as the sole depositor, or one of a select few, who were being paid, when the depositors, as a class, were not being paid in the order in which their checks were presented. It has been held that if a payment was made not in the ordinary course of business, when the bank was actually, though not avowedly, insolvent, the payee cannot hold the amount paid to him, though he was ignorant of the bank's condition. 2 *Morse on Banks* (4th Ed.) § 625. Payment made by an insolvent bank, or made in contemplation of insolvency, with the intent to give a preference to a particular creditor, is void, irrespective of

whether the insolvency was open and notorious, or whether the payee knew of the insolvency or motive of the bank in making the payment. *Boone on Banks*, § 301. Under our statutes, however, it would seem that if the depositor, although paid not in the usual course of business, was ignorant of the insolvency and of the intent of the bank to prefer him, he would be protected, and not required to refund. However, it would seem, under some circumstances, that payment out of the usual course of business would be a circumstance to be given great weight in determining whether there was notice, as a payment made with a view of giving a preference to a particular creditor is rarely, if ever, made in the usual course of business. See, in this connection, *Clarke v. Ingram*, 107 Ga. 565, 33 S. E. 802.

3. There was no evidence whatever authorizing the instruction of the judge on the subject of special deposits. The instruction of the judge, that if the defendant placed his money on deposit, and such action was induced by the officers of the bank, and if the insolvency of the bank was unknown to him, he would have a right to withdraw the money when he learned of the insolvency, was also unauthorized by the evidence; there being no evidence whatever that there was any inducement held out to him to make the deposit which he himself claims was a mere general deposit. The errors thus committed are of such grave nature, under the facts of the case, as to require a reversal of the judgment. The assignment made by the president and cashier of the bank, without the authority of the board of directors, was admissible simply as a circumstance showing the insolvency of the bank; it being, in effect, an admission of both the president and the cashier that the bank was insolvent on the day of the transaction in question, but the rejection of this evidence probably would not have been alone sufficient reason for reversing the judgment.

Judgment reversed. All the Justices concur.

(128 Ga. 544)

### RAGAN v. STANDARD SCALE CO.

(Supreme Court of Georgia. June 15, 1907.)

#### SUBROGATION—PURCHASERS OF INCUMBERED PROPERTY.

Where one purchases a certain piece of property against which there are two recorded mortgages, and pays off the senior mortgage out of the purchase money, and it is canceled, equity will not, in the absence of an agreement between the parties to that effect, subrogate him to the rights of the senior mortgagee, as against the other incumbrancer, whose lien was subject to the senior mortgage, but prior to the purchase.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 44, Subrogation, § 38.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by the Standard Scale Company against R. J. Ragan. Judgment for plaintiff, and defendant brings error. Reversed.

The Standard Scale Company filed an equitable petition against Ragan, and alleged the following facts: On May 26, 1902, one Corley executed and delivered to the Exchange Bank of Rome certain promissory notes for the principal sum of \$240, and secured the notes by a mortgage on one "De Loach paragon" planer, and the mortgage was recorded on May 27, 1902. Subsequently Corley executed to Ragan a mortgage covering the same property, which was recorded on October 8, 1902, and "some time during the month of November, 1902, petitioner bought said property from said Corley for the sum of \$200, and out of said purchase price it [plaintiff] paid the Exchange Bank of Rome the sum of \$160; said amount being the balance due said bank upon said note and mortgage held by it. Upon receipt of said sum, said bank canceled its said mortgage, and surrendered the same to Corley." Ragan obtained a judgment in the city court against Corley on Corley's note and mortgage to him, and the execution was levied on the property described in the mortgage; and to this levy the Standard Scale Company interposed a claim. Corley is insolvent and has left the state. It was prayed "that said Ragan be enjoined from proceeding further with said case in the city court until this cause can be heard and disposed of; that petitioner be subrogated to the rights of said bank as against said property; that said Ragan be required to pay \* \* \* petitioner the sum of \$160, with 8 per cent. interest thereon from November 6, 1902; and that upon failure to pay said amount, with interest, said property be found not subject to the mortgage *fi. fa.* held by said Ragan." The case was submitted to the presiding judge upon an agreed statement of facts, which accorded with the foregoing statement, and the court rendered judgment as follows: "That the property levied upon and claimed in said cause be, and the same is hereby, found not subject to the lien of plaintiff's *fi. fa.* unless plaintiff in *fi. fa.* (Ragan) pay over to claimant (Standard Scale Company) within thirty days from the date hereof the sum of \$160, with 8 per cent. interest thereon from November 6, 1902." Ragan excepted.

C. E. Davis and J. W. & G. E. Maddox, for plaintiff in error. Dean & Dean, for defendant in error.

BECK, J. (after stating the facts). 1. The doctrine of subrogation was ably discussed by Justice Cobb in the case of *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, where the rule was announced (page 47 of 113 Ga., and page 381 of 38 S. E.) that "subrogation will arise only in those

cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he has some interest to protect, or where he advanced the money under an agreement, expressed or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor." The case of *Simpson v. Ennis*, 114 Ga. 202, 39 S. E. 853, which is relied upon by the defendant in error to support the ruling of the court below, is not in point in the case at bar. In that case Simpson purchased certain lands from the heirs of a deceased person. At the time of the purchase it was represented to Simpson by the heirs and their attorney that there were no other debts against the estate, except one due the Georgia Loan & Trust Company and some state and county taxes, which it was agreed that the purchaser should pay out of the purchase money, and which he did so pay. There is nothing in the record to show that the purchaser had either actual or constructive notice of any other debts due by the decedent. Subsequently to this conveyance the defendant qualified as administrator of the estate of said deceased, and brought an action of ejectment against the grantees of Simpson to recover, as the property of the decedent, the lands thus sold in order to subject them to judgments which had been obtained against him as administrator. Simpson filed an equitable petition to enjoin the administrator from prosecuting the ejectment suits until he should have reimbursed the petitioner for the amounts paid by him in extinguishing the debt to the Georgia Loan & Trust Company; and this court very properly held that the plaintiff was subrogated to the rights of the creditor whose debts he had extinguished as against the plaintiff in the ejectment suits. In the present case, however, the plaintiff purchased a piece of property against which there were two recorded mortgages. He paid off the senior mortgage, and "the bank [the holder thereof] canceled its said mortgage and surrendered the same to Corley," the plaintiff's vendor; and the plaintiff now seeks to be subrogated to the rights of the bank as against the holder of the junior incumbrance.

The rule in such cases is thus stated in *Sheldon on Subrogation* (2d Ed.) 48: "Where the purchaser from a mortgagor pays off the mortgage and has it discharged without more, equity will not subrogate him to the rights of the mortgagee against an incumbrancer whose lien is subject to the mortgage, but prior to the purchase." And in 27 Am. & Eng. Enc. of L. (2d Ed.) 238, it is said: "A purchaser of property who has discharged an incumbrance thereon will be subrogated to the lien of such incumbrance as against the holders of other incumbrances of which he had no notice, but not as against the holders of other incumbrances of which he had notice, either actual or constructive."

See, also, *Woodside v. Lippold*, 118 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267. When the Standard Scale Company purchased the property in controversy from Corley and paid off the mortgage to the bank, it did so with constructive, if not actual, notice that Ragan held another mortgage against the same property; and it is not contended that the scale company made any agreement with either the debtor or the creditor that it was to be subrogated to the rights and priorities of the bank. Under the rule above announced, it follows that the court erred in holding that the plaintiff was subrogated to the lien of the bank as against the mortgage held by Ragan.

Judgment reversed. All the Justices concur.

(128 Ga. 549)

### CARMAN v. WATSON & CO.

(Supreme Court of Georgia. June 15, 1907.)

#### APPEAL—REVIEW.

The evidence introduced by the plaintiff was sufficient to authorize the verdict in his favor. No error of law is complained of, and the judge being satisfied with the verdict, it should be allowed to stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3948.]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by Watson & Co. against J. L. Carman. From the judgment, Carman brings error. Affirmed.

J. F. Mitchell and Theo. Titus, for plaintiff in error. Hammond & Hammond, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(128 Ga. 550)

### WHITE et al. v. NORTH GEORGIA ELECTRIC CO. et al.

(Supreme Court of Georgia. June 15, 1907.)

#### 1. INJUNCTION — CONTEMPT — MULTIFARIOUS PETITION.

If a petition for injunction and other relief is multifarious, and an objection is properly made, urging multifariousness as a reason why the prayers should not be granted, it is erroneous for the court, upon such petition, to grant an injunction and render a judgment finding the defendants in contempt of court for violating a former injunction declared upon in the suit.

#### 2. ACTION—JOINDER OF CAUSES OF ACTION—MULTIFARIOUS PETITION.

A petition which embraces two claims by separate and distinct parties against separate and distinct parties, where there is no common right to be established, is multifarious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 511.]

#### 3. SAME.

The allegations of the petition in this case were of such character as to render the petition multifarious. Appropriate objection being taken thereto, it was erroneous for the court, irrespective of any other question in-

volved, to grant the injunction and adjudge the defendants in contempt of court.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action by the North Georgia Electric Company and others against S. E. White and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Brown & Randolph, J. J. Bowden, R. E. A. Hamby, and Spencer R. Atkinson, for plaintiffs in error. H. H. Dean, for defendants in error.

ATKINSON, J. 1, 2. As a general rule distinct and separate claims of or against different persons cannot be joined in the same action. Civ. Code 1895, §§ 4938, 4946. In equity, where there is a common right to be established by or against several, and one is asserting the right against many or many against one, equity will determine the whole matter in one action. Civ. Code 1895, § 4846. Equity is ancillary, but never antagonistic to the law. Civ. Code 1895, § 3923. The sections of the Code above referred to are entirely in harmony. The claims are not separate and distinct where there is a common right to be established by several against one or more. The contrary is true if no common right is involved, and if there is no community of interest between the parties suing. The common right referred to may consist of a joint interest in the cause of action declared upon, or of separate interests in the particular subject-matter of the suit. An example of the first class would be a suit upon a promissory note payable to several persons instituted by the several payees because each has an interest in the note and is entitled to collect it. An example of the second class would be a suit by several creditors having distinct and separate claims against an insolvent debtor, instituted for the purpose of marshaling assets of the debtor. In such case there is no joint ownership of the several claims asserted against the insolvent debtor, but all are interested in the disposition to be made of his property. It may be said that where several sue jointly, if there be not a joint interest in the claim declared upon or a common right in the object sought, the claims will be separate and distinct, and cannot be joined. With an improper joinder of causes of action the suit will be multifarious.

The doctrine of multifariousness is ably discussed by Mr. Justice Fish in *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, and the "common-right" test applied. There it is said: "An equitable petition by a judgment creditor against the defendant in execution and others alleged, in substance, that they had all entered into a conspiracy to defeat the collection of the debt upon which the judgment was founded, that the common object of all the conspirators was to 'hide' and

'cover up,' in the names of the conspirators other than the defendant in execution, property which really belonged to him, and that, in pursuance of this object, various deeds had been executed purporting to convey specified parcels of realty to these conspirators, which in fact belonged to the judgment debtor; the particulars in each instance being set forth. The petition prayed for the cancellation of the various conveyances which were, for the reasons stated, alleged to be fraudulent; and for a judgment subjecting all the property to the petitioner's execution. Held, that this petition was not demurrable as failing to set forth an equitable cause of action, nor as being multifarious, nor for want of sufficient fullness in stating wherein the alleged fraudulent acts of the several defendants consisted." So, also, in *Van Dyke v. Van Dyke*, 120 Ga. 984, 48 S. E. 380, the subject was considered. Mr. Justice Fish, again speaking for the court, said (page 988 of 120 Ga., and page 382 of 48 S. E.): "It is not true that since the passage of the uniform procedure act of 1887 multifariousness is no longer a ground of demurrer to an equitable petition. That act allows the joinder of equitable and legal causes of action in one suit, but an equitable petition that would have been demurrable for multifariousness in joining separate and distinct causes of action against different defendants, prior to the passage of that act, is still demurrable on such ground." Numerous other illustrations of the "common-right" test may be found in the decisions on the subject of multifariousness cited in 9 Michie's Dig. Ga. R. 472-474. If there is a common right and the court of equity takes jurisdiction, there is no limit to which the court will go in order to do complete justice, but, where there is no common right, equity will not, for any purpose, entertain a suit wherein separate and distinct parties with separate and distinct claims unite against one or more parties. The statutes simply prohibit the joining of such claims in one suit. If a suit be defective because of such multifariousness, it is demurrable, and, if objected to by appropriate demurrer, it is error to grant an injunction and adjudge certain of the defendants in contempt of court for a violation of an older injunction. See, in this connection, *Webb v. Parks*, 110 Ga. 639, 36 S. E. 70; *Moore v. Hill*, 59 Ga. 760.

3. The case before us furnishes an example of multifariousness. After amendment the plaintiffs are the North Georgia Electric Company and Crisson, Poore, and Lockeby. The defendants are White, Magid, Prentiss, and De More. The plaintiffs Crisson, Poore, and Lockeby are not interested in any relief against any of the defendants, except De More. The only relief sought against him by Crisson, Poore, and Lockeby is an injunction to stay the prosecution of a certain forcible detainer proceeding, regularly sued out under the statute and pending in

the justice's court. There were no parties to that proceeding except Crisson, Poore, and Lockeby as defendants, and De More as plaintiff. The right of no other person was involved in that litigation, and the result obtained therein could not by any possibility have affected either the plaintiff the North Georgia Electric Company, or the defendants White, Magid, or Prentiss. If that proceeding could be enjoined, there were no other necessary or proper parties for the accomplishment of such a purpose than Crisson, Poore, and Lockeby as plaintiffs, and De More as defendant. With respect to that subject-matter the North Georgia Electric Company may have been stricken from the pleadings, and all allegations relating to matters between the North Georgia Electric Company on the one hand, and White, Magid, and Prentiss on the other, may have been stricken, and a complete case would have been left for determination by the court, to wit, the application for injunction by Crisson, Poore, and Lockeby against De More. This claim between these parties was separate and distinct, and could not be joined in the same suit with another claim between other parties concerning a different subject-matter. The North Georgia Electric Company was not concerned with the injunction sought against the prosecution of the forcible detainer proceeding instituted by De More. It was wholly immaterial whether in that case De More should win or lose. The judgment would not affect that company in the least. Its claim was against White, Magid, Prentiss, and De More with respect to entirely different matters. Concerning this claim, it was alleged that the North Georgia Electric Company held title to certain land under a chain of title extending back to Bleckley et al.; that while the land was owned by Bleckley a controversy arose over the title between Bleckley and White, which resulted in the recovery of the land by Bleckley and the grant of a permanent injunction against White, enjoining all future interference with Bleckley's possession; that, in order to avoid the effect of the injunction, White sold to Magid and Magid sold to Prentiss, and that they had all combined and confederated for the purpose of defeating the injunction, and, so combining, had employed De More as a mere agent to go and enter upon the possession of the property. The prayer was for injunction against White, Magid, Prentiss, and De More, seeking to enjoin them from interfering with the possession of the North Georgia Electric Company, and likewise for a cancellation of the deed from White to Magid and the deed from Magid to Prentiss as clouds upon the title of the North Georgia Electric Company, and likewise to punish all for a contempt of court in violating the first injunction obtained by Bleckley against White, to which reference has already been made.

In this claim there is no possibility by which Crisson, Poore, and Lockeby could

have had any interest. Whatever be the relief to which the North Georgia Electric Company may be entitled against White, Magid, Prentiss, or De More with respect to the subject-matters alleged, it was wholly separate and distinct from the injunction sought by Crisson, Poore, and Lockeby, and was entirely independent of Crisson, Poore, and Lockeby. If all reference to the claim for injunction sought by Crisson, Poore, and Lockeby were eliminated from the case, it would still leave pending in court all of the essentials of a case between the other parties, upon which the court could proceed. There would be the North Georgia Electric Company as plaintiff, and White, Magid, Prentiss, and De More as defendants, with a proper subject-matter for adjudication by the court. In other words, there would be another separate and distinct claim. It is thus seen that in this one suit there are two separate and distinct claims by separate and distinct parties without any common right. The court not only granted the injunction, but also adjudged some of the defendants in contempt of court for a violation of the injunction described in the plaintiff's petition. We have already seen that, if a suit is multifarious and is properly objected to upon that ground, the court should not in such suit grant an injunction and enter a judgment absolute upon a rule as for a contempt of court declared upon in the suit. The suit in this case is multifarious, and the judgment of the court with respect to both matters should be reversed. Judgment reversed. All the Justices concur.

(128 Ga. 567)

## BALDWIN v. SEABOARD AIR LINE RY. CO.

(Supreme Court of Georgia. July 9, 1907.)

## CARRIERS—CARRIAGE OF PASSENGERS—WRONGFUL EXPULSION.

A passenger on a railway train who had paid his fare to a given city, which was under quarantine regulations, and who, when near the end of his journey, left the train at a station on the railway line, in obedience to the order of a quarantine or health officer, who told him that he would not be allowed to ride on the train into the city, but must leave it at that station, has no cause of action against the railway company for a wrongful expulsion from its train, although the conductor pointed him out to the health officer, and, after knowledge of such officer's order to the passenger, did not interfere to prevent its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1411.]

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; W. A. Little, Judge.

Action by Gale Scott Baldwin against the Seaboard Air Line Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Gale Scott Baldwin brought an action against the Seaboard Air Line Railway Com-

pany to recover damages. The petition made the following allegations: In September, 1905, the plaintiff purchased from the defendant, in the city of Albany, Ga., a ticket entitling him to ride on its passenger train from that city to Columbus, Ga. He boarded defendant's train at Albany, and the conductor thereof accepted his ticket for his transportation to Columbus. When the train approached Sulphur Springs, in Chattahoochee county, an agent of the defendant, who was riding on the train, notified the plaintiff that he must leave the train at that station, and that he would not be allowed to ride the remainder of the distance into Columbus; and, when the train arrived at Sulphur Springs, this agent of the defendant ordered him to leave the train, "and in obedience to said order he did so, and was not allowed by the defendant to ride any further on said train." The conductor of the train "knew that said other agent of said defendant had ordered \* \* \* petitioner to leave said train, and, in fact, pointed out [petitioner] to said agent as a person to be ejected from said train, and failed to interfere and prevent the said agent from ejecting" him. By reason of his ejection from the train, the petitioner was put to great inconvenience and trouble, and subjected to great personal annoyance, and was compelled to walk a long distance to another railroad for the purpose of getting to his destination. The expulsion of petitioner from the train was with the consent and approval of the conductor, who failed and refused to protect him, and such expulsion was without fault on the part of petitioner. When petitioner applied at the office of defendant in Albany for a ticket from that place to Columbus, Ga., he was notified by the ticket agent that, before purchasing a ticket, it would be necessary for him to have a health certificate. Petitioner thereupon "applied to the health officer in the city of Albany, and produced evidence to show that he was in good health, and had not been exposed during the 10 days preceding said date to the infection of yellow fever, and had not been in any infected or suspected locality for 10 days, and \* \* \* procured from said health officer the certificate," which he alleges was in due form, and a copy of which he attaches to his petition. He exhibited this certificate to the ticket agent of defendant, and thereupon the agent sold him the ticket from Albany to Columbus. When he was approached "by the said officer who expelled him from said train, \* \* \* and asked for a health certificate, he produced said certificate and exhibited the same to said officer and to said conductor," and "it was the duty of said conductor and said officer to have passed him on said certificate into the city of Columbus, and his expulsion from said train, as hereinbefore set forth, was wrongful and unjustifiable," and he has thereby been injured and damaged in the sum of \$2,000. A

copy of the health certificate in question was set forth in petition. The petition was demurred to upon various grounds, and the petitioner thereupon, with leave of the court, amended it. The amendment alleged: The person who notified petitioner that he must leave the train at Sulphur Springs and that he would not be allowed to ride thereon into the city of Columbus, and who, when the train arrived at Sulphur Springs, ordered him to leave it, claimed to act as a quarantine officer, but was unknown to petitioner, who "does not admit" that this person was a quarantine officer. The person "claiming to act as a quarantine officer" ordered petitioner to leave the train, "notwithstanding the fact that [he] exhibited to said person and to said conductor his health certificate as set out in full" in the original petition, "which entitled him to ride on said train into the city of Columbus." The "conductor negligently refused to interpose in any way to prevent \* \* \* petitioner from being removed from said train by said person, but, on the contrary, pointed out \* \* \* petitioner to said person and thereby assisted him in removing \* \* \* petitioner from said train." The conductor "made no effort whatever to protect \* \* \* petitioner, or to induce said person not to remove \* \* \* petitioner from said train, as it was his duty to do under the circumstances, but allowed him to be ejected from the train, contrary to law." After the allowance of this amendment the defendant renewed its original demurrer, and demurred upon other grounds. One of the grounds of the demurrer was that the allegations of the petition were insufficient to set forth a cause of action. Other grounds (which were but amplifications of the general demurrer) were: "Because it is apparent from said petition that the alleged 'agent' or 'officer' ordering plaintiff from the train was a quarantine agent or officer of said state, or some duly constituted municipal authority thereof, and was not an officer or agent of defendant, nor subject to its control or direction. \* \* \* It appears, by reasonable inference, that the person alleged to have ordered plaintiff off the train was an officer of said state or some duly constituted municipality thereof, acting within the scope of his authority or apparent authority and independently of defendant and its agents, and that defendant and its agents were without power or authority to control or interfere with said officer." The court sustained the demurrers and dismissed the petition, and the plaintiff excepted.

W. R. Hammond, for plaintiff in error.  
Goetchins & Chappell, for defendant in error.

FISH, C. J. (after stating the facts). We think the plaintiff's petition clearly indicates that at the time of the occurrence of which he complains quarantine regulations were in force with reference to travelers seeking

to enter the city of Columbus, at least as to such travelers coming from Albany, Ga. The petition shows that, before the plaintiff purchased his ticket, he was put on notice of the existence of such regulations by the agent of the defendant to whom he applied to purchase the ticket, as the agent notified him "that, before purchasing the same, it would be necessary for him to have a health certificate." In order to procure such a certificate from the Albany health officer, the plaintiff had to produce evidence to show that he had not within the past 10 days been exposed to the infection of yellow fever, nor been in any infected or suspected locality. As the train upon which he was riding approached the city of Columbus, an officer, claiming to be a quarantine officer, approached him and asked him for a health certificate, and plaintiff exhibited the one which he had procured in Albany to such officer, who told plaintiff that he would not be allowed to ride on the train into Columbus, but must leave it at Sulphur Springs. These facts alleged in the petition clearly indicate the existence of quarantine regulations; and when to them are added the allegations that plaintiff's health certificate "entitled him to ride on said train into the city of Columbus," and that it was the duty of "said officer to have passed him on said certificate into the city of Columbus," it seems impossible to fairly construe this petition without reaching the conclusion that there were such regulations in force relative to persons traveling from Albany to Columbus, Ga. The petition shows that, before the plaintiff purchased his ticket, he had every reason to suspect that ere he reached his journey's end he would encounter a quarantine officer, and that he relied both on his railroad ticket and his health certificate for his entry into the city of his destination. While in the amendment to the petition the plaintiff was careful to allege that he did not admit that the person who ordered him to leave the train at Sulphur Springs was what such person claimed to be, a quarantine officer, yet not only do the circumstances alleged in the petition strongly tend to indicate that this was true, but, as we have seen, the plaintiff himself alleges that it was the duty of "said officer to have passed him on said certificate into the city of Columbus." The allegation that it was the duty of said officer to have passed the plaintiff into the city of Columbus on the health certificate which he exhibited for the officer's inspection is equivalent to an admission that such officer was a quarantine officer. Unless he was a quarantine officer, how could it have been his duty to pass the plaintiff into the city of Columbus upon the evidence as to his right to enter that city afforded by the health certificate? The allegation here referred to was a direct admission that the person who ordered the plaintiff to leave the train was an "officer" of some kind, and an indirect admission that

he was a quarantine or health officer, else it could not have been his duty "to have passed" the plaintiff "into the city of Columbus" upon his health certificate. Against this clearly implied admission in the original petition, we have the allegation, in the amendment thereto, that plaintiff does not admit that the person who ordered him from the train was a quarantine officer; but he did not deny that such was the fact. The matter, then, stands thus: An officer, whose duty was such as to clearly indicate that he was a quarantine or health officer, ordered the plaintiff to leave the train, but the plaintiff neither expressly admits nor denies that such officer was a quarantine officer. As the rule is well established that pleadings are to be construed most strongly against the pleader and the allegation from which the admission is implied was not stricken from the original petition, the plaintiff could not escape its force and effect by merely alleging that he did not admit the natural and logical deduction from such allegation. While, by an amendment to the original petition, the plaintiff could have withdrawn an allegation previously made, he could not by an amendment place his own construction upon the facts which he had alleged.

After all, however, it does not really make any difference by what particular name the officer who ordered the plaintiff to leave the train be called, if his duty was such as the plaintiff alleges it to have been. He must have been a health officer, clothed with authority to pass upon the sufficiency of health certificates to entitle the holders thereof to enter the city of Columbus, otherwise it could not have been his duty to pass the plaintiff into that city upon the health certificate which he exhibited for inspection. If he was not clothed with such authority, he owed the plaintiff simply the negative duty of noninterference with his liberty, and could not have owed him the positive duty of passing him into the city of Columbus because he had exhibited a proper health certificate. A health officer who had authority to pass upon the sufficiency of plaintiff's health certificate to entitle him to enter Columbus had also, by necessary implication, authority to prevent him from entering such city, if the certificate, under the health regulations in force, was not such as to entitle him to do so. The case, then, resolves itself into this question: Was it the duty of the conductor to interfere to prevent a health officer, clothed with such authority, from compelling the plaintiff to leave the train before it reached the city of Columbus? *Brunswick & Western Railroad Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152, is a case which is directly in point here. There it was held: "A railroad company is bound to use extraordinary diligence to protect a passenger while in transit from violence or injury by

third person; but, where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest." In the present case the conductor was not bound to contest with the health officer the propriety or legality of the exercise of his power and authority in the particular instance; as the sufficiency of the health certificate was a question for the health officer, and not for the conductor. A railroad conductor is not required, for the protection of one of his passengers, to enter into a contest with, or put himself in opposition to, an officer of the law, who is apparently acting within the scope of his authority. *Brunswick & Western R. Co. v. Ponder*, supra; *Duggan v. Baltimore & Ohio R. Co.*, 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672; *Fetter on Carriers of Pas.* § 101.

While the petition alleged that the conductor pointed the plaintiff out as a person to be ejected from the train, there is no averment that the conductor said why he pointed out the plaintiff to the health officer, or that he did anything whatever to indicate why he did so. As an allegation of fact, therefore, this statement simply amounts to an averment that the conductor pointed the plaintiff out to the officer who ordered him to leave the train; the alleged purpose of the conductor in pointing him out being a mere conclusion of the pleader. The conductor had a perfect right to point out to the health officer the passengers on the train who had boarded it at a given city or locality. For instance, if the health officer asked the conductor to indicate to him the passengers who had held tickets from Albany, and the conductor did so, he would not thereby render the railroad company responsible for the subsequent official conduct of such officer to such passengers, or any of them. He would be merely giving information to which the health officer, as a matter of public policy, was entitled. It was held in *Owens v. Wilmington & Weldon Railroad Co.*, 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642, that "a railroad company is not liable for the false arrest of a passenger on one of its trains where the conductor in charge of the train merely pointed out such passenger to a sheriff who had come to arrest him as a party suspected of a capital offense." In that case the court said: "The defendant was wholly ignorant of the occurrence, and its conductor did not originate the cause or instigate or participate in the arrest. It would be vain and unreasonable to require him to resist an officer of the law, or the law itself. Whether the officer had authority or probable cause for making the arrest is immaterial."

In the case with which we are dealing the court properly dismissed the petition upon demurrer, and the judgment is therefore affirmed. All the Justices concur.

(128 Ga. 550)

**SAVANNAH ELECTRIC CO. v. WHEELER et al.**

(Supreme Court of Georgia. July 9, 1907.)

**1. CORPORATIONS—LIABILITY FOR TORTS OF AGENT.**

A street railway company is liable for a tort committed by its conductor in the prosecution and within the scope of its business, whether by negligence or willfully.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1899-1903.]

**2. SAME.**

Where a petition alleged that a conductor on the car of a street railway company, while engaged in the prosecution and within the scope of his business in collecting fares, failed and refused to give a passenger correct change, and, upon request therefor, drew a pistol and fired at the passenger, but that the ball missed the passenger and struck a woman passing on the public street through which the car was running, causing her death, and that the plaintiffs were the husband and children of the decedent, the allegations set out a cause of action against the company, and the petition was not demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1899-1904; vol. 34, Master and Servant, §§ 1230-1233.]

**3. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER.**

Allegations that the company knowingly placed in charge of one of its passenger cars a conductor of bad character, who was drunk and armed with a pistol, and that a homicide occurred in the manner indicated in the preceding note, were not demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1209.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Ferry F. Wheeler and another against the Savannah Electric Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Ferry F. Wheeler and Ferry F. Wheeler, Jr., a minor, appearing by his father as next friend, brought suit against the Savannah Electric Company. The petition contained three counts. The first alleged, in brief, as follows: The defendant, a corporation, operates, maintains, and controls a system of electric street railways, running in and through the streets of the city of Savannah, including a line of railway running through Broughton street, in the city of Savannah, and did so on October 26, 1905. It was a common carrier of passengers over said line. On the afternoon of that day one of its passenger cars was run and operated by two of its servants and agents; one of them being the motorman and the other the conductor. The conductor was the principal servant in charge of the car. He was drunk to such an extent that he was unable to properly perform his duties as conductor while collecting fares from the passengers. He was so unsteady upon his feet that he reeled from side to side of the car, and failed to make proper change for the passengers, in one instance giving pistol bullets for change. He failed and refused to give one of the pas-

sengers on the car the change that was due him, and, upon request to do so, with an oath, he drew his pistol from his pocket and tried to shoot the passenger. The latter grabbed the pistol barrel, and scuffled with the conductor in order to keep from being shot. During the scuffle the conductor fired the pistol three times at the passenger. One shot struck the passenger; the other two missing him. One of them passed through the window of the car, and struck Mrs. Wheeler, causing her death in a few minutes. At the time the bullet wound was received by her she was returning to her home on Broughton street, and was in the act of going up the steps of her house. At that time and place Broughton street was full of people passing and repassing, and any pistol shot fired in the car, as was done by the conductor, was very apt to do injury or cause death to some person upon the street. The shot was not actually intended for Mrs. Wheeler, and was not fired at her. It was intended to injure the passenger on the car or to kill him, and it would have done so had he not grabbed the pistol in time to change the course of the shot. The passenger had paid his fare, and had given no provocation whatever for the assault made upon him. There was no quarrel between him and the conductor and no enmity existed between them; but the assault upon him by the conductor was due to the drunken condition of the latter. The conductor was in a drunken condition at the time he took charge of the car as conductor, and had so been for some time prior thereto. On account of his condition he was totally unfit to be put in charge of the car, and the corporation knew of his unfitness to run the car on that day prior to the time of the shooting, and in time to have prevented him from taking charge of the car and continuing to act as conductor thereof. Yet the company negligently permitted him to act for it as conductor of the car from the time it put him in charge up to and including the time of the death of Mrs. Wheeler. One of the plaintiffs was her husband and the other was her only child. The homicide resulted from the negligence of the defendant in permitting the drunken conductor, who was also armed, to its knowledge, to act as conductor of said car, and from the negligence of the defendant, through its conductor, in violating the duty it owed to the passenger. The direct cause of the death of Mrs. Wheeler was the bullet fired by the conductor, and this was a tort, an act of negligence attributable to the defendant. The pistol was also fired at a place where the car was being operated and run in a public street of the city, and such firing at that place was a violation of the municipal laws of the city which prohibited the discharge of firearms within the limits of the city. Broughton street is about 80 feet wide, and the street car track runs down the middle of it. The distance between the conductor and Mrs.



Wheeler at the time the pistol shot was fired was about 45 feet. There were also allegations as to the value of her life and her capacity to earn money. The second count differed from the first mainly in alleging that the defendant negligently permitted the drunken conductor to act for it as conductor from the time it put him in charge of the car on the day of the homicide up to and including the time of the injury, knowing his condition and that he was armed, and that the homicide resulted from such negligence. It is also alleged that the defendant was negligent in failing to exercise ordinary care and diligence in the employment of the conductor to act for it; that he was an unfit and improper person for such employment by reason of being habitually addicted to alcoholic liquors when on duty and being, while under such influence, a dangerous character who was apt to use his pistol, which he always carried when on duty, to the knowledge of the defendant; and that he had borne a bad record for a long time previous to his employment by the defendant on account of his drinking habits. Several instances of his previous conduct were stated. It was further alleged that on the evening in question he was drinking heavily at a resort at the terminus of the company's line, and was in a drunken condition on the car within the knowledge of the conductor and motorman who then had charge of it; that he had been previously assigned to duty by the defendant to relieve said conductor and take charge of the car when it should arrive at the shed in the city of Savannah and start on a tour through the streets for the purpose of carrying passengers; that it was the rule and custom of the defendant to inspect at said "car shed" the conductors and motormen who were assigned to duty as a relief crew to take the place of other motormen and conductors who had to be relieved. At that place conductors were "checked up" and their accounts handed in just prior to being temporarily relieved from duty. The place of inspection is where the cars pass about half a mile from the station and headquarters. At that place the motorman and conductor who had brought in the car from the terminus turned it over to their successors, one of whom was the conductor who caused the injury. He was visibly so much under the influence of liquor that he was totally unfit to act as conductor. The company was also negligent in allowing him to take charge of the car at that time and place. It was also negligent in failing to have any inspection of him as to his fitness to run the car, and in failing to remove him from his position as conductor prior to the time of the injury. The third count briefly alleged that the car was being operated by two of the agents of the company, one of them being the conductor, who was the principal agent; that on the car was a passenger who had duly paid his fare; that without any provo-

cation the conductor assaulted him with a pistol; and that while shooting at the passenger the conductor accidentally and negligently shot and killed Mrs. Wheeler, who was going up the steps of her home on Broughton street. The defendant filed a general demurrer, which was overruled, and it excepted.

Osborne & Lawrence, for plaintiff in error. R. R. Richards and R. G. Richards, for defendants in error.

LUMPKIN, J. (after stating the foregoing facts). The demurrer to the plaintiff's petition was overruled. It raised several questions.

1, 2. Was the act of its conductor in shooting at the passenger attributable to the company, or was this the individual act of the conductor, for which the company was not responsible? "Every person shall be liable for torts committed by his \* \* \* servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." Civ. Code 1895, § 3817. "Every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duties." Civ. Code 1895, § 1861. What was the master's business? Operating electric street cars as a common carrier of passengers. In its conduct of that business it was bound to use extraordinary diligence to protect the lives and persons of its passengers. Civ. Code 1895, § 2266. Who was discharging this duty for the master? The petition alleges the conductor was so engaged. He was taking up fares, not for himself, but for the company. In doing this he had to make change. He failed and refused to give proper change to a passenger, and, when it was asked for, assaulted the passenger with a pistol. The protection of the passenger, the collecting of fares, the giving of change, and dealing with passengers about these matters were all in the prosecution and within the scope of his employment. But it is said that when he conducted this dealing, not properly by giving change, but improperly by shooting at the passenger, that was his individual tort, and the company was not liable. Many authorities state the liability of a master for the tort of his servant substantially as it is codified in our Code. Expressions used in some reports and text-books, that a master is bound by the acts of his agent or servant in the scope of his agency and in furtherance of the master's business, or when the servant is acting for the benefit of the master, do not mean that the agent's act must be beneficial to the master or the latter is not bound. If any declare such a rule as that the master is bound by torts of the servant which benefit him, but not by any others, we cannot accept it as the rule in this state. In this matter, as in some others, there has been an evolution in the law, arising from the growth and change in corporate life and ac-

tivity, and the better study of them. In *Central Ry. Co. v. Brown*, 113 Ga. 415, 38 S. E. 989, 84 Am. St. Rep. 250, it was held that: "A master is liable for the willful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. This rule applies as well where the master is a corporation as where he is a private individual. A railroad company is liable as a trespasser to a passenger for an unjustifiable assault made upon him by the conductor of the train; the conductor being engaged in the company's business and in the conduct thereof making such assault." And again: "Some of the courts seem at one time to have been inclined to hold that a master could not be held liable for the willful torts of his servant, because, it was said, if the servant through anger or malice committed an assault upon a person, he ceased for the time being to occupy the position of servant, and acted independently; that, inasmuch as he was not authorized to commit an assault, he did not represent the master in that act, but acted as an individual, the master therefore being not liable either in case or in trespass. This argument has long since been exploded. The theory that one may be a servant one minute, and the very next minute get angry, commit an assault, and in that act be not a servant, was too refined a distinction." In *Western & Atlantic Railroad v. Turner*, 72 Ga. 292, 53 Am. Rep. 842, it was held that, when a conductor maliciously assaulted one who was treating with him for passage, he was acting in the prosecution and scope of the company's business, and it was liable. And see *Turner v. Atlantic Railroad*, 69 Ga. 827. In *Peebles v. Brunswick & Albany R. Co.*, 60 Ga. 232, where a declaration alleged that a conductor called a passenger out of the train of which he had charge and beat him, it was held to set out a cause of action, and was not subject to a general demurrer. In *Craker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 510, it was said: "If one hire out his dog to guard sheep against wolves, and the dog sleeps while the wolf makes away with a sheep, the owner is liable; but, if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*." In *Gasway v. Atlanta & West Point R. Co.*, 58 Ga. 216, a railroad company was held liable for a willful tort of a baggage master and conductor committed upon one who was seeking to have his baggage checked. The trial judge charged to the effect that, unless the act of the defendant's agent tended to facilitate or promote the business for which the agent was employed, the company was not responsible, and refused to charge to the effect that the principal is responsible for the acts of its agents within the range of their employment. This court said: "Railroad companies are responsible to passengers for

the torts of the conductors and other servants of the company employed in running trains when such torts are committed in connection with the business intrusted to such servants and spring from or grow immediately out of such business." This case has been often cited, but never reversed. In *Haehl v. Wabash Ry. Co.*, 119 Mo. 325, 24 S. W. 737, where a bridge watchman willfully struck and shot a trespasser on the bridge, it was held to be an act in the scope of his employment, and that the company was liable. In *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, it was held that a railroad corporation was responsible for an assault and battery by its conductor upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. In the opinion, Gray, J., said: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent. The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares." In *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, 266, Willes, J., though using at one place the expression, "in the course of his master's business and for his master's benefit," evidently meaning merely in the discharge of the business intrusted to him, said (page 266): "It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." See, also, *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; *Texas & Pacific Ry. Co. v. Williams*, 62 Fed. 440, 10 C. O. A. 463; *Cole v. Atlanta & West Point R. Co.*, 102 Ga. 474, 31 S. E. 107; *Savannah Street R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464; *Patterson's Ry. Ac. L. 105*; *Higgins v. Southern Ry. Co.*, 98 Ga. 751, 25 S. E. 837; *Southern Ry. Co. v. Chambers*, 126 Ga. 404, 55 S. E. 37; *Georgia R. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565.

It is contended that there is a difference between an assault on a passenger, to whom the company owes a duty of protection, and a willful assault upon a stranger or mere passer having no relation with the company, and that the company is not liable for the latter. Cases of willful assaults by an employé upon a mere stranger are not in point. The petition alleges that the conductor did not shoot at the woman killed. He shot at the passenger, and, missing him, hit the woman. Moreover, a railroad company's liability for the willful torts of its agents acting in the scope of their business is not limited to torts on passengers. Some of

the cases cited above are based on torts to trespassers and persons not passengers. What we think we have demonstrated is that, under the allegations of the petition, the conductor in dealing with the passenger and shooting at him was acting in the prosecution and scope of the business entrusted to him, within the meaning of the law. If he had hit the passenger, there could be no doubt that the shooting would have been within the rule. If he missed the passenger, did the shooting cease to be within the scope of his business? Shooting at another does not fall within or without the scope of the agent's employment according as his aim is good or bad. Bad marksmanship does not alter the status of the agent doing the shooting. If, then, the conduct of the conductor within the car was in law the conduct of the company, why was not the result of that same conduct, taking effect outside the car, also the result of the conduct of the company? It is not easy to see. But it is contended that, although there was an unlawful or negligent act relatively to the passenger, there was no violation of duty toward a passer on the street, and therefore no liability, although she was struck. It is a mistake to say that there was no duty to passers on a public highway not to do wrongful or negligent acts which would naturally tend to injure them. In *Fletcher v. Baltimore & Potomac Railroad*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, it was said: "A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could have been prevented by the exercise of reasonable diligence on the part of the company." In that case wood was thrown from a repair train by hands returning from work, and caused injury to one on the highway. The hands were not then engaged in the performance of their duties, but it was shown that the practice by the men of collecting refuse timber for firewood and throwing it off along the line near their homes had been going on for some time, and that the company was charged with notice of it, and acquiesced in it, or at least it was a question for the jury, and that it was also for them to say whether the company exercised due care to prohibit the custom and prevent the performance of the act. A single act of this kind by a passenger, or an employé outside the scope of his business, would not suffice to charge the company, unless it had reason to anticipate the dangerous act and failed to use proper diligence to prevent it. But where the act is done by the agent of the company in the scope of his employment, and while prosecuting it for the

company, the single act is the company's act. Again, it has been held that if in the performance of its business the company, through its agents, negligently sets in motion a force which naturally and proximately causes an injury, it is liable. In *Fraser v. Charleston & Savannah R. Co.*, 75 Ga. 222, where wood negligently fell or was thrown from an engine and injured a person on a highway, the case was held to be one for the jury. See, also, *Savannah Florida & Western Ry. Co. v. Slater*, 92 Ga. 391, 17 S. E. 350. In *Western & Atlantic R. Co. v. Bailey*, 105 Ga. 100, 31 S. E. 547, a petition alleged that an engineer, while running a train, saw a trespasser in time to stop before striking him, but nevertheless "carelessly, negligently, recklessly, and wrongfully allowed and permitted" the train to run at a reckless and dangerous rate of speed, without any bell or whistle being sounded and without any effort to stop the train; that the engine struck the trespasser and hurled his body against an employé of the company, who was in his proper place performing his duties, and who was thus injured. It was held that a cause of action on behalf of the injured employé was set out. The ruling was put on the ground that "the negligence of the defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto," and did not rest on any duty arising from the relation of master and employé. Apparently the fact of employment was mentioned rather to show that the employé was rightfully at the place where he was. The principle involved in the case just cited was impliedly recognized in *Georgia R. Co. v. Wood*, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146. In that case a boy who, with others, had previously been in the habit of swinging on trains, attempted to do so on the occasion in question. He desisted, however, and ran off from the train into a private yard, where he was attempting to conceal himself. The brakeman on the train threw a stone at him. The stone, by accident, having missed the boy, hit and injured another person who was then on the same premises. It was held that no presumption arose that at the time of the throwing of the stone the servant was acting in behalf of the company or within the scope of his employment as to anything then done or attempted to be done with a view to injure or affect the boy; and "consequently the company is not liable for the injury thus done to the third person." Assuming that the employé had authority to keep trespassers off the train, the implication is that, if he had been acting within the scope of his business at the time he threw at the boy, the company would have been liable to the third person. In *Alabama Great Southern R. Co. v. Chapman*, 80 Ala. 615, 2 South. 738, the plaintiff, while walking on the

track of the defendant's road, observed an approaching train, and got down on the edge of the embankment just before the train came along. A cow came up on the other side of the embankment, and was thrown from the track by the engineer, and bounced down, hit and injured the plaintiff. The plaintiff was not seen by the engineer, owing to the embankment. There was some evidence tending to show that the engineer was negligent. It was held that, if the animal was thrown from the track by the negligence of those in charge of the train, the injury to the plaintiff could not be regarded as a purely accidental occurrence, for which no action would lie, but must be deemed to have been proximately caused by the negligence. In *Quill v. New York Central R. Co.* (Sup.) 11 N. Y. Supp. 80, a person was standing on a highway at a railroad crossing when a passing train collided with a coal cart, which was thrown forward upon him, inflicting injuries which caused his death. It was claimed that the collision between the train and the coal cart was due to negligence on the part of its servant in not giving proper and timely warning of the approaching train. A recovery in favor of the administrator of the decedent was sustained. In *Jackson v. Galveston Ry. Co.*, 90 Tex. 372, 38 S. W. 745, a declaration alleged that the plaintiff was repairing the track of the defendant railroad company; that the foreman sent an employé back to signal an approaching train; that the signal was given, but the train was not stopped, owing to the engineer's negligence or the insufficiency of the brakes; that, as the train approached, plaintiff stood aside to escape it; that as it neared plaintiff the fireman, to avoid danger which he properly apprehended, jumped from the engine against the plaintiff, and injured him. It was held that the negligence of the defendant was the proximate cause of the injury. The fact that the plaintiff was an employé appears, from the opinion, to have been stated in order to show that he was rightfully on the ground near the track. Denman, J., in speaking of the act of the fireman in leaping to escape danger caused by the negligence of the defendant or its engineer, said: "His acts, under the circumstances, are in law regarded as would be the movements of an inanimate object set in motion by such negligence." In *Osborne v. Van Dyke*, 113 Iowa, 557, 85 N. W. 784, 54 L. R. A. 367, an employé was holding a horse while the master applied some medicine to its neck. The horse jumped, and defendant began beating it with a heavy stick with a nail drawn through it, and, by reason of defendant's foot slipping, he unintentionally hit the plaintiff on the nose, causing injury. It was held that an instruction that the defendant would not be liable if in beating the horse he exercised reasonable care to avoid striking the plain-

tiff, and the blow which inflicted the injury was caused by an accidental slip, was erroneous, since the slipping of defendant's foot, being the consequence of his own wrongful act, was not an excuse for the injury. In 1 *Addison on Torts* (Wood's Ed.) 4, it was said: "If the damage done is the immediate result of force exercised by the defendant in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happened accidentally, or by misfortune, unless the force was used strictly in self-defense." In *James v. Campbell*, 5 Car. & P. 373, Mr. Justice Bosanquet instructed the jury that, if one of two persons fighting unintentionally struck a third, he was answerable in an action for assault, and the absence of intention could only be urged in mitigation of damages. In the celebrated case of *Scott v. Shepherd*, 2 W. Bl. 892, 1 *Smith's Leading Cases* (9th Ed.) 737, it was held that an action for damages would lie for originally throwing a squib which after having been thrown about in self-defense by other persons, at last put out the plaintiff's eye. There was some difference of opinion among the judges as to whether the proper form of action was in trespass or on the case.

Was the killing of Mrs. Wheeler the proximate result of the conduct of the company and its conductor? The definitions of proximate cause and proximate result in the textbooks and reports vary very much in expression, and sometimes in idea. Prof. Jaggard says that, in determining what is a proximate and what is a remote consequence, the English courts incline to accept the measure of damages in cases of contracts, and to hold such damages as (a) directly and necessarily result from the wrong complained of; (b) such further damages as should have been foreseen by the wrongdoer, in view of his knowledge, actual or constructive, of the special circumstances of the case. He asserts that the American courts do not seem to have determined very definitely whether the test is (a) what a reasonably prudent man should have foreseen under the circumstances, (b) what follows as a natural result in the ordinary course and constitution of nature. 1 *Jaggard, Torts*, 372. These two tests applied by the American courts may not be so far apart as they at first appear, since it would seem that what follows as a natural result in the ordinary course and constitution of nature ought to be foreseen by a reasonably prudent man. Section 3913 of the Civil Code of 1895, above quoted, in stating the rule, uses the expression, "damages which are the legal and natural result of the act done," though contingent to some extent; but states that damages traceable to the act, but not its legal or "material" consequence, are too remote. The word "material" seems to be inapt, and, as in the first part of the section

the language is "legal and natural," it would appear to the writer that probably the word "material" originally found its way into the section by inadvertence or misprint, and that the same expression, "legal and natural," was intended to be used. This, however, is merely conjectural. In *Atchison, T. & S. F. Ry. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105, it was held that "negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." This is quoted approvingly in *Western & Atlantic R. Co. v. Bryant*, 123 Ga. 77-83, 51 S. E. 20, 23. In *Mayor & Council of Macon v. Dykes*, 103 Ga. 847, 848, 31 S. E. 443, it was said that "the rule is that, in order to recover for an injury alleged to have resulted from the negligence of another, the injury must be the natural and probable consequence of the negligence; or, as otherwise stated, the wrong and resulting damage must be known, by common experience, to be naturally and usually in sequence. The damage, according to the usual course of events, must follow from the wrong. The principle in this state seems to be substantially the same." In 1 *Shearman & Redfield on Negligence* (5th Ed.) § 29, it is said: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." In *Insurance Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395, it is said: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." See, also, *Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *Thompson on Negligence*, § 59; *St. Louis Ry. Co. v. McKinsey*, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54.

3. It requires no argument to show that it was negligent to knowingly place a drunken conductor armed with a pistol and of bad habits in charge of a passenger car, traversing the streets of a city, or at least that it should be left to the jury to determine whether this was not negligent. As matter of law, on demurrer, we cannot say that this was not an act of negligence. It was contended that the homicide was not the natural and probable result of such act on the part of the company. But we know nothing more

apt to endanger life and safety than to place in control of a passenger street car the combination of a dangerous character, a conductor loaded with whisky, and a pistol loaded with powder and ball. In *Christian v. Columbus & Rome Ry. Co.*, 79 Ga. 460, 7 S. E. 216, it was held that if a railroad company employed an agent and assigned him to duty with knowledge that he was insane, or of his being subject to sudden fits of insanity, it would not be excused from responsibility for a homicide committed by him while engaged in its business. See, also, *Central Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Kerlin v. Chicago R. Co.* (C. C.) 50 Fed. 185; *Williams v. Missouri Pacific Ry. Co.*, 109 Mo. 475, 18 S. W. 1098. If the company negligently assigned the conductor to take charge of the car, and, while acting in the general scope of the business entrusted to him, he wrongfully shot at a passenger, and as a proximate consequence thereof a person passing on the highway was killed, the company would be liable.

It is urged that the decision in *Belding v. Johnson*, 83 Ga. 177, 12 S. E. 304, 11 L. R. A. 53, is controlling as to liability not resulting from the placing of the drunken conductor in charge of the car. In that case it was alleged that a saloon keeper sold and continued to furnish liquor to a person who was drunk, knowing that such person, when under the influence of liquor, was dangerous. The person so furnished shot and killed another while thus drunk. On demurrer it was held that the homicide was not the proximate result of the sale of the liquor. This differs materially from the present case. A mere sale of liquor to a drunken customer is not at all the same as knowingly to place a drunken employé, armed with a pistol, in charge of a car, with the duty of controlling it, dealing with passengers and conducting a part of its business. In *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. 331, where a barkeeper assaulted a person who was in the saloon in an intoxicated and helpless condition, the court held that the proprietor of the saloon was liable.

What facts may be developed by the evidence we cannot, of course, foresee, but the court properly overruled the demurrer and retained the case for submission to the jury on the evidence.

Judgment affirmed. All the Justices concur.

(123 Ga. 535)

#### ANDERSON v. HALL.

(Supreme Court of Georgia. June 14, 1907.)

#### 1. INJUNCTION—VIOLATION—CONTEMPT.

Where the defendant in an injunction proceeding is informed by the attorney for the plaintiff that a temporary restraining order has been issued against him, and is also shown a copy of the order, which information clearly and plainly indicates what is the act from which

he must abstain, he is bound to obey the order of the court, whether he is served with the writ or not; and a refusal or failure to comply with the order, under such circumstances, is as much a contempt as if the defendant had been personally served by the sheriff with the writ. *Murphey v. Harker*, 41 S. E. 585, 115 Ga. 77.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 446.]

## 2. SAME—NOTICE OF INJUNCTION.

The evidence was sufficient to authorize the court below to find and hold that the defendant had been notified of the contents of the restraining order by the attorney for the plaintiff, and actually read a copy thereof which was exhibited to him by said attorney, and that, after being thus notified, the defendant violated the terms of the order; and the judgment holding the defendant in contempt for said violation should be allowed to stand.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Action by Emma Hall against G. H. Anderson. Judgment for plaintiff. Defendant brings error. Affirmed.

Haygood & Cutts, for plaintiff in error. C. C. Curry and D. B. Nicholson, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(128 Ga. 547)

## CENTRAL OF GEORGIA RY. CO. v. FOREHAND.

(Supreme Court of Georgia. June 15, 1907.)

### 1. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Whether the act of a passenger on a railroad train in leaving his seat and going to the door or upon the platform of the coach, while the train is in motion, and before it comes to a full stop, is such negligence as would defeat a recovery for an injury resulting from the negligence of the company in operating its train, is a question for the jury to determine from all the facts and circumstances of the particular case under consideration; and, in the determination of this question, the jury are authorized to take into consideration the age and physical condition of the passenger, the speed of the train, the reason of the passenger for leaving his seat and going to the door or upon the platform, the purpose to be accomplished, and all other attendant facts and circumstances as disclosed by the evidence. *Augusta Southern R. Co. v. Snider*, 44 S. E. 1005, 118 Ga. 146, and cases cited; *Cotchett v. Savannah Ry. Co.*, 11 S. E. 553, 84 Ga. 687. See, also, *Parris v. A., K. & N. Ry. Co.* (decided May 20, 1907) 57 S. E. 692.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375-1378, 1383.]

### 2. DAMAGES—EXCESSIVE.

The petition set forth a cause of action, the evidence authorized the verdict, the amount found as damages was not excessive, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by S. R. Forehand against the Central of Georgia Railway Company for per-

sonal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Kiddos, for plaintiff in error. Hoke Smith and Smith, Berner, Smith & Hastings, for defendant in error.

ATKINSON, J. In addition to what is stated in the headnotes, we do not deem it necessary to make any statement with reference to the case, further than a brief reference to the amount of the verdict. There was testimony from which the jury could have found that the plaintiff was 38 years of age, of robust health, and of active business habits. For five years immediately preceding the injury he had earned an average of from \$1,200 to \$1,700 per annum. He was riding on the train of the defendant as a passenger, and was approaching the station to which he was destined. The station was a flag station, at which trains stopped for a very short time, and it was customary for passengers intending to leave the train at that station to leave their seats while the cars were still in motion and go to the platform, so as to alight immediately upon the stopping of the train. On this occasion the train was running 35 or 40 miles an hour, but, upon approaching the station, commenced to slack speed, as usually done preparatory to stopping, whereupon the defendant left his seat and proceeded to the platform in order to leave the train. Upon reaching the door, he perceived that the car was passing his station, and thereupon turned to call to the conductor or other servants operating the train, at which time the train, without stopping, gave a sudden jerk forward and threw him out of the door onto the platform, thence to the ground, dragging him a short distance, bruising his head and face, and finally running over his leg above the ankle. Amputations were necessary and were performed at two different times. The wound did not heal for eight months. He was unconscious for several days after the injury, and suffered great pain. He was unable to do any kind of work up to the time of the trial, and his earning capacity was permanently impaired. The jury returned a verdict in his favor for \$15,000. The evidence being such as to authorize the jury in finding all of the foregoing to be true, we cannot say that the verdict for \$15,000 in favor of the plaintiff was excessive.

Judgment affirmed. All the Justices concur.

(128 Ga. 794)

## VICKERS v. HAWKINS.

(Supreme Court of Georgia. Aug. 8, 1907.)

### 1. INFANTS—ACTIONS—WRIT OF ERROR—BILL OF EXCEPTIONS—SERVICE.

Where a minor sues by prochein ami, and prevails at the trial, the prochein ami is the proper person upon whom the bill of exceptions sued out by the defendant should be served.

**2. TAXATION—COLLECTION—TAX EXECUTION—VALIDITY—MISPELLING OF OFFICIAL'S NAME.**

The misspelling of an official's name to a process does not invalidate it, if it is made to appear that the official authorized another to sign it in his presence, or actually adopted the signature and acted upon it.

**3. SAME.**

The addition of the letters "T. C." to the signature to a tax execution sufficiently indicates the official who issued it did so in his capacity as tax collector.

**4. SAME.**

A tax fi. fa. in the following words: "Georgia, Worth County. To the Sheriff of Worth County, to Execute and Return, to Advertise and Sell According to Law: You are hereby commanded that on unreturned wild land number 211, in the 14th district of Worth county, you cause to be made the sum of \$3.28, it being the amount of state and county taxes for the year 1888, and the further sum of 50 cents for the costs of this fi. fa. and make due return thereof to me according to law. Herein fail not. Given under my hand and seal, this 20th day of Dec., 1888. [Signed] W. J. Stoy, T. C."—recites the necessary jurisdictional facts required by the statute.

**5. SAME.**

Under the law in force in the year 1888, a tax execution against unreturned wild land was properly issued by the tax collector.

**6. SAME.**

The levy of an execution should be signed by the levying officer. If another sign the levying officer's name, the levying officer may adopt the signature as his own. Where the undisputed evidence is that the levying officer caused the property to be advertised for sale pursuant to the levy, personally cried it at the sale, executed a deed to the purchaser, and made an entry of the sale on the fi. fa., it is sufficient to authorize an inference that the levying officer adopted the signature as his own.

**7. EVIDENCE—DOCUMENTARY EVIDENCE—PRELIMINARY PROOF—DETERMINATION.**

The Civil Code of 1895, § 3628, relating to a filing of an affidavit of forgery to a deed, and having a special issue made up and tried as to the genuineness of a deed attacked for forgery, is inapplicable to a fi. fa. and entry of levy thereon offered in connection with a sheriff's deed, which is also attacked for forgery.

**8. TRIAL—INSTRUCTIONS—PROVINCE OF COURT AND JURY.**

A request to charge that "the law presumes that an officer does his duty, and an entry made on an official document, purporting to be an entry by the officer whose duty it is to make it, is presumed to be the act of such officer, and such presumption is not overcome except by the strongest proof," was properly refused. The vice of the request is an intimation of opinion as to the quantum of proof necessary to overcome a rebuttable presumption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by Herbert Hawkins, by next friend, against E. L. Vickers. Judgment for plaintiff, and defendant brings error. Plaintiff sued out a cross-bill. Judgment on the main bill reversed and on the cross-bill affirmed.

Fulwood & Murray, J. J. Forehand, and Z. D. Harrison, for plaintiff in error. T. R.

Perry, J. H. Tipton, and Hall & Hall, for defendant in error.

EVANS, J. The action was complaint for land, and has been twice tried. On a review of the first trial the verdict was set aside and the case remanded to the superior court. See 111 Ga. 119, 38 S. E. 463. On the second trial the plaintiff introduced a grant from the state, and mesne conveyances from the state's grantee to herself. The defendant proffered in evidence a tax fi. fa. and the sheriff's deed to one Dixon (under whom he claimed title), whereupon the plaintiff filed an affidavit of forgery, averring that the sheriff's deed, the tax fi. fa., and the entry of levy on the fi. fa. were forgeries. Upon the preliminary proof submitted by the defendant, the court allowed in evidence the sheriff's deed and the tax fi. fa. over the plaintiff's objection. The plaintiff excepted pendente lite to the admission of the deed and fi. fa. The court ruled that the filing of the affidavit of forgery devolved upon the defendant the burden of proving the genuineness of the tax fi. fa. and levy, and to show that any alteration appearing in the entry of levy was made prior to the sheriff's sale, and instructed the jury to this effect. No separate issue of forgery was made, but the issues of the genuineness of the tax fi. fa. and entry of levy were submitted along with the other issues in the case. The defendant also introduced a deed to himself from the purchaser at the tax sale, and proof that he had been in possession of the land since that time, and had made thereon permanent and substantial improvements. The jury returned a verdict for the plaintiff, the court refused a new trial, and the defendant excepted. The plaintiff sued out a cross-bill of exceptions, assigning error on her pendente lite exceptions.

1. On the call of the case in this court the defendant in error moved to dismiss the bill of exceptions because the only service thereof was an acknowledgment of service by the next friend, Herbert Hawkins; that he is only a formal party, and that A. H. Hawkins is the real party in the case, and service should have been made upon her. The purpose of having a guardian ad litem, or next friend, to represent a minor, is to furnish a person sui juris to carry on the litigation for the minor's benefit. Service of notice or other process pertaining to the case prosecuted by a prochein ami should be made upon him. He represents the minor in the particular litigation, and, if service cannot be had upon him, his connection with the case would be without practical value. We therefore hold that the next friend was the proper person upon whom to serve the bill of exceptions, and the motion to dismiss is denied.

2. As between the litigants according to the proof made at the trial, the ownership of the land in controversy depends upon the validity of the tax sale. We will therefore

first examine the objections to the admissibility of the tax *fi. fa.* upon which error is assigned in the cross-bill of exceptions. The tax *fi. fa.* was as follows: "Georgia, Worth County. To the Sheriff of Worth County to Execute and Return, to Advertise and Sell According to Law: You are hereby commanded that of unreturned wild land number 211, in the 14th district of Worth County, you cause to be made the sum of \$3.26, it being the amount of state and county tax for the year 1888, and the further sum of 50 cents for the costs of this *fi. fa.* and make due return thereof to me according to law. Herein fail not. Given under my hand and seal, this the 20th day of Dec. 1888. [Signed] W. J. Stoy, T. C. [L. S.]" Indorsed upon the *fi. fa.* was the following entry of levy: "I have this day levied the within *fi. fa.* upon lot of land number 211 in the 14th district of said county, for state and county tax for the year 1888. January 30th, 1889. [Signed] S. M. Cox, Sheriff." The plaintiff objected to the tax *fi. fa.* and entry of levy indorsed thereon being received in evidence because the tax *fi. fa.* was signed, "W. J. Stoy, T. C.," when it was admitted in open court by the defendant that the tax collector in the year 1888 was W. J. Story; that the letters "T. C." following the name of W. J. Stoy did not show that the execution was issued by the tax collector of the county. Objection was further made to the introduction of the *fi. fa.*, on the ground that one of the defendant's witnesses had already testified that the execution was not signed and issued by the tax collector of Worth county, but was signed by witness at the request of the tax collector, plaintiff contending that the tax collector could not delegate any verbal authority to sign the execution, witness not testifying that he had been appointed to collect taxes in Worth county in 1888. It appeared that the tax collector was dead at the time of the trial. While the testimony did not directly establish that the tax collector's name was signed by the witness in the tax collector's presence, it does appear that it was done at the special instance and request of the tax collector at his house, and under such circumstances as might afford an inference that it was done in his presence. It is the duty of the tax collector to sign a tax execution. It is not essential, however, that he should actually do the manual act of signing his name in every instance. In *Hitchcock v. Latham*, 97 Ga. 253, 22 S. E. 997, objection was made to the introduction in evidence of an execution on the ground that the name thereto purporting to be that of the tax collector "was in printing as it came from the printing office," and that, therefore, the execution did not bear the genuine signature of the tax collector, and there was nothing to show when, how, or where the name of the tax collector had been affixed to the execution. But this court held that the objection was not good where it affirma-

tively appeared that the *fi. fa.* came into the sheriff's hands, who had acted upon it as a legal execution, and in so doing had levied upon, advertised, and sold land; that, in the absence of further proof on the subject, it will be presumed that the printed signature was authorized by the tax collector; and that he issued the execution as his official act. It appeared from the record in this case that the sheriff had acted upon this *fi. fa.*, advertised the land levied on to satisfy it, and sold the land thereunder, and made a deed to the purchaser at the sale. As a general rule, when the law declares that a process shall be signed by a particular official, his name cannot be affixed to it by another, not in his presence, under a previous general authority. *Biggers v. Winkles*, 124 Ga. 990, 53 S. E. 397. However, we are not in opposition to this general proposition when we hold that the facts of this case bring it within the principle of the *Hitchcock Case*, *supra*.

The misspelling of the tax collector's name of itself furnished no ground to hold the *fi. fa.* illegal. It is clear that if the tax collector, signing his name, had inadvertently omitted a letter, and the proof showed that he actually signed it, the signature would be valid.

3. Nor was the objection good that the letters "T. C." following his signature were insufficient to show that he had signed the execution in his official character. Under the law existing at that time, such a *fi. fa.* must have been issued by the tax collector, and it is to be presumed that the abbreviation "T. C." represents the officer's official character.

4, 5. The *fi. fa.* was further objected to, because it did not show on its face the necessary jurisdictional allegations that the taxes for the year 1888 were due and unpaid; that it did not show that the lot of land in question had not been returned and had been double taxed, as required by law; and that the tax collector had no authority under the law to issue a tax execution against unreturned wild land, but that at that time such authority was in the tax receiver. We think the necessary jurisdictional facts appear on the face of the *fi. fa.* It is not to be presumed that the tax collector will issue a *fi. fa.* for taxes that have been paid. The *fi. fa.* recited that it was for state and county taxes for the year 1888, and that the land had not been returned for taxes; and it issued for an amount alleged to be due against this particular land, which it is to be presumed was the proper amount. The tax collector, by virtue of the act of December 13, 1882 (Acts 1882, p. 47), in force at the time of the issuance of this execution, had authority to issue the *fi. fa.* for unpaid taxes due upon unreturned wild land.

6. Objection was also made to the entry of levy appearing on the *fi. fa.* Prior to tendering the deed and *fi. fa.* in evidence, one of the witnesses for the defendant had testi-



fied that the entry of levy on the *fi. fa.*, although purporting to have been made and signed by S. M. Cox, sheriff, was not signed by S. M. Cox, but by another person; that for that reason it did not appear to be an official entry, because it had been shown that it was not made by the sheriff of the county, or by any one authorized by the sheriff. The testimony disclosed that the sheriff was dead when the case was tried, and that one W. J. Ford wrote the entry of levy and signed the sheriff's name to it. Ford did not hold any office. There also appeared the following entry upon the *fi. fa.*: "The within lot of land number 211 in the 14th district, sold this day to J. A. Dixon, for one hundred and fifteen dollars, this 7th day of May, 1889. [Signed] S. M. Cox, Sheriff." There was testimony that this entry of sale was in the handwriting of Cox, the sheriff. The statute declares that the officer making the levy shall enter the same on the process by virtue of which the levy is made. Civ. Code 1895, § 5421. In order that the entry of levy may be authenticated as the official act of the officer, it should be signed. *Jones v. Easley*, 53 Ga. 454. An entry of levy may be made and the levying officer's name signed thereto by a scrivener, if done in the immediate presence and by the direction of the levying officer. In such a case, notwithstanding the officer's name may be signed by the scrivener, it will be upheld as the entry of the officer. *Ellis v. Francis*, 9 Ga. 325; *Cox v. Montford*, 66 Ga. 62; *Weaver v. Wood*, 103 Ga. 89, 29 S. E. 594. There is no evidence in the record authorizing a conclusion that the entry of levy, and the signing of the sheriff's name thereto by Ford took place in the immediate presence of the sheriff. The undisputed evidence, however, discloses that the sheriff advertised the land by virtue of this particular levy, personally cried the same at the sale, and made an entry of the sale on the *fi. fa.* There was also evidence by one of the subscribing witnesses to the deed that he saw the sheriff sign the deed, and that he and the other witness attested it as witnesses. This evidence authorizes an inference that the sheriff adopted, as his own act, the entry of levy made by Ford, and acted on it, caused the property to be advertised, sold it, and made a deed to the purchaser. Even if the entry of levy was not made in the immediate presence of the sheriff, he immediately ratified it, and adopted it as his own act, when he advertised the property and sold it by virtue of this particular levy. The adoption by the sheriff of the entry, relatively to a bidder at the sale, made it the sheriff's own act and deed just as effectually as if Ford had signed it in his presence, or the sheriff himself had signed the entry.

7. Several of the grounds of the motion for new trial complain that the court erroneously extended the Civil Code of 1895, § 3623, to embrace a *fi. fa.* and entry of levy thereon, when tendered in evidence along with the

sheriff's deed. This section provides that "a registered deed shall be admitted in any court in this State without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief, when the court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed." Its provisions are applicable only to registered deeds. *Hill v. Nisbet*, 58 Ga. 586; *Sibley v. Haslam*, 75 Ga. 490; *Holland v. Carter*, 79 Ga. 139, 3 S. E. 690; *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645; *Chatman v. Hodnett*, 127 Ga. 380, 56 S. E. 439. It has been held that the proceeding is purely statutory, and is to be strictly construed, and will not be extended to a will. *Smith v. Stone*, 127 Ga. 485, 56 S. E. 640. It is limited to the one issue of genuineness of the deed, and there is no authority of law for drawing into the trial of that issue questions foreign to the factum of the execution of the deed. *Roberts v. Roberts*, 101 Ga. 768, 29 S. E. 271. The provisions of the Code section providing for a separate issue upon the affidavit of forgery cannot be extended to the genuineness of the execution or entry of levy thereon. It is true that a sheriff's deed, even though registered, is not admissible as a muniment of title without the *fi. fa.* under which the sale was made accompanies it, or its loss is shown. But the law does not require that the *fi. fa.* shall be recorded along with the deed before it will be admissible in evidence. The Civil Code of 1895, § 3625, permits the record of the *fi. fa.* in connection with the deed, and provides that when this is done, and the *fi. fa.* is lost, a certified copy of the record of the *fi. fa.* is admissible in evidence. An attack on the *fi. fa.* or entry of levy, because it was not signed by the proper officials and is therefore void, is directed against the authority of the officer to make the sale. It is not a direct attack on the deed. The burden is upon him who is asserting that the official signature is not genuine to show that fact. The ruling of the trial court, that the Civil Code of 1895, § 3623, was applicable to the tax *fi. fa.* and the entry of levy, and that the burden was on the defendant to show their genuineness, and to explain any alteration that might appear in the levy, improperly cast a burden upon the defendant which the law does not place upon him. This error necessitates a new trial, inasmuch as we are unable to say that the jury were not influenced by this instruction in deciding the issues of fact respecting the validity of the different official entries.

8. The defendant complains, in his motion for a new trial, that the court erred in refusing to charge, though requested in writing so to do, that "the law presumes that an officer does his duty, and an entry made on an official document purporting to be an entry by the officer whose duty it is to make it is presumed to be the act of such officer, and such

presumption is not overcome except by the strongest proof." There is a presumption that every officer does his duty, and every official entry is supposed to be the act of such officer, yet this is a rebuttable presumption and may be overcome by proof; and, while it is true that an officer's return should not be lightly set aside, yet it would be improper for the court to instruct the jury that the presumption of verity which the entry imported should prevail unless overcome by the strongest proof. Such an instruction is equivalent to an expression by the court as to quantum of evidence necessary to overcome a rebuttable presumption. For this reason the request was properly refused.

Judgment on the main bill of exceptions reversed, on the cross-bill affirmed. All the Justices concur.

(128 Ga. 578)

### NICK v. STATE.

(Supreme Court of Georgia. July 9, 1907.)

#### 1. CRIMINAL LAW—CONTINUANCES—DISCRETION OF COURT.

Applications for continuances are in all cases addressed to the sound legal discretion of the court, and a judgment refusing to continue a case will not be reversed unless it is made to appear that this discretion has been abused. No abuse of discretion has been made to appear in the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1311; vol. 15, Criminal Law, § 3045.]

#### 2. MURDER—EVIDENCE.

The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Will Nick was convicted of murder, and brings error. Affirmed.

The accused was charged with the offense of murder. He made a motion to continue the case. The showing for the continuance was made in the name of counsel appointed by the court to defend the accused. In the motion it was stated that Messrs. G. H. Howard and J. L. Kent had been appointed as counsel for the accused late Monday afternoon; that the case was called for trial Tuesday, and that they had not had sufficient time to prepare the case for trial or to confer with the witnesses; that the indictment was not returned until Monday afternoon, and that the accused was not arrested until Saturday morning preceding the convening of the court; that from investigation made the evidence would develop that the deceased was killed at a negro party, where more than 75 persons had assembled; that the killing occurred at night, outside the house, and that many shots were fired by different parties, and that counsel did not know, and could not, during the present session of court, interview those who were present, to ascertain who saw the shooting; that many saw

it, and, while all of the witnesses were not known, they will swear, if time is given to confer with them to ascertain who they are, that the accused did not fire the fatal shot; that it was impossible for them, under the circumstances, to do justice to their client, or to see that he had a fair trial, such as is guaranteed under the Constitution; that many of the witnesses the accused did not know, but according to the best of his information some of them were living in the county adjoining that in which the indictment was pending; that, when counsel were appointed, they at once issued subpoenas for a large number of witnesses, the names of whom were furnished by the accused, some of whom lived in other counties, and it would be impossible for the officers to summon these witnesses during the present term of court; that, if such witnesses were produced, the accused would be able to prove that the killing was not done by him, but by another; that counsel used all diligence possible under the circumstances; and that the motion was not made for delay, but in order to secure the testimony of these witnesses at the next term. The court overruled the motion to continue, appointed a bailiff to assist counsel in procuring the witnesses desired, and passed the case until Thursday afternoon at 2 o'clock. Error is assigned upon this ruling. When the case was called on Thursday afternoon, another motion was made to continue the case, upon the grounds stated in the former motion, and upon the additional facts appearing in the statement made to the court by Mr. Kent, of counsel for the accused. The substance of Mr. Kent's statement was that the bailiff had been endeavoring to find the witnesses, but was unable to do so; that they had not been able to obtain the witnesses for him; that the court had also appointed other counsel besides himself and Mr. Howard, and these had been excused by the court, and that the case should not be pressed to trial until other counsel were appointed in their place; that a number of the witnesses to the transaction lived in Johnson, Jefferson, and Washington counties, and possibly other counties in the state; that counsel had been unable to obtain these witnesses so as to interview them; that some of the witnesses for whom subpoenas had been issued the officer had not been able to find; that the bailiff made every effort to get these witnesses, but now gave the information that they were not there; that counsel had learned that one of the witnesses possibly did not get the subpoena, and that one lived in Jefferson county very near to the scene of the occurrence; and the accused informed counsel that he could prove by this witness that another man fired the fatal shot; that counsel did not know whether this witness could be brought at that term of the court, but that he had not been brought. The court overruled the motion to continue, and this ruling is assigned as error. The trial resulted

In a verdict finding the accused guilty, and he was sentenced to death. The accused filed a motion for a new trial, which was overruled, and the accused excepted.

G. H. Howard and J. L. Kent, for plaintiff in error. Alfred Herrington, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

COBB, P. J. (after stating the facts). 1. Motions for continuance are addressed to the sound legal discretion of the court. This is the rule in all cases, including those where the accused is charged with a capital felony. The Constitution guarantees to every one charged with a crime the privilege and benefit of counsel. This constitutional guaranty amounts to nothing, unless the counsel selected by the accused or appointed by the court are given a reasonable time to ascertain what is the character of the case that the accused is called upon to defend. There is no rule fixing what is a reasonable time for such preparation. What is a reasonable time depends upon the general character of the case and the questions of law and fact involved therein. In the present case it appears from the showing made for a continuance that the only question involved was: Who fired the fatal shot? That there was a homicide, and that this homicide was murder, seems not to have been an open question. The accused was present at the scene of the killing. It is true that there was a large number present. It does not appear that the accused was among strangers. It is manifest, from the terms of the showing, that he knew a number of those present, if not all of them. He furnished to his counsel the names of a number of those who were present, and subpoenas were issued for them, but, notwithstanding this, there does not appear in the showing for a continuance the name of a single witness whose presence at the trial was desired. The showing upon which it is based is very loose and irregular, being, in substance, that there were a number of persons present, and that counsel were not in a position to do the accused justice until they could have an opportunity to find out who of those present were witnesses to the homicide. In one portion of the showing it is stated that there was a witness living in another county who would testify that the accused did not fire the fatal shot; but the name of this witness was not disclosed to the court. If it had been, the court would probably have exercised its discretion and postponed the trial until a later date in the term, in order to have this witness brought into court. While it appears from the showing that counsel were not in a position to know who were the witnesses by whom the accused could establish that the homicide was committed by another, there is nothing in the showing to indicate why it was that the accused himself could not have given to counsel the

names of those persons who actually witnessed the homicide. When the showing is considered in its entirety, there was no abuse of discretion shown. See, in this connection, *Hardy v. State*, 117 Ga. 40, 43 S. E. 434; *Thompson v. State*, 24 Ga. 297; *Bradley v. State*, 128 Ga. —, 57 S. E. 237. That portion of the showing which complains that other counsel who had been appointed to assist in the defense of the accused were excused, and no others had been appointed to take their place, is not referred to in the brief of counsel, and this point will be treated as abandoned.

2. The motion for a new trial contains no other special grounds than the ones dealt with in the preceding portion of this opinion. The evidence amply authorized the verdict, and we see no reason for reversing the judgment.

Judgment affirmed. All the Justices concur.

(128 Ga. 660)

#### THRELKELD v. STATE.

(Supreme Court of Georgia. July 11, 1907.)

##### 1. CRIMINAL LAW — WRIT OF ERROR—ESTOPPEL TO ALLEGE ERROR.

When, in the trial of a murder case, the judge requests counsel to define their positions as to the issues involved, and both counsel for the state and for the accused reply that the only issue is the question as to whether the accused is guilty of murder or not guilty of any offense, and that voluntary manslaughter is not involved, if the court submits the issue to the jury as thus stated, the accused cannot, after conviction of murder, founded upon sufficient evidence, complain that the court erred in failing to charge the law of voluntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3007-3010.]

##### 2. HOMICIDE—TRIAL—INSTRUCTIONS.

The extracts from the charge of the court, upon which error is assigned, are not erroneous for any reason assigned.

##### 3. WRIT OF ERROR—REVIEW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The evidence authorized the verdict. The newly discovered evidence is not of such character as would probably produce a different result; and the discretion of the judge, exercised in overruling the motion for new trial, will not be interfered with.

(Syllabus by the Court.)

Error from Superior Court, Grady County; T. A. Parker, Judge.

Newton Threlkeld was convicted of murder, and he brings error. Affirmed.

W. M. Hammond and J. W. Walters, for plaintiff in error. W. E. Thomas, Sol. Gen., John C. Hart, Atty. Gen., and S. A. Roddenberg, for the State.

ATKINSON, J. Newton Threlkeld was indicted for murder, and convicted. In his motion for new trial complaint is made that the court omitted to instruct the jury upon the law of voluntary manslaughter, although the evidence showed that offense to be involved. In his order approving the grounds

of the motion the judge certifies that: "During the progress of said case, at the opening of the argument, the court requested counsel to define their positions as to the issues involved in said case. Whereupon counsel for the defendant and also counsel for the state stated in open court that the only issue was the question as to whether the defendant was guilty of murder or not guilty of any offense; that voluntary manslaughter was not involved in the case. The court agreed with counsel in this position, and for this reason the law of voluntary manslaughter was not given in charge." This certificate is conclusive as to what transpired at the time. If voluntary manslaughter was involved, it was the duty of the court to charge with respect thereto; but, if the court's omission so to charge was brought about by the conduct of the defendant, it would not lie in the mouth of the defendant afterwards to complain. The maxim, "Consensus tollit errorem," applies in criminal cases as well as in civil cases. *Howard v. State*, 115 Ga. 244, 41 S. E. 654. See, also, *Caesar v. State*, 127 Ga. 711, 57 S. E. 66; *Steed v. State*, 123 Ga. 569, and citations, 51 S. E. 627; *Coney v. State*, 90 Ga. 140, 15 S. E. 746; *Griffin v. State*, 113 Ga. 279, 38 S. E. 844. While a judge is not bound to commit an error simply because he is so requested, yet, if an error is committed as the result of a request on the part of the accused, he cannot thereafter complain. Able counsel for the defense no doubt believed that it was to the interest of their client that the law of voluntary manslaughter should not be given in charge to the jury, and thereupon took the bold position that the defendant was guilty of murder or of no offense. By taking that position in responding to the inquiry by the court they waived whatever right they may have had to a charge upon the law of voluntary manslaughter. After making such a waiver, if the evidence authorizes a verdict for murder and the defendant is convicted of that offense, a new trial should not be ordered simply because the court did not instruct the jury upon the law governing the less offense of voluntary manslaughter.

We do not deem it necessary to elaborate upon the rulings expressed in the second and third headnotes.

Judgment affirmed. All the Justices concur.

(128 Ga. 510)

PAYTON et al. v. McPHAUL.

(Supreme Court of Georgia. June 14, 1907.)

#### 1. MORTGAGES—DESCRIPTION—SUFFICIENCY.

A mortgage which describes the property mortgaged as "100 acres in the southeast corner" of a given lot of land, which contains 490 acres and is in the form of a square, is sufficient as a description. The corner of the lot is to be taken as a base point from which two sides of the tract of land conveyed shall extend an equal

distance; so as to inclose by parallel lines the quantity conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 125-132.]

#### 2. SAME—PLACE OF SALE.

The power of sale in a mortgage authorized a sale "before the courthouse door in the town of Isabella, Ga." Subsequently to the execution of the mortgage the county site of the county was removed from the town of Isabella to Sylvester. *Held*, that a sale before the courthouse door in Sylvester was a valid execution of the power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1048.]

#### 3. SAME—FORECLOSURE UNDER POWER OF SALE—CONVEYANCE TO PURCHASER.

A deed by a mortgagee, signed in his own name, but purporting to be in the execution of the power of sale in the mortgage, is a good execution of the power, when the recitals of the deed are sufficient to indicate that it was the intention of the grantor to convey in behalf of the mortgagor, and not in his own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1113, 1118½.]

#### 4. SAME—PURCHASE BY MORTGAGEE—VALIDITY.

The general rule is that the mortgagee cannot be a purchaser at his own sale under the power in the mortgage, but a purchase by him is not absolutely void, but voidable only at the instance of the mortgagor or the owner of the equity of redemption. A purchaser at an execution sale, had subsequently to the sale under the power, the execution being based on a judgment rendered after the execution and record of the mortgage, will not be allowed to impeach the purchase by the mortgagee at his own sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1080-1084.]

#### 5. USURY—EFFECT OF POWER OF SALE IN MORTGAGE.

The power of sale in a mortgage is not rendered void by reason of the fact that the debt sought to be secured is infected with usury. A sale under the power may be had for the purpose of collecting the principal and lawful interest on the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 158-160.]

#### 6. SAME.

No sufficient reason has been shown for reversing the judgment complained of.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by John G. McPhaul against Claude Payton and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John G. McPhaul filed a petition against Claude Payton, C. E. Hay, and J. D. Bridges, alleging that on July 7, 1904, W. D. Collier executed and delivered to the Bank of Poulan a mortgage to secure a debt of \$490.20, due October 15, 1904, upon property described as follows: "100 acres in the southeast corner of lot No. 307 in the 7th district of Worth county, Ga." The mortgage contained the following provision: "Should this debt not be paid at maturity the said Bank of Poulan, Poulan, Ga., or their assigns are hereby authorized to advertise and sell the real property hereby mortgaged, before the court-house door in the town of Isabella, Ga., four weeks' notice of such sale being made by the publication in

a newspaper published in the town of Sylvester; and the said Bank of Poulan, Poulan, Ga., or their assigns are hereby authorized and empowered to make purchaser at such sale fee simple titles to the property sold. The proceeds arising from the sale of the property to be applied to the payment of the debt and the expenses of advertising and selling the same, and the balance, if any, paid over to the undersigned." Collier failed and refused to pay the debt at maturity, and the Bank of Poulan, after advertising the property for four weeks in a newspaper published in Sylvester, exposed the property for sale, within the legal hours of sale, before the courthouse door of Worth county, in the city of Sylvester, and the plaintiff became the purchaser of the property for \$1,000. On September 4, 1906, in pursuance of this sale, the Bank of Poulan executed and delivered a deed to the plaintiff conveying the property. At the June term, 1904, of the city court of Sylvester, Hornic & Co. recovered certain common-law judgments against Collier, and on July 30th executions issued thereon were levied on the property, and on the same date that the sale under the power took place, but after that sale, the sheriff exposed the land described in the mortgage to sale under the executions above referred to. Payton became the purchaser of the same for \$83. The sheriff executed and delivered a deed to Payton & Hay, who afterwards conveyed a half interest to Perry by a quitclaim deed, upon a consideration of \$37.50, and Perry subsequently conveyed his half interest to Bridges upon the same consideration. On September 4, 1906, McPhaul entered into possession of the property he had purchased at the sale under the power, and posted notices in three or more conspicuous places on the land that he was the owner thereof. On September 13th the sheriff undertook to put Payton & Hay in possession, accompanying Payton to the land; McPhaul being at that time in possession of the land. The notices posted by McPhaul were destroyed by Payton, and notices were posted by him, claiming the property for himself and Hay, and forbidding trespassing thereon. As soon as McPhaul learned of these acts, he removed such notices, and reposted the land in the manner in which he had posted it at the time he took possession. It is distinctly alleged that he is now in possession. He alleges that he is informed and believes that the defendants intend to re-enter and continue to interfere with his possession by attempting to rent his land and place tenants in possession thereof, and other acts interfering with his right of possession and enjoyment of the property. The prayer of the petition is for an injunction to restrain the defendants from interfering with the right of possession and the use of the property; that the sheriff's deed to Payton & Hay, as well as the deed from Perry to Bridges, be delivered up and canceled, and for process. The judge sanctioned the peti-

tion, granted a temporary restraining order, and set the case down for a hearing. At the hearing the defendants showed as cause against the granting of the injunction a demurrer and an answer. The demurrer set up that the allegations of the petition were not sufficient to authorize any of the relief prayed for; that it did not appear from the petition that there was any sum due on the mortgage at the time the power of sale was exercised, such sale taking place nearly two years after the maturity of the debt; that it appears from the facts stated in the petition that the legal title to the property is in the defendants; that the deed to the plaintiff was not in harmony with the power; that it appears from the copy of the deed from the Bank of Poulan to McPhaul, attached to the petition as an exhibit, that McPhaul is the president of the Bank of Poulan, and that, therefore, he was acquainted with all of the facts in reference to the deed, and it was incumbent upon him to show that the debt was unpaid and that there was no usury in it; and that the description of the land in the mortgage is so indefinite that no lien was created by the execution thereof. In the answer it was averred that the description in the mortgage was too indefinite, and that McPhaul was active manager of the Bank of Poulan and the largest stockholder, and he was not authorized to purchase at a sale had by the bank, and that the bank had no authority to sell the property at Sylvester, the power only authorizing a sale at Isabella; that McPhaul has not complied with his bid and paid the amount thereof; that the debt which the mortgage was given to secure was infected with usury, and the power of sale in the mortgage was therefore void; that the judgments in favor of Hornic & Co. were the only valid liens on the property, and the title to the property is therefore in the defendants. The answer denied that McPhaul was in possession, and set up that the defendants were in possession, and that Anglin, who was the tenant of Collier, had attorned to them as landlord. It is admitted that it was the intention of the defendants to erect a dwelling house upon the land at an early date, and that, as soon as the injunction is dissolved, it is their desire to continue to improve the land which is theirs. The answer concludes with a prayer that the plaintiff be enjoined from interfering with the right of possession of the defendants and their enjoyment of the property, and that the deed to the plaintiff be delivered up and canceled. The judge, after hearing the evidence, passed an order granting the injunction prayed for by the plaintiff, and the defendants excepted.

Payton & Hay and T. R. Perry, for plaintiffs in error. J. B. Williamson and Polhill & Foy, for defendant in error.

COBB, P. J. (after stating the facts). 1. The court will take judicial notice of the

fact that land lot No. 307, in the Seventh district of Worth county, Ga., contains 490 acres and is in the form of a square. *Huxford v. Sou. Pine Co.*, 124 Ga. 182 (3), 52 S. E. 439. It is claimed that the description of the property mortgaged is so indefinite that no lien was created by the execution of the mortgage. The description is: "100 acres in the southeast corner of land lot No. 307 in the 7th district of Worth county, Ga." A deed or mortgage will not be held void for an insufficient description of the property if, by any reasonable construction of the terms of the instrument, the description therein used can be held to inclose or embrace a tract of land. If three sides of a tract are given, and there is nothing to indicate that the line not given is otherwise than a straight line, the description will be completed by supplying a straight line, and thus inclosing a tract; this being presumed to be the intention of the parties. *Ray v. Pease*, 95 Ga. 153 (1), 22 S. E. 190. Persons do not execute deeds and mortgages except for the purpose of conveying or creating a lien upon the property, and the intention to convey or create a lien will never be held to have been futile on account of the description of the property, when, by any reasonable construction, the instrument may be upheld. If two sides of a tract of land at right angles to each other are given, and it is clear from the instrument that it was the intention of the parties that the land conveyed should be in the shape of a square, the other two sides will be supplied by construction by drawing lines parallel with those which are given. In *Walsh v. Ringer*, 2 Ohio, 327, 15 Am. Dec. 555, the deed described the land as "70 acres of land being and lying in the southwest corner of the southwest quarter section of section 14." In the opinion it was said: "The general position of the land conveyed is given with sufficient certainty. It is in the southwest corner. According to the rules of decision, both in this state and in Kentucky, that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south, the east and north boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty." See, also, 2 Devlin on Deeds (2d Ed.) § 1013. The lot out of which the mortgage is to be taken is a square. The property intended to be mortgaged is in the corner of the square, and contains 100 acres. The number of acres intended to be mortgaged cannot be more nearly or accurately described to be in the corner of the lot than by taking the lines of the lot forming the corner referred to, and drawing parallel lines from each of such lines at such a point that the four lines would embrace a square con-

taining 100 acres. It can be reasonably inferred that this was the intention of the parties, and this construction will be placed upon the terms used.

2. At the time the mortgage was executed the county site of Worth county was the town of Isabella. At the time that the power of sale was exercised the county site was at the city of Sylvester. The power of sale in a mortgage must be construed like other parts of the contract, so as to effectuate the intention of the parties; and this is true as to the place of sale, as well as in regard to the other stipulations in the power. There are numerous cases dealing with the question as to the validity of sales where, for some reason, the place of sale, as indicated by the strict terms of the power, was not chosen as the place of sale on account of events transpiring between the date of the execution of the instrument and the date that the power was exercised. When the power provides that the sale shall be at the courthouse door, the rebuilding, removal, destruction, or temporary abandonment of the building raises a doubt as to where the sale should be had under the power. The general rule is that, where the door of the courthouse is designated as the place of sale, the building is referred to in its character as an official and public building, and that, therefore, the place of sale is the courthouse at the time of the foreclosure, rather than the place used for that purpose at the time the mortgage is executed. This has been held even where the courthouse was temporarily abandoned, as well as in cases where the building was destroyed or permanently abandoned. The decisions, however, are by no means in harmony. No general rule seems to have been laid down fixing the place of sale when there has been a new location of the courthouse. In some cases the sale at the old situs has been held good, and in others a sale at the door of the new structure has been upheld. 28 Am. & Eng. Enc. of Law (2d Ed.) 804; 2 Jones on Mort. (6th Ed.) § 1848. In *Napton v. Hurt*, 70 Mo. 497, the power was to sell at the courthouse in Kansas City, and after the execution of the mortgage the courthouse was, by law, removed to and established in a different place in the same city; and it was held that the sale must be had at the new place, and not at the old. In *Williams v. Pouns*, 48 Tex. 141, it was held that a trust deed requiring the sale to be made at the courthouse of the county is properly executed by a sale at the courthouse of a newly organized county which includes the land sold. It will be seen, from an examination of these authorities, that the court is in each instance endeavoring to ascertain the intention of the parties and carry it into effect as to the place of sale, and that wherever there has been a change of the location of the courthouse between the date of the exe-

cution of the mortgage and the date of the sale the sale has been upheld, even though at the new place, if it was fairly conducted, and no injury was shown to have resulted from conducting it at such place. The power in the mortgage under consideration declares that the sale shall be "before the courthouse door in the town of Isabella, Ga." The question is whether it was the intention of the parties that the sale should be held at the place for legal sales for Worth county, or whether it was the intention that the sale should be at the town of Isabella, without reference to whether legal sales were conducted at that place. A sale could never be had in strict compliance with the power; for the reason that at the date of the sale there was no courthouse door in the town of Isabella. It may be that the old building formerly used was still there, but it was no longer the courthouse of the county. It does not appear that the land was situated in the town of Isabella, nor is there anything to indicate whether it was nearer the town of Isabella than to the city of Sylvester. It would be a reasonable construction of the terms of the power that it was the intention of the parties that the sale should be held at the county site, rather than at the place which was no longer the place of holding sales for the county. The use of the word "courthouse" is significant. Isabella can be considered as simply descriptive of the place where the courthouse was situated, and not as the place designated for the sale. But the courthouse door is the place. The courthouse door of Worth county was at the date of the sale in Sylvester. We think the power was properly executed by the sale at the courthouse door of Worth county; that is, in the city of Sylvester.

3. The deed made in pursuance of the sale under the power was signed by the Bank of Poulan through its president, vice president, and a director. Objection is made that this was not a good execution of the power, for the reason that it should have been signed in the name of Collier. It distinctly appears, from the recitals in the deed, that it was the intention of the grantor to convey the property in behalf of Collier, and not in its own behalf. Under the ruling in *Tenant v. Blacker*, 27 Ga. 418, this was a good execution of the power. See also *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420. If there is anything in the cases of *Compton v. Cassada*, 32 Ga. 423, and *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. 638, in conflict with the ruling just referred to, what is said therein must yield to the older ruling. While it appears from the headnote in *Tenant v. Blacker* that the statement therein was the opinion of only Benning, J., an examination of the case shows that the point was directly involved and absolutely necessary to be decided.

4. It is said, though, that McPhaul was

the president of the Bank of Poulan and the owner of a large majority of the stock therein, and that the purchase by him at the sale was really a purchase by the Bank of Poulan. The general rule is that a mortgagee selling under a power of sale cannot buy at his own sale, either directly or indirectly. 28 Am. & Eng. Enc. Law (2d Ed.) 818; 2 Jones on Mortgages (6th Ed.) § 1876. But a purchase by the mortgagee is not absolutely void. It is merely voidable, and only voidable at the instance of the mortgagor or the owner of the equity of redemption at the time of the sale. *Palmer v. Young*, 96 Ga. 246, 22 S. E. 928, 51 Am. St. Rep. 136; 28 Am. & Eng. Enc. Law (2d Ed.) 819; 2 Jones on Mortgages (6th Ed.) § 1876a. Neither a judgment creditor of the mortgagor whose judgment is rendered subsequently to the execution and record of the mortgage, nor a purchaser at the sale under such a judgment subsequently to a sale under the power, is allowed to impeach a purchase by the mortgagee at his own sale. *Williams v. Williams*, 122 Ga. 178, 50 S. E. 52, 106 Am. St. Rep. 100; *Martinez v. Lindsey*, 8 South. 787, 91 Ala. 334.

5. The Code declares that all titles made as a part of a usurious contract are void. Civ. Code 1895, § 2892. But we know of no law which says that a mortgage shall be invalid when the debt sought to be secured thereby is infected with usury. The debtor may plead the usury and reduce the amount to be recovered in the foreclosure suit, but the lien of the mortgage may be asserted for the principal and lawful interest due on the debt. If the mortgagee is thus allowed to foreclose at law for the principal and lawful interest on the debt, we see no reason why he should not be allowed to exercise the power of sale to this extent. While the case of *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. 638, may not be said to be a direct ruling on this question, the reasoning of the court tends to that end. In that case the mortgagor acquiesced in the sale under the power, and it was held that he could not thereafter impeach the sale on the ground of usury.

6. It is said that it does not appear from the allegations of the petition that the debt of Collier was unpaid at the time that the sale under the power was had. It does distinctly appear that the debt was not paid at maturity, and we do not think it is incumbent upon the plaintiff to negative the fact that payment had been made after maturity and before the execution of the power. The evidence was conflicting as to who was in possession of the land. Both plaintiff and defendants claimed to be in possession. The person in actual possession of the land seems to have been Anglin, and both of the parties claim him as a tenant. There was evidence that Anglin had attorned to each. The plaintiff was proceeding against him as a tenant by distress warrant to collect rent. Anglin had given a note to the defendants for rent.

The judge resolved this issue of fact by holding that the plaintiff was in possession, and we will not disturb his finding on that question. If the plaintiff was in possession, he was entitled to the undisturbed possession. The defendants were interfering with him. They had committed an actual trespass. It is alleged in the petition that they were threatening to commit other acts of trespass, and the answer practically admits that, but for the injunction, the defendants would have continued to deal with the land as their own. Such conduct on their part would amount to a trespass if the plaintiff was the holder of the legal title and in possession. We do not think that the judge abused his discretion in granting a temporary injunction until these issues of fact could be decided by a jury.

Judgment affirmed. All the Justices concur.

(1 Ga. App. 673)

**GEORGIA RY. & ELECTRIC CO. v. HAMER.** (No. 279.)

(Court of Appeals of Georgia. April 25, 1907.)

**1. JUDGMENT—SETTING ASIDE—VERDICT.**

Until the end of the term at which rendered, judgments are "in the breast of the court," and may be set aside or modified at the judge's discretion; but to set aside a final judgment based on a verdict, except for defects appearing on the face of the record, the verdict must also be set aside, and the verdict is not "within the breast of the court" in the sense that the judgment is. *Ayer v. James*, 48 S. E. 154, 120 Ga. 580; *Jordan v. Tarver*, 17 S. E. 851, 92 Ga. 379; *Clark's Cove Guano Co. v. Steed*, 17 S. E. 967, 92 Ga. 440; *Regopoulos v. State*, 42 S. E. 1014, 116 Ga. 596; *Tietjen v. Merchants' Bank*, 43 S. E. 780, 117 Ga. 502.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 667.]

**2. TRIAL—SETTING ASIDE VERDICT.**

Any motion to set aside a verdict, based on matters not appearing on the face of the record, is in effect a motion for a new trial, and is subject to all the rules of law governing such motions. *Lucas v. Lucas*, 30 Ga. 191, 206, 78 Am. Dec. 642; *Prescott v. Bennett*, 50 Ga. 272; *Hyfield v. Sims*, 13 S. E. 554, 87 Ga. 282; *McCrory v. Gano*, 41 S. E. 580, 115 Ga. 296.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 273, 275.]

**3. NEW TRIAL—BRIEF OF EVIDENCE.**

A brief of the evidence is an indispensable statutory requisite to a valid motion for a new trial. This is true, even though the verdict be directed by the court, and even though the motion be based on grounds which do not require a consideration of the evidence. *Moxley v. Georgia Ry. & Elec. Co.*, 50 S. E. 339, 122 Ga. 493; *Mize v. Americus Mfg. & Imp. Co.*, 32 S. E. 22, 106 Ga. 140; *Baker v. Johnson*, 27 S. E. 706, 99 Ga. 374.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action between the Georgia Railway & Electric Company and one Hamer. From a judgment, the company brings error. Reversed.

Rosser & Brandon and Walter T. Colquitt, for plaintiff in error. Sidney C. Tapp, for defendant in error.

**POWELL, J.** Judgment reversed.

(1 Ga. App. 1)

**HUNTER v. LISSNER.** (No. 1.)

(Court of Appeals of Georgia. Jan. 11, 1907. Rehearing Denied Jan. 24, 1907.)

**1. PLEADING—MATTERS OF EVIDENCE—COPIES OF BANKRUPTCY PROCEEDINGS—NECESSITY—JUDICIAL NOTICE.**

To a suit on a promissory note in a justice's court the defendant filed under oath the following plea: "That on the 22d day of October, 1903, defendant filed his voluntary petition in bankruptcy in the District Court of the United States for the Southern District of Georgia, and was duly adjudged a bankrupt by said court, and now has application for discharge pending before said court; that the indebtedness sued upon was contracted and became due before the filing of said petition and said adjudication in bankruptcy; that the plaintiff was duly scheduled in said petition in bankruptcy as one of the unsecured creditors of said bankrupt, was given notice and had actual knowledge of said proceedings in bankruptcy, and appeared before the court having jurisdiction of said matter and filed proofs of claim; that said adjudication in bankruptcy and said discharge, when granted unto defendant, will release defendant from all liability upon the indebtedness sued upon in this case. Wherefore defendant prays that said suit be suspended and stayed until after said adjudication or the dismissal of defendant's said petition in bankruptcy, and until the question of his final discharge is determined, and that, upon the granting of such discharge, judgment in his favor be rendered in the case." This plea was stricken by the court, upon the ground that it did not have attached thereto certified copies of the bankruptcy proceedings referred to. *Held*, that this judgment was error: (a) Because this plea was in the exact language of section 11 of the bankrupt act of 1898. Act July 1, 1898, 30 Stat. 549, c. 541 [U. S. Comp. St. 1901, p. 3426]. (b) Because it was not necessary to attach to said plea "certified copies of bankruptcy proceeding" relied upon for a stay of said suit. This was a matter of proof and not pleading. (c) The state court in which the application for stay was properly made could not know or take judicial notice of the proceedings in bankruptcy, but the plea in this case brought before it in an appropriate manner such proceedings, and the defendant should have been given an opportunity to prove this plea; and upon such proof it is the duty of the court to stay the suit "to await the determination of the court in bankruptcy on the question of discharge," unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 65.]

**2. JUSTICES OF THE PEACE—CERTIORARI—VERIFICATION—SUFFICIENCY.**

The answer of the magistrate to the writ of certiorari was as follows: "The facts set forth in the defendant's petition for certiorari are substantially true and correct, in so far as came under the knowledge of respondent." *Held* a sufficient verification of the allegations of the petition for certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 782.]

(Syllabus by the Court.)



Error from Superior Court, Glynn County; Parker, Judge.

Action in justice's court by J. J. Lissner against R. E. Hunter on a promissory note, carried by certiorari to the superior court to review a judgment for plaintiff. From a judgment of the superior court dismissing the petition for certiorari, defendant brings error. Reversed.

A. D. Gale and Brantley & Butts, for plaintiff in error. Max Isaac, for defendant in error.

HILL, C. J. J. J. Lissner sued R. E. Hunter on a promissory note for \$50, in the justice's court for the 26th district, G. M. The defendant at the first term filed a plea under oath, asking that the suit be suspended and stayed, because of bankruptcy proceedings then pending against him, until his application for a discharge in bankruptcy, then pending in the United States District Court for the Southern District of Georgia, should be passed upon and determined. This plea is fully set out in the first headnote. Counsel for plaintiff moved to strike this plea, on the ground that it did not have attached thereto certified copies of the proceedings in the bankruptcy court referred to in said plea. The court sustained this motion, dismissed the plea, and entered up judgment against the defendant. This judgment of the justice's court was carried by certiorari to the superior court, and, upon a hearing of the same, the superior court dismissed the petition. This judgment is assigned as error.

1. The judgment of the justice's court, striking and dismissing the plea, was error. If the plea was defective, because certified copies of the bankruptcy proceedings were not attached, it could have been amended on special demurrer thereto. But we do not think it was necessary to have certified copies of the bankruptcy proceedings attached to or made a part of the plea. The plea set out fully section 11 of the bankrupt act of 1898 (Act July 1, 1898, 30 Stat. 549, c. 541 [U. S. Comp. St. 1901, p. 3426]), and was sufficient and appropriate pleading to put the state court on notice of the pendency of bankruptcy proceedings and to permit proof of the averments of the plea. This proof would be the bankruptcy proceedings referred to in the plea, properly authenticated. Bankr. Act 1898, § 21, subsec. "d." The production of a certified copy of the petition in bankruptcy or of the adjudication will be enough to establish the fact that such bankruptcy proceedings are pending; and, while the state court must be informed by proper pleading of the facts, we know of no law requiring that proof of the facts must be made a part of such pleading. United States District Judge Shiras in the well-considered case of *In re Geister* (D. C.) 97 Fed. 322, states the following rule as applicable to section 11 of the act of 1898, and points out the course to be pursued in cases like that now under

consideration. "The bankrupt who is the defendant in the state court should file in court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will be the duty of the state court to grant the stay prayed for." In *Boynnton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985, it is said: "The state court could not know or take judicial notice of the proceedings in bankruptcy, unless they were brought before it in some appropriate manner. The state court does not thereupon lose jurisdiction of the case; but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge." The same rule is laid down by the Supreme Court of Georgia in *Rutherford v. Rountree*, 68 Ga. 722; *Howell v. Glover*, 65 Ga. 466; *Cohen v. Duncan*, 64 Ga. 341; *Steadman v. Lee*, 61 Ga. 58.

The plea being sufficient to authorize the proof of the facts therein set forth, the state court should have sustained the plea, and, upon the proof of such facts, the law required that the suit be stayed to await the determination of the court in bankruptcy on the question of the discharge. If the bankrupt is discharged, the certificate of the discharge would be a bar to any further prosecution of the suit. If the application for discharge is denied, the stay is at an end, and the suit proceeds to judgment. The suit in the state court being for the collection of a debt from which a discharge would be a release, there can be no doubt that the law required that the stay asked for should have been granted until the determination of the application for discharge. Bankr. Act, § 11; *In re Geister* (D. C.) 97 Fed. 322; *Hill v. Harding*, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. Ed. 493; *Collier on Bankruptcy* (4th Ed.) 121, 123, 127. This result follows whether the suit in the state court was brought before, or after, the filing of bankruptcy proceedings. *Collier on Bankruptcy*, 131; *In re Basch* (D. C.) 3 Am. Bankr. Rep. 237, 97 Fed. 761.

It is insisted that the judgment of the justice's court striking the plea and dismissing the motion to stay was right, because at the time of the motion more than 12 months had elapsed since the adjudication. It does not appear when the adjudication was made, and we cannot assume that it was as of the date of the filing of the petition in bankruptcy or immediately thereafter. This limitation of the continuance of the stay of suits "until twelve months after the date of such adjudication" applies to suits "pending against the person" of the bankrupt before or when the petition in bankruptcy is filed and the adjudication had. It cannot reasonably apply to suits brought against the bankrupt after the petition and adjudication. Besides, the act provides that if, within the 12 months

after the adjudication, the bankrupt makes an application for discharge, the suit shall be stayed until the question of such discharge is determined; and the allegation in this case is that an application for discharge was pending when the request to stay the suit was made to the justice's court. The object of the bankrupt law is to have an exclusive administration of a bankrupt's estate fairly and equally between all unsecured creditors. It does not permit the harassment of bankrupts, by suits for the collection of simple debts from which a discharge would be a release, until reasonable time has been given for the determination of the question of discharge. Especially is this true when the creditor has gone into the bankrupt court and proved his debt. In proper cases it allows suits for the purpose of liquidation.

2. Attack is made in this court on the verification by the magistrate of the allegations in the petition for certiorari. This verification is in the following language: "The facts set forth in the defendant's petition for certiorari are substantially true and correct, in so far as came within the knowledge of respondent." The criticism made is that it verifies the facts only "in so far as they came within the knowledge of respondent." We are not able to see how he could be expected to verify facts that did not come within his knowledge. In our opinion, the verification is sufficient; and, if the judge below dismissed the certiorari on the ground that it was not sufficient, this was error.

Judgment reversed.

(1 Ga. App. 511)

**JOHNSON et al. v. WAXELBAUM CO.**  
(No. 140.)

(Court of Appeals of Georgia. March 28, 1907.)

**1. BANKRUPTCY—ACTION AGAINST BANKRUPT—STAY.**

A plea to a suit in the state court, setting up the pendency of bankruptcy proceedings and asking for a stay of the suit, must show that the debt sued on is one from which a discharge would be a release, and that application for a discharge had been made, or that the time for such application had not elapsed.

**2. SAME.**

The suit in the state court will not be stayed on the application of a co-debtor with the defendant, against whom no bankruptcy proceedings are pending.

**3. CORPORATIONS—AUTHORITY OF OFFICERS.**

Where a corporation holds out a person as its officer, it is bound by acts apparently within the scope of his authority, notwithstanding a by-law or other limitation upon the power of the officer, not known to a party dealing with him as such officer.

**4. PLEADING—DECLARATION—OBJECTIONS—WAIVER—BILLS AND NOTES—JOINT MAKER—SURETY.**

One who writes his name upon the back of an otherwise complete note, merely for the purpose of guaranteeing the payment, is apparently a surety only, and not liable as an indorser. Where he is sued on the note as joint maker, and makes no objection by demurrer or plea to the form of the suit, he is bound by the judgment.

(Syllabus by the Court.)

Error from City Court of Sylvester; Park, Judge.

Action by the Waxelbaum Company against W. A. Johnson and the Pate-Smith Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Payton & Hay, for plaintiffs in error.  
Hardeman & Jones and Polhill & Foy, for defendant in error.

HILL, C. J. The Waxelbaum Company brought suit on a note in the city court of Sylvester against the Pate-Smith Company and W. A. Johnson as makers. The defendants filed pleas and answers substantially as follows: (1) That the Pate-Smith Company, on August 16, 1904, had been adjudged a bankrupt; that the plaintiff had proved its claim in the bankruptcy case in the bankrupt court at Thomasville, Ga.; that the trustee had in hand \$2,700 to be distributed to creditors; that the Pate-Smith Company had not been discharged, and that this suit should therefore abate, to await the action of the bankrupt court, to ascertain what amount, if any, the Pate-Smith Company is indebted over and above the amount realized from the assets of the said defunct company; and that the plaintiff should be remanded to its rights in the bankruptcy court. (2) That the note sued on was never made by the Pate-Smith Company, because it was not signed by the president of the company, but appears to have been made, and the stamp thereto attached of the name of Pate-Smith Company and signed, by W. B. Williams as secretary, while the charter and by-laws of the company required notes to be signed in the name of the Pate-Smith Company by the president of the company, and countersigned by the secretary and treasurer. The defendants deny that the Pate-Smith Company, or any one else properly authorized by it, did make and execute the note sued on. The plaintiff demurred to these pleas and answers, and the court struck them, directed a verdict, and entered judgment against both of the defendants. To the order of the court striking the pleas and answers, both of the defendants excepted; and to the judgment against the defendants jointly the defendant Johnson excepted, because, under the plaintiff's pleadings, the verdict should have been against the Pate-Smith Company as maker and W. A. Johnson as indorser only.

1. The plea setting up the pendency of bankruptcy proceedings against the Pate-Smith Company was properly stricken. It did not come up to the requirements of such a plea (Bankr. Act July 1, 1898, § 11, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]). It did not allege that the Pate-Smith Company had applied for a discharge, or intended to apply for a discharge, or was entitled to a discharge, or that the debt sued on was one from which a discharge would be a release. *Hunter v. Lissner*, 1 Ga. App. 1, 52

S. E. 54. What we have said above applies to the plea of bankruptcy proceedings made by the defendant the Pate-Smith Company. The other defendant, W. A. Johnson, whether as indorser, surety, or joint maker, could not plead in discharge of his liability on the note the bankruptcy of the maker. Section 16 of the bankrupt act provides: "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

2. The plea of non est factum was properly not allowed as a defense against the note in question. This note was signed in the corporate name by the secretary and treasurer, and was indorsed by the person who was president of the corporation. (See affidavit of W. A. Johnson to the plea.) We do not think the by-law requiring notes of this company to be signed by the president and countersigned by the secretary and treasurer would be binding upon third persons who had no knowledge of such requirements. We do not think that an officer of a corporation would be permitted to make a corporate contract, and then, without denying (as in the case of the execution of a note) that it was for a valid consideration received and enjoyed by the corporation, be allowed to defend a suit on the note because of a by-law limitation unknown to the party dealing with the corporation. 10 Cyc. 942. "Every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duty; and no corporation can be relieved of its liability to third persons for the acts of its officers by reason of any by-law or other limitation upon the power of the officer, not known to such third person." Civ. Code 1895, § 1861. Where a corporation holds out another as its officer, it is bound by acts within the apparent scope of his authority, notwithstanding by-laws limiting such authority, unknown to a person dealing with him as such officer. Raleigh R. Co. v. Pullman Co., 122 Ga. 705, 50 S. E. 1008. The plea in this case did not allege that the Waxelbaum Company had any knowledge or notice of the by-law in question.

3. The defendant Johnson was sued as joint maker, and he did not, either by demurrer or plea, make any objection to the form of the suit, or allege that he was other than joint maker. He cannot now be heard to object on the ground that the suit did not describe him as indorser, and that a judgment was not entered up against him as such. As a matter of fact he seems not to have been an indorser, but was either a joint maker or a surety. The fact that he wrote his name across the back of the note did not necessarily make him an indorser. Ridley v. Hightower, 112 Ga. 476, 37 S. E. 733.

The judgment of the court in striking the pleas and answers, and in directing a verdict for the plaintiff is affirmed.

(1 Ga. App. 841)

## FERGUSON v. STATE. (No. 890.)

(Court of Appeals of Georgia. May 16, 1907.)

### 1. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.

To authorize a conviction of crime, the state must prove every material allegation necessary to constitute the offense charged; and, when a given act may be done under certain circumstances without guilt (unless the statute contains provisos and exceptions in distinct clauses), the proof for the state must take such act out of the exceptions provided by the statute.

### 2. WEAPONS—SHOOTING ON HIGHWAY.

To sustain a conviction for a violation of Pen. Code 1895, § 508, it must not only be shown that the accused shot a gun or pistol between dark and daylight, as charged, and that such shooting was not in defense of person or property, but it is further incumbent on the state (unless the proof shows that such firing was done on a public highway) to prove that such shooting or firing within 50 yards of the public highway was not on the defendant's land.

### 3. SAME—EVIDENCE.

The evidence sustains the verdict, and there was no error in refusing a new trial.

### 4. CRIMINAL LAW—NEW TRIAL.

The newly discovered evidence presented would not require a different result on another trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2336.]

### 5. SAME—APPEAL.

This court gathers the facts of the case from the brief of evidence as approved by the trial judge.

(Syllabus by the Court.)

Error from City Court of Americus; Crisp, Judge.

One Ferguson was convicted of shooting on the highway, and brings error. Affirmed.

Blalock & Cobb, for plaintiff in error.  
Zach. Childers, Sol., for the State.

RUSSELL, J. In the city court of Americus the defendant was convicted of the offense of shooting on a public highway. His motion for a new trial was overruled, and he excepts to that judgment. The motion is upon the statutory grounds and also upon the extraordinary ground of newly discovered evidence.

The plaintiff in error contends that it is necessary for the state to prove all of the material allegations before the jury would be authorized to convict, and insists that the state failed in this case to establish his guilt, because, under Pen. Code 1895, § 508, guilt is not established by proving alone that the defendant shot on a public highway between dark and daylight, but it is also incumbent upon the state to prove to the jury beyond a reasonable doubt that the shooting was done willfully and wantonly, and not in self-defense, nor on the premises of the defendant. We willingly agree that the contention of plaintiff in error is sound, and it is sustained by authority. In construing the section now under consideration the Supreme Court has expressly held that as it is not an offense to shoot on or near a public highway, when it is done in defense of per-

son or property or on one's own premises, it is incumbent upon the state to negative each one of these things by proof, in order to make out the offense. In delivering the opinion of the court in *Rumph v. State*, 119 Ga. 123, 45 S. E. 1003, Justice Cobb says: "The line is sometimes very closely marked between what exceptions need be proved and what need not. It is safe to say, however, that whenever the exception constitutes a part of the offense itself, and not merely an exception to a general offense previously defined, it is necessary to allege and prove that the case is not within the exception; or, to state it differently, whenever a statute makes penal an act when committed by a particular class of persons, or when committed under particular circumstances, it must appear that the person accused was within the particular class or committed the act under the particular circumstances." The precise rule which is applicable to accusations under section 508 is laid down in *Elkins v. State*, 13 Ga. 435: "Where a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos which it contains; but, on the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in order that a description of the crime may, in all respects, correspond with the statute." The decisions in *Conyers v. State*, 50 Ga. 105, 15 Am. Rep. 686; *Newman v. State*, 63 Ga. 533; and *Isom v. State*, 83 Ga. 379, 9 S. E. 1051, are to the same effect. So that we think that the position assumed by the plaintiff in error is correct as a matter of law.

On the other hand, we think that the allegations and evidence fully sustain the conviction of the plaintiff in error when applied to the rule we have stated. The state was obliged to show that the defendant shot a pistol or gun, as charged, within 50 yards of the public highway named in the indictment, between dark and daylight; and in order to show that it was willfully and wantonly done the state was further obliged to prove that such shooting was not in defense of person or property, and that it was not on the defendant's land. There were a number of witnesses introduced, and the testimony of several of them is confused, unsatisfactory, and insufficient. But the jury was authorized to convict, if they had had no other testimony, if they believed the evidence of Alonzo Bivins; and they had the right to disregard all other witnesses and rest their verdict on his testimony alone. He testified that he saw the defendant shoot five times at John Coleman's house. The defendant stood in the public road and shot five times just as fast as he could load and unload his breech-loader. It was between dark and daylight, in Sumter county, Ga. The witness swore, further, that the moon was shining, and that he could see the defendant

plainly, and knew that it was he who did the shooting. The witness says, further, that the only thing that was going on at that time was some fussing and loud talking in Coleman's house, where the dancing was going on. The state proved by this testimony that the shooting was not on the defendant's land, by proving that Ferguson fired in the public road; and, of course, the public road is not his land. It proved that the shooting was not in self-defense or in defense of his property at the time of the shooting, by proving that nothing was being done to Ferguson at the time of the shooting. This showed conclusively that, whether there had been pistol shots there that night or not, Ferguson's shooting was not necessary for his defense. According to Bivins' testimony, when taken with the testimony of some of the other witnesses, the defendant willfully and wantonly fired his gun on land belonging to the public, and without any necessity for defending himself, his brother, or his belongings.

The plaintiff in error insists that a number of witnesses swore that Bivins was in a house and could not see, and therefore his testimony was false. This was a matter entirely for the jury. It is for them to say whether Bivins or the witnesses who contradicted him were impeached, and by their verdict they sustain Bivins. In the brief of state's counsel it is insisted that there was an error in the approved brief of evidence. Of course we cannot consider this statement. The brief of evidence as approved by the trial judge is taken to be true to its very letter.

The plaintiff in error further insists that he is entitled to a new trial upon the ground of newly discovered evidence. We have often marveled at the power of a verdict of guilty in quickening the thirst for an investigation and the faculty of discovery. But, even if the newly discovered evidence submitted in this case were produced before a jury, it could not produce a different result. The testimony of one of the witnesses is to the effect that he heard some unknown man say to the Mancy boys that he tried his best to get one of the Fergusons; and the affidavit of Simpkins is simply cumulative of testimony, already adduced, that there were pistol shots, both preceding and following the report of the shotgun. If there is anything in this testimony it would tend only to set up the fact that the defendant fired in his own defense. And this testimony would be impeaching, not only the state's witnesses, but his own witnesses as well; and it does seem to us that if a new trial is not to be granted upon extraordinary grounds when the newly discovered evidence merely impeaches the witnesses of the opposite party, it should much the less be granted when the newly discovered evidence would impeach one's own witnesses, for whose veracity he vouches. The only purpose of the newly discovered evidence is to establish self-

defense in firing the gun. The defendant and his witnesses say he did not fire at all.

Motions for new trial upon the extraordinary ground of newly discovered evidence are not favored. If not regarded with suspicion, they should at least be granted with great caution. They should only be granted to avoid palpable injustice, and in order that the judgment set aside may perhaps be replaced by a different finding. We think there was no error in refusing to set aside the verdict and judgment in this case.

Judgment affirmed.

(1 Ga. App. 20)

# SOUTHERN RY. CO. v. SCHLITTLER.

(No. 10.)

(Court of Appeals of Georgia. Jan. 11, 1907.)

## 1. COURTS—COURT OF APPEALS—CONSTITUTIONAL QUESTIONS—CERTIFICATION TO SUPREME COURT.

Where, in a pending case, a question is raised as to the constitutionality of an act of the General Assembly of this state, this court will examine the record and ascertain whether a decision of the constitutional question is necessary to the determination of the case. If we find that the decision of such a question is necessary to the determination of the case, we will so certify to the Supreme Court and abide their instruction in the matter; but, where the contrary appears, we will proceed to decide the case without so certifying.

## 2. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—NECESSITY OF DETERMINATION.

Where suit is brought for the recovery of an amount for which the defendant would be liable, even in the absence of the statute which he seeks to set aside as being contrary to the Constitution of the United States, as well as for an additional amount as the penalty authorized by such statute, and the trial court awards judgment in favor of the plaintiff only for the sum which he would be authorized to recover in the absence of such a statute, upon a bill of exceptions brought to this court by the defendant, complaining of the judgment and attacking the constitutionality of such a statute, a determination of such constitutional question is neither necessary nor proper.

## 3. CARRIERS—CARRIAGE OF FREIGHT—OVERCHARGE—LIABILITY.

Independently of the statute of 1889, embodied in Civ. Code 1895, § 2316, a carrier is liable to suit by a shipper for the recovery of an overcharge of freight which such shipper has paid under protest in order to obtain his goods, and which the carrier refused to repay on demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 915.]

## 4. SAME—PERSONS ENTITLED TO RECOVER.

The recovery in this case is authorized by the evidence.

(Syllabus by the Court.)

Error from City Court of Baxley; Thomas, Judge.

Action by one Schlittler against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error.

POWELL, J. Schlittler brought suit against the railway company for the recovery

of an overcharge of freight which he had paid to it, under protest, upon the shipment of a car load of horses from Louisville, Ky., to Baxley, Ga.; the shipment not being made by Schlittler personally, but by one Baxley, who, it was alleged and proved, was the agent of Schlittler. He also alleged the demand required by Civ. Code 1895, § 2316, and prayed judgment for the penalty provided by that statute for the failure of the carrier to repay the overcharge. By both plea and demurrer the defendant set up that the section of the Code referred to, as applied to this interstate shipment, is violative of the commerce clause of the Constitution of the United States. The demurrer, which was oral and general, and which went to the whole petition, was overruled by the court; but upon the conclusion of the testimony the judge, who heard the case without the intervention of a jury, rendered a finding that the plaintiff was entitled to recover \$30.95 overcharge and the interest thereon, but that he was not entitled to recover the statutory penalty. The defendant excepted, and insists here, in addition to the general ground that the verdict is contrary to the law and the evidence, upon a reversal of the judgment on the ground that the Code section (2316) is unconstitutional, and asks this court to certify the question of the unconstitutionality of the statute to the Supreme Court for their instructions.

1. The constitutional amendment by which this court came into existence provides: "Where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this state, or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court; and thereupon a transcript of the record shall be transmitted to the Supreme Court, which after having afforded the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the question so certified, and the Court of Appeals shall be bound by the instruction so given." Acts 1906, p. 28. Since the duty of certifying that the decision of the constitutional question is necessary to the determination of the case is placed upon the Court of Appeals, the jurisdiction to decide when such a necessity exists obviously rests with this court. Hence, when such a question is raised, we will examine the record, and, if we find that a decision of a constitutional question is necessarily involved, we will so certify to the Supreme Court; otherwise, we will not. This doctrine is in keeping with the general rule, obtaining in the courts, that it is not proper to examine into the constitutionality of an act of the General Assembly unless it is found necessary to do so in order to determine the case as made.

POWELL, J. Prince, as sheriff of the city court of Dublin, levied a common-law *fi. fa.* in favor of Walker upon certain crops of the defendant in *fi. fa.* Subsequently, upon the sheriff's neglecting to sell the property, Walker brought rule, alleging that the crops levied on were amply sufficient to pay the *fi. fa.* in full, and that by the sheriff's failure to proceed with the levy he had been damaged in the amount of his debt. The sheriff answered, admitting the levy, but denying that the crops levied on were sufficient to have paid the *fi. fa.*, and setting up additionally that after the levy the crops were removed from the field by the landlord of the defendant in *fi. fa.* and appropriated to pay the rent due the landlord for the use of the land on which the crops were raised, that it took all of said crops so levied on to pay the lien for rent, and that the landlord's lien was superior to plaintiff's *fi. fa.* The court struck the entire answer as being wholly insufficient in law, and gave rule absolute for the amount of plaintiff's *fi. fa.* The sheriff excepts.

So far as the answer of the sheriff denied that the crops were sufficient to pay the *fi. fa.*, it presented a good defense. "Two things are necessary to fix the sheriff's liability by rule—contempt of court in not executing its process, and injury to the plaintiff." *Wheeler v. Thomas*, 57 Ga. 163. See, also, *Wilkin v. Am. Freehold Mortgage Co.*, 106 Ga. 182, 32 S. E. 135. It seems plain, therefore, that this portion of the answer should not have been stricken.

There is more difficulty as to the other excuse set up by the sheriff for not making the money—that after the levy the landlord took the crops and applied them to his superior lien. The sheriff contends that by showing this fact he demonstrates that no injury has resulted to the plaintiff in *fi. fa.*; and we must confess that the proposition strikes us with considerable force. However, after an examination of the authorities, we have concluded that this does not present any sufficient answer. The levying officer may show outstanding title in a third person to escape liability for not selling property levied on; but the landlord has no title. His only remedy by which he could protect his lien after the levy by the sheriff was to sue out a distress warrant and to place it in the hands of the sheriff for the purpose of claiming the proceeds upon rule to distribute. *Mulherin v. Porter*, 1 Ga. App. 153, 58 S. E. 60. Upon such a rule the plaintiff in *fi. fa.* could have contested with the landlord upon equitable principles, and probably upon more favorable terms than he could have resisted the defense set up by the sheriff under the landlord's rights; since in the latter case the matter has been so brought about that the sheriff and the landlord, whose interests would naturally be in line with those of the sheriff, are probably enabled to claim a monopoly upon the direct proof as to the

value of the crops. *Justice Samuel Lumpkin, in Duncan v. Clark*, 96 Ga. 266, 22 S. E. 923, in discussing the reasons why it is necessary for the landlord to foreclose in order to assert his lien, adverts to this question as follows: "It covered the entire crop of the tenant, and it is obvious that in such a case the landlord and tenant, by collusion between themselves, could easily defraud judgment creditors of the latter, if he were allowed, by merely delivering the crops, or a portion thereof, to the landlord, to vest in him a title which would be superior to the lien of existing judgments against the tenant. The tenant, by delivering to the landlord more than enough of the crops to satisfy the landlord's lien, could, with the latter's connivance, cover up property really subject to judgments held by other creditors. Hence, in such cases, as was suggested in *Stallings v. Harrold, Johnson & Co.*, 60 Ga. 478, the necessity that the property be legally administered and the proceeds paid out according to due priority, thus giving to all persons interested the assurance of obtaining their exact rights." If the sheriff had maintained his levy, the landlord might have found other means of obtaining the sum due him. We therefore hold that the portion of the answer relating to the seizure of the crops by the landlord and the appropriation of them to the rent lien was properly stricken.

The sheriff's remedy in the matter is to sue the landlord for the violation of the levy. To such a suit the landlord would not be permitted to set up as a defense his wrongful seizure of the property from the sheriff's possession. The sheriff's title acquired by the levy is superior to the landlord's unforeclosed rent claim. Let there be a new trial, solely on the ground indicated in the head-note.

Judgment reversed.

(1 Ga. App. 106)

DAVIS v. JOINER. (No. 48.)

DURDEN v. MUTUAL FERTILIZER CO. (No. 49.)

(Court of Appeals of Georgia. Jan. 29, 1907.)

1. WRIT OF ERROR—BILL OF EXCEPTIONS—SUFFICIENCY—STATUTORY PROVISIONS.

A bill of exceptions which recites that a motion to dismiss a certiorari was made upon various grounds, and that the motion to dismiss was sustained on all the said grounds (said grounds being specifically set out in the bill of exceptions), "to each and all of which rulings the plaintiff excepted, now excepts, and assigns the same as error," specifies "plainly the decision complained of and the alleged error," and "specifically sets forth the errors alleged to have been committed," within the meaning of Civ. Code 1895, §§ 5527, 5528.

2. JUSTICES OF THE PEACE—REVIEW—CERTIORARI—PAYMENT OF COSTS—CERTIFICATE.

Section 4639, Civ. Code 1895, requires, among other things, that, "before any writ of certiorari shall issue, the party applying for the same, his agent or attorney, shall \* \* \* produce a certificate from the officer whose decision or judgment is the subject-matter

of complaint that all costs which may have accrued on the trial below have been paid." Where such certificate was not made by the "officer whose decision or judgment is the subject-matter of complaint," but by the clerk of the court, this was not a compliance with the positive requirements of this section of the Code, and a motion to dismiss the certiorari on this ground, made in the superior court, was properly sustained. *Fuller v. Arnold*, 64 Ga. 600 (3); *Osborn v. Osborn*, 70 Ga. 716; *Cole v. Thurman*, 45 S. E. 718, 119 Ga. 55; *Dixon v. State*, 49 S. E. 311, 121 Ga. 346; *Miller v. State*, 55 S. E. 405, 128 Ga. 558. The statute on this point, being free from ambiguity, must be construed according to its plain terms. *Nowell v. Haire*, 42 S. E. 719, 116 Ga. 388. For the reasons stated in this headnote, the judgment dismissing the certiorari is affirmed in both cases.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; Rawlings, Judge.

Two actions—one between one Davis and one Joiner, and the other between one Durden and the Mutual Fertilizer Company. From the judgments, Davis and Durden bring error. Affirmed.

Saffold & Larsen and Z. D. Harrison, for plaintiffs in error. Smith & Kirkland, for defendants in error.

HILL, C. J. Judgments affirmed.

(1 Ga. App. 514)

MOORE v. CENTRAL OF GEORGIA RY. CO. (No. 214.)

(Court of Appeals of Georgia. March 28, 1907.)

#### 1. CARRIERS—EXPULSION OF PASSENGER—DAMAGES.

The forcible expulsion of a passenger from a railway train, where he presents the conductor a ticket from which coupons have been improperly detached by another conductor of the company on an earlier portion of the passage, is a tort by breach of duty, for which the passenger is entitled to recover any damage he may have sustained, as determined by the jury from the evidence; and it is error to award a nonsuit, where the plaintiff has proved such case, as laid in the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1432.]

#### 2. TRIAL—NONSUIT—OPENING CASE.

Whether a case shall be opened after a motion to nonsuit has been made is in the discretion of the trial court; and, where (as in this case) the trial judge did not in terms refuse to open the case as a matter of discretion, his consent to open the case is implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 165.]

#### 3. EVIDENCE—DOCUMENTS IN POSSESSION OF ADVERSE PARTY—PRODUCTION.

As a general rule (subject to exceptions for privilege), where it is shown that a paper which would be evidence material to the issue is in the court, it is the duty of the judge to require the production of such documentary evidence instant; and it is the duty of the court, where the alleged holder of such paper is there present, to grant a proper request for an investigation to determine whether such paper is in fact in court, and whether its production shall be required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1540–1557.]

#### 4. SAME.

A railroad ticket is evidence of the purchaser's right to ride a certain distance. When honestly obtained by purchase and payment therefor, it is the property of the purchaser. It is his property until delivered by him in exchange for transportation. If it be a coupon ticket, and any of the coupons be negligently, improperly, or wrongfully detached by the carrier, the purchaser has, none the less, a property right in such detached coupon, for purposes of evidence.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by one Moore against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Edgar Latham, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

RUSSELL, J. The plaintiff was nonsuited, and he excepted. He objects to the process of legal mechanics by which his case was chopped off. As this mechanical treatment can only be applied in a case so clear as to leave it beyond question that the plaintiff has nothing which it would be to his advantage to submit to the jury, and as the plaintiff in this case had proved the allegations of his petition, the question before us really becomes one as to whether the plaintiff selected the proper form of action; that is, whether he should have sued, as he did, because he was ejected from the train, or whether he should have based his cause of action (if he has any) on the wrongful tearing of his ticket. We think the plaintiff's case is controlled by the decision in *Head v. Ga. Pacific R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

Counsel for the defendant insists that the plaintiff did not present a complete ticket to the conductor; that what he did present was a part of a contract, which was absolutely worthless without the ticket part of the same attached thereto. It is a further contention of the defendant in error that in the *Head Case*, in *Morse v. Southern Ry. Co.*, 102 Ga. 302, 29 S. E. 865, and in *Southern Ry. Co. v. McKenzie*, 102 Ga. 313, 29 S. E. 869, and other similar cases, the plaintiff, in each case, had a ticket and made an effort to comply fully with the requirements of the railroad company. We can see no real difference between those cases and the present case. In the *Head Case*, as in this, the plaintiff did not have a ticket, in the strict sense of that term. It lacked validation; and this lack of validation, according to one of the express stipulations of the contract, voided it, so far as return passage was concerned. In this case the plaintiff had a ticket; but the coupon was detached, without any fault on his part. If he had objected to the conductor detaching the return coupon (instead, as appears from the evi-

there is still no question raised as to the construction of a clause of the Constitution. The excerpt from the constitutional amendment creating this court, quoted above, is also to be construed in pari materia with another provision in the same law that "the decisions of the Supreme Court shall bind the Court of Appeals as precedents." Therefore, if the identical question of construction has been before the Supreme Court, and that court has judicially given a construction to the clause in question, it is unnecessary to certify and to continue to certify such a question to the Supreme Court every time a party may seek to raise it. In this case the able and earnest counsel for the defendant raises no question as to the construction of the clause of the Constitution under which he attempted to assert his defense; he merely contends that under the well-known, well-recognized, and unquestioned construction of that fundamental law his defense was good. In his argument in this court he contended that under the recognized construction of that provision of the Constitution the "same-transaction test" should be applied to his plea of former jeopardy; and counsel for the state agreed with him. The trial court heard evidence for the express purpose of determining whether the transaction for which the defendant had been convicted already was the same transaction for which he was about to be put on trial in the second case. The finding of the court, that the transactions were not the same, in no sense involved any construction of the constitutional provision; and by determining, as we now do, that the trial court committed no error in that finding, we have not decided any constitutional question.

2. The defendant shot two separate and distinct men. The assault upon each of them was separate. They had made no joint attack upon him. The intent to kill was directed against them individually. The fact that the interval between the two shootings was slight does not make the transactions identical. Therefore there was no lawful reason why he should not be tried and convicted in both cases. *Crocker v. State*, 47 Ga. 568.

3. The only other assignment of error not already disposed of is that the court erred in not charging the jury, in the case relating to the assault upon Solomon, the law of shooting at another and the law of simple assault. Under the evidence in the case these offenses were not involved.

Judgment affirmed on each bill of exceptions.

(1 Ga. App. 126)

#### HAMMOCK v. STATE. (No. 157.)

(Court of Appeals of Georgia. Feb. 4, 1907.)

#### 1. CRIMINAL LAW—APPEAL—QUESTIONS REVIEWABLE.

No question as to the construction of a provision of the Constitution is necessary to the determination of this case.

#### 2. SAME—EVIDENCE UNLAWFULLY EXTORTED.

When by an unlawful search and seizure, under an illegal arrest, a person is compelled by an officer of the law to furnish incriminating evidence against himself, such evidence is not admissible against him in a criminal prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 874.]

(Syllabus by the Court.)

Error from City Court of Macon; Hodges, Judge.

One Hammock was convicted of carrying a concealed weapon, and brings error. Reversed.

Charles H. Hall, Jr., for plaintiff in error.  
William Brunson, Sol. Gen., for the State.

POWELL, J. The defendant was tried and convicted upon an accusation charging him with the offense of carrying a concealed pistol. The only testimony offered in the case was that of the prosecutor, as follows: "I am a deputy sheriff of this county. Upon information I arrested the defendant. I had no warrant for him. After I arrested him I searched him, and found a pistol in his right hip pocket. The pistol was concealed. The defendant was doing nothing at the time I arrested him. I took the pistol from his pocket myself. I had not seen the defendant commit any crime. The defendant wore a coat which covered pocket in which pistol was found. I arrested him in Dan O'Connell's bar, in Bibb county, Macon, Ga. This was on September 8, 1906." To the introduction of this evidence the defendant objected on the following grounds: "Because the evidence of the said witness Jones was acquired by the unlawful and illegal arrest of the defendant by the witness Jones, such unlawful and illegal arrest of the defendant being forcible, being without the consent and against the will of defendant; that by means of such unlawful and illegal arrest of defendant, he, the defendant, was by said witness Jones compelled to furnish the incriminating evidence against himself, in violation of the Constitution and laws of this state, which provide that no person shall be compelled to give testimony tending in any manner to criminate himself." The court overruled the objection, and the defendant brings up the ruling for review.

1. In his argument in this court defendant's counsel asked us to certify to the Supreme Court the question made by him as to the admissibility of the testimony complained of. Since the ruling made by this court in the case of *Fews v. State*, 1 Ga. App. 122, 58 S. E. 64, seems to cover this point, we deem further discussion of it unnecessary.

2. Under the Constitution persons are protected against unlawful searches and seizures, and also against being compelled to give testimony tending in any manner to incriminate themselves. A violation of the former right does not necessarily render evi-



dence, incidentally disclosed thereby, inadmissible. A violation of the latter right does. When the act in question is a concurrent violation of both rights, the person is none the less to be protected. By an application of this test the decisions by the Supreme Court in the cases of *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748 (3), *Woolfolk v. State*, 81 Ga. 562, 8 S. E. 724 (6), *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269, *Dozier v. State*, 107 Ga. 708, 33 S. E. 418, *Springer v. State*, 121 Ga. 155, 48 S. E. 907, and *Duren v. City*, 125 Ga. 1, 53 S. E. 814, may be distinguished from and reconciled with the decisions in the cases of *Day v. State*, 63 Ga. 667, *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717, *Rusher v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175, and *Evans v. State*, 106 Ga. 519, 32 S. E. 659, 71 Am. St. Rep. 276. These decisions are not in absolute harmony, if we regard all that is said by way of argument and obiter, but are not irreconcilable when only the points actually decided are considered. If we were untrammelled by some of these decisions, our own views of the sacred character of these constitutional rights of the private citizen might induce us to extend the rule further than we do. After giving recognition to the limitations imposed by the precedents, we hold that, when a person is subjected to an illegal arrest accompanied by an unlawful search of his person, whereby he is involuntarily compelled to disclose evidence of a crime which, in the absence of his volition being destroyed, he would not otherwise have disclosed, the evidence so obtained shall not be received against him on a prosecution for the crime. Nothing in this ruling conflicts with the decisions cited above. In *Franklin v. State*, *Dozier v. State*, and *Springer v. State*, the evidence was disclosed by a lawful search pending lawful arrest. In *Duren v. City*, no arrest was made and no evidence was obtained from the accused, nor from what was on his person. In *Williams v. State* the objection was not made to the testimony on the ground that the defendant had been compelled to furnish testimony tending to incriminate herself, but merely on the ground that the search and seizure, by which the testimony was disclosed, was unlawful, and the decision of the court was upon this point alone.

That the evidence offered in this case was obtained by an officer of the law as a result of an unwarranted act of violence committed by such officer upon the person of the accused, who was not under lawful arrest, is too plain to admit of question. The crime committed by the officer was far more serious than that committed by the accused. The law recognizes no offset of crimes in such cases, but it does recognize that there is a public policy which would rather see the guilty go unpunished than have the guilt of the accused

established by violently and unlawfully compelling him to furnish evidence against himself. To say, in a case such as this, that the officer furnishes the testimony, and that the defendant, therefore, has not been compelled to give evidence tending to incriminate himself, can be justified only by skimming the surface and neglecting to consider the pene-tralia of the transaction. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. Although the remarks of Chief Justice Blackley in *Rusher v. State* may have been obiter, they are too good to be untrue. He says (94 Ga. 366, 21 S. E. 594, 47 Am. St. Rep. 175): "The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime and bringing the offender to punishment. The law should never suffer itself to become an enemy or antagonist to its own reign. The multiplication of crimes as a remedy for crime would be a very absurd and disastrous public policy, and we think courts should not lend themselves to the advancement of any such policy, unless they are compelled to do so by statute or some authority equally obligatory." The statement in the first headnote in that case, "The well-established rule that independent facts discovered in consequence of a constrained confession made by a prisoner are admissible in evidence against him is of force in this state, unless it appears that criminal violence was used in procuring the confession or making the discovery," coincides very closely with what we are here ruling.

Judgment reversed.

(1 Ga. App. 700)

# SOUTHERN EXPRESS CO. v. STATE. (No. 160.)

(Court of Appeals of Georgia. May 3, 1907.)

## 1. CORPORATIONS—LIABILITY FOR VIOLATION OF PENAL LAWS.

The responsibility of corporations for violation of penal laws, though developed by gradual evolution, is well-settled and necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2133.]

## 2. SAME.

A corporation can be guilty of the offense of furnishing liquors to a minor, if such liquors be delivered to a minor by the agent of the corporation in the course of its business, or if such agent knowingly permits such delivery by another.

## 3. INTOXICATING LIQUORS—INDICTMENT—VARIANCE.

Proof of sale to one minor will sustain a conviction under an indictment charging that the defendant sold and furnished to three. The word "furnish," as used in Pen. Code 1895, § 444, has the same meaning as the word "deliver."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 274.]

## 4. SAME.

Where an indictment charges the accused with selling or furnishing three or more kinds of liquors, the evidence is sufficient to support

a conviction if it shows the sale or furnishing of any one of the liquors charged. "The indictment may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and,' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." 1 Bish. New Cr. Proc. § 436.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 271.]

##### 5. CRIMINAL LAW—TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.

To assume in a criminal case that the testimony for the state is the truth, though such testimony be not contradicted by evidence for the defendant, and to charge the jury that such testimony is the truth and that there is no contention to the contrary, is violative of section 4334 of the Civil Code of 1895, and demands a new trial. The plea of not guilty, filed by the defendant, is a contention on his part as to every material and essential fact necessary to establish his guilt, and implies a denial of every such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1754.]

##### 6. INTOXICATING LIQUORS—PROSECUTION—EVIDENCE—SUFFICIENCY.

A conviction of a corporation for violation of section 444 of the Penal Code of 1895 cannot be sustained, where the evidence fails to show that the delivery of the liquors was made by an agent of the company, unless it appears that such agent knowingly permitted such unlawful furnishing; and a verdict, unsupported by proof of either of these facts, is, for lack of evidence, contrary to law.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; Fite, Judge.

The Southern Express Company was convicted of furnishing liquor to a minor, and it brings error. Reversed.

F. G. Du Bignon, McDaniel, Alston & Black, and G. A. Coffee, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for the State.

**RUSSELL, J.** The Southern Express Company was presented for the offense of furnishing spirituous, malt, and intoxicating liquors to three certain minors, named in the presentment. The express company is a corporation under the laws of Georgia, and was presented as a corporation. Before arraignment the company demurred to the presentment, on the ground that the charge is set out in such a way as to word the same in the alternative, in that the charge is that the defendant did sell, give, and furnish to Wofford Cox, Cleveland Wofford, and Charlie Gresham, minors, spirituous, malt, and intoxicating liquors. It also demurred because the description of the liquor is not sufficiently definite to put the defendant on notice of the kind of liquor which the state expects to prove was given, sold, or furnished by the defendant. It also demurred upon the ground that the defendant, as a corporation, cannot be indicted under section 444 of the Penal Code of 1895, and, further because there was no statement in the presentment as to where the defendant was incorporated. This demurrer was overruled, and exceptions pend-

ente lite were properly allowed, and are presented in the bill of exceptions.

The evidence developed the following state of facts: One of the three minors, in behalf of all of them, ordered some whisky from a liquor dealer in Chattanooga, Tenn. It came by express, consigned to Wofford Cox, one of the three. Cleve Wofford paid the express charges and Wofford Cox received it. The three minors were each about 18 years of age. These minors, after its delivery, took the whisky to a pine thicket, "opened it up," and drank it. Each of them testified that the fluid was corn whisky. This whisky was not ordered at or from the express office in Calhoun. It was ordered at Ballew's, in Calhoun, Ga. The whisky was delivered by a boy, whom the testimony showed to be from 12 to 15 years old, and who was referred to by the witnesses as "George Gardner's little boy." It was uncontradicted that he was not employed by the defendant. He was employed by the Western Union Telegraph Company, which had an office in the same place as the express company. The agent for the Western Union Telegraph Company was also agent for the Western & Atlantic Railroad Company and for the Southern Express Company. There is conflict in the evidence as to whether the agent, Mr. Parrott, was in the office at the time of the delivery. Some witnesses testified that they did not know whether he was present, and others, including Parrott himself, swore positively that he was not present; but the only witness who testified that Parrott, the agent of the express company, was present, also testified that he (Parrott), so far as the witness knew, had no knowledge of the delivery of the whisky. This witness (Cleveland Wofford) testified: "I seen Mr. Parrott in there then. I am sure about that. I don't think Mr. Parrott was up town then. At that time he was looking over some boxes and looking around for some express for somebody else. I don't know whether he [Parrott] was engaged with the express company's business at the time I was there or not. He was attending to some business around there in the office. I don't know what it was; looking around for some boxes, or something or another, hunting some express for somebody else, I think." It was further in evidence that the young boy who delivered the whisky was not employed by the express company and received no compensation from it; and the agent testified that he was not authorized by the express company to employ him or to delegate any authority to him. There was evidence that Cleveland Wofford, who paid the express charges, had scattering beard on his face. He could not recollect whether he was the one who asked for the whisky or not. There was no evidence showing that the company had knowledge of the contents of the jug, or knowledge of the fact that it contained intoxicating liq-

nor. Upon conviction the defendant made a motion for new trial, based on various exceptions to the charge of the court and refusals to charge as requested. The motion was overruled, and the writ of error presents for consideration the overruling of the demurrer, excepted to pendente lite, and the refusal of the new trial.

We think the demurrer was properly overruled. It is well settled that the offense defined in section 444 of the Penal Code of 1895, may be properly set out by an allegation of sale to more than one minor, and sustained by proof as to any one of them. *Dukes v. State*, 79 Ga. 795, 4 S. E. 876. The word "give" may be treated as synonymous with "deliver," which is the meaning of the word "furnish," in this section; and it may, therefore, be regarded as surplusage. And it is well settled that a corporation is included in the word "person," used in the criminal statute. Pen. Code 1895, § 2. It is true that the doctrine of holding corporations responsible for violation of penal laws is one developed by gradual evolution; but it is none the less the law, and is of healthful necessity and utility. Mr. Thompson, in his work on Corporations (section 6285), uses the following language: "The rule that laws are to be construed with such strictness as to restrain the real purpose of the Legislature where they are penal is believed to have no just principle upon which to rest, as there is no reason why a corporation should be included in the word 'person' for the purpose of jurisdiction, and be excluded from it for the purpose of being exempted from liability to penal actions for the commission of wrongs for which the statute law makes individuals so liable. On the contrary, such an interpretation gives to an aggregate body of wrongdoers an immunity from punishment which individuals do not enjoy. The sound rule is that corporations are to be construed as persons, when the circumstances in which they are placed are identical with those of a natural person expressly included in a statute, and where the statute can be as aptly applied to them as to corporations." *Wales v. Muscatine*, 4 Iowa, 302; *Stewart v. Waterloo Turn Verein*, 71 Iowa, 226, 32 N. W. 275, 60 Am. Rep. 786. In *South Carolina R. Co. v. McDonald*, 5 Ga. 531, it is held that corporations are embraced in the word "person." A corporation "is a person under the law—an artificial person, created by the Legislature. It has a name—a local habitation, too. It is not a citizen in every sense of the word, but it is an inhabitant. It dwells where by law it is located. *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. Ed. 353. A corporation is a 'judicial person'—a legal entity. \* \* \* Where the lawmaking power uses the word 'person'—where it is found in the statute book—it is to be presumed that the legal meaning is intended, and not the social or ordinary meaning. \* \* \* The General As-

sembly \* \* \* intended to guard against the very construction \* \* \* that the act applies only to natural persons." There can be no question that while, at an early period, it was supposed that a corporation could not even commit a tort, for the reason that, being created for lawful purposes and having no power to do acts unlawful, whenever its agents or servants exceeded the charter authority they necessarily committed the act as individuals, and not as representatives of the corporation, still that view was found to be untenable, and it was found necessary to hold the corporation responsible for the torts of its servants; and for the same reason while the corporation has no arm or hands by which itself to commit a penal offense, still it can employ servants and agents whose acts are the acts of the corporation, and who can and do, in its behalf and at its behest, violate the criminal law. It is well known that freight trains are frequently run on the Sabbath day; the physical operation being the charge of the conductor and engineer and their assistants, but the actual running of the train being ordered and directed by those higher in authority and having the company's business directly in charge. The servants who operate the train might greatly prefer to observe the Sabbath as a day of rest, but to retain their situation and the good will of their employers they have no option but to obey their orders. The case of *Southern Express Co. v. State*, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 148, cited by counsel for plaintiff in error, has no bearing on a case of furnishing liquor to minors. In fact, in that case the court refers to the case of *Burnett v. State*, 92 Ga. 474, 17 S. E. 858, and expressly distinguishes section 444, supra, from the local statute for Bartow county, then under consideration. The selling and furnishing of intoxicating liquors to minors is considered an exception to general rules in reference to sales.

It is unlawful, without the written authority of the guardian or parent of the minor, to be the medium in any way whatsoever by which the minor may obtain intoxicants. An express company, where the delivery is not "C. O. D.," can deliver intoxicating liquor to the consignee, because the sale was complete and is supposed to have been lawful when such liquors were delivered by the consignor to the carrier. The consignee, when of lawful age, has the right to the possession. The consignee, when a minor, has no right to buy, or by any means be supplied or furnished with, intoxicating liquors without the written authority of his parent or guardian. "It has been repeatedly held that a saloon keeper who allows an adult to buy intoxicating liquor and give it to a minor to drink in his saloon is guilty of the violation of the statute against furnishing liquor to minors." *People v. Neumann*, 48 N. W. 290, 85 Mich. 98; *State v. Munson*, 25 Ohio St.

381; *State v. Best*, 12 S. E. 907, 108 N. C. 747. The word "furnish," in Pen. Code 1895, § 444, has the same meaning as "deliver." The General Assembly, in the "passage of this statute, intended to make it penal for any person in any way to enable minors to have access to intoxicating liquors; and that this was the construction placed upon it by the Supreme Court is clearly shown by the decisions in *Blodgett v. State*, 97 Ga. 351, 23 S. E. 830, and *Dixon v. State*, 89 Ga. 785, 15 S. E. 684, as well as by a number of others. There is no merit in the complaint that the state failed to show that the minors did not have written authority. Where intoxicating liquors are shown to have been delivered to a minor, it is incumbent upon the defendant to make proof that he had written authority from the parent or guardian of such minor authorizing such sale or delivery.

In view of what we have said above, there is no merit in the exceptions to the judge's charge, as taken in the first, second, and third grounds of the amended motion; nor did the judge err in charging the jury in his recharge, as follows: "It is the duty of the express company to ship liquor or anything else delivered to it to the point of destination. It is not the duty of the company to deliver liquor to minors. If the company does it through its agent, employes, or any person that they have in their employ about the building to deliver packages, if it is done by the agent or any person acting under the agent, by his direction or with his consent, delivering packages generally, if in doing that they deliver liquor to minors, then that is a violation of the law." The errors assigned as to this instruction are that the word "delivered" is there used as synonymous with the word "furnished"; that it charges that if the delivery is by the agent, or by any person acting under the agent and by his direction or consent, and is a delivery of liquor to minors, then it is a violation of the law; and, further, that it leaves out of consideration the fact that the company must have known the character of the liquor, or the facts must have been such as to reasonably put the company upon notice of the contents of the package; and, further, that the company was presented for the offense described in the first paragraph of section 444, for itself selling and furnishing the liquor, whereas the charge of the court is such as to make the defendant guilty under either the first or the second clause of that section. So far as the first three objections to the charge are concerned, it is a sound presentation of the law. The fourth exception appears to us to be well taken. Section 444 of the Penal Code of 1895 "makes it an offense for one to sell or furnish spirituous liquors to a minor by himself or another. That is the act of the party himself. But where the liquor is sold or furnished to a minor by a person other than the defendant, and not by his order or direction, if he per-

mit it to be done, this is a different offense under the Code. If the liquor was furnished or sold to a minor by a person other than the accused, and not under his order and direction, it was his duty to prevent it from being done. His failing to do so makes him liable as permitting it to be done, and he should be so charged in the indictment; but he was not so charged in this case." *Johnson v. State*, 83 Ga. 555, 10 S. E. 208.

The exception contained in the fifth ground of the amended motion for new trial is well taken, and demands the grant of a new trial. The portion of the charge excepted to is as follows: "Now, there is no contention here that the party who delivered the liquor did not know it was liquor. Therefore it is not necessary to charge on this point. The state contends that the liquor was delivered, and there is no contention here that the party who delivered it didn't know it was whisky." This was a manifest expression on the part of the court that it had been proved that the article delivered was whisky, and that the party who delivered it knew it was whisky. Such a statement on the part of the court is forbidden by law and is reversible error. It is true that the evidence of three witnesses for the state was to the effect that it was whisky; and there is no evidence to the contrary. But the defendant's plea of not guilty put the state on proof of every material allegation in the indictment, and submitted to the jury, not only the facts testified to by witnesses, but also the credibility of each and every witness. Further, there was no evidence as to whether the party who delivered it knew or did not know that it was whisky. There was certainly no evidence that he knew it to be whisky. And, while the defendant had the right to put the state on proof of every material fact necessary to establish his guilt, it was not only illegal, but manifestly prejudicial, to state that there was no contention "that the party who delivered it didn't know it was whisky." The state was obliged to show that it was whisky, or some like intoxicating liquor, and submitted testimony upon that subject for the consideration of the jury. The defendant had the right, under his plea of not guilty, to have the jury, and not the court, pass upon the issues of fact in the case.

This court is bitterly opposed to the furnishing of liquor to minors by any means or device whatsoever, but even in trials for that offense the "dumb act" (Civ. Code 1895, § 4334) is of force. The court should have granted a new trial, not because the corporation could not be indicted, or because its delivery of whisky would not amount to furnishing, nor upon the other grounds which have been referred to, but because of the intimation and expression of opinion on the evidence above quoted, and because the verdict is contrary to law, for lack of evidence to support it. The corporation can be guilty of furnishing liquor to a minor, but it can

only be guilty because it is held responsible for the acts of its agents, and, in case of furnishing liquor to a minor, for permission given by its agent, for the sale or furnishing of the liquors in question. There was no evidence introduced by the state in this case which showed that the agent knew of the delivery, consented to it, or permitted it. The only witness who testified that the agent was present (taking his testimony to be the truth) also testified that there was nothing to attract the attention of the agent to the delivery. None of the parties interested in the whisky spoke to him, and, if present, he was absorbed in the consideration of other business. The proof was uncontradicted that the boy who delivered the whisky was not employed by the express company. If the state had shown that the agent was looking at the boy, or told the boy to deliver the whisky, or was silently standing by and made no protest when he saw the boy delivering the same, the jury might have been authorized to consider the act of the boy as the act of the agent, and then the act of the agent would have been the act of the company. But the state's own testimony negatives the idea that the agent either knew of, consented to, or permitted the delivery in this case.

Judgment reversed.

(1 Ga. App. 790)

NEWSOME v. STATE. (No. 426.)

(Court of Appeals of Georgia. May 9, 1907.)

1. INTOXICATING LIQUORS—FURNISHING LIQUOR TO MINOR.

A liquor dealer, who in one county receives by mail an order for intoxicating liquor from a minor in another county, and who fills the order by shipping the liquor by express to the latter county, where it is delivered to the minor, may be indicted and punished in either of the counties named, for a violation of Pen. Code 1895, § 444.

2. SAME—EVIDENCE.

A liquor dealer who ships whisky to a customer not personally known to him does so at his peril; for, if the customer prove to be a minor or other person to whom the furnishing of intoxicating liquors is forbidden, the dealer's ignorance of that fact will not excuse him from criminal responsibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 172.]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; Mitchell, Judge.

W. D. Newsome was convicted of furnishing intoxicating liquors to a minor, and bring error. Affirmed.

The plaintiff in error was indicted for causing intoxicating liquors to be furnished to a minor. He pleaded not guilty, and his case was tried before the court without the intervention of a jury upon the following agreed statement of facts: "On January 31, 1907, one Joe Davis, at Nashville, Ga., sent by mail to W. D. Newsome, at Valdosta, Ga., a letter,

signed by himself, stating as follows: 'Enclosed find money order for \$3.50, for which please send me two quarts of Montreal malt and two quarts of your best 75 cent rye.' The said Joe Davis was then and there at Nashville, Berrien county, Ga. W. D. Newsome was then and there a licensed liquor dealer in the city of Valdosta, Lowndes county, Ga. The said W. D. Newsome, upon receipt of said order, immediately sent by express, via Southern Express Company, to the said Joe Davis, at Nashville, Ga., the whiskies and liquors ordered, and the Southern Express Company received the same at Valdosta, in Lowndes county Ga., and transported the same to Nashville, Ga., in Berrien county, where R. L. Ferguson, as the agent of the Southern Express Company at Nashville, Ga., Berrien county, delivered the same then and there to the said Joe Davis. The said Joe Davis was a minor under 21 years of age. The liquors as aforesaid, as stated, were delivered to the Southern Express Company in Lowndes county, Ga., by the said W. D. Newsome, and the Southern Express Company, a common carrier, conveyed the same, as stated, to Nashville, Ga., the express being paid by the minor, who was the consignee (Joe Davis), at Nashville, Ga.; the said W. D. Newsome not having first obtained the written authority, from either a parent or guardian of the said Joe Davis, to sell or furnish any liquors to the said Joe Davis. That said W. D. Newsome, after receiving the order signed by Joe Davis as aforesaid, without inquiry as to whether the said Joe Davis was or was not a minor, shipped the liquor as stated. The particular whisky shipped had not, at the time the order was received, been separated from the general stock of the said W. D. Newsome in his saloon, at Valdosta, Lowndes county, Ga., but was separated therefrom after the receipt of said order and its acceptance, and delivered to the carrier, the Southern Express Company, as aforesaid. The liquors furnished were intoxicating. The delivery to the carrier, as stated, was for the purpose of shipment under the usual contract specifying its conveyance and delivery to the consignee at Nashville, Berrien county, Ga. It was contemplated by the parties, at the time the order was sent and received and accepted, that the whisky was to be sent by express, as stated." He was adjudged guilty, and excepted.

Cranford & Wilcox, for plaintiff in error.  
W. E. Thomas, Sol. Gen., for the State.

POWELL, J. (after stating the foregoing facts). Pen. Code 1895, § 444, makes it criminal for "any person, by himself or another," to "sell, or cause to be sold, or furnished," to any minor, any spirituous, malt, or intoxicating liquors, unless such person shall first obtain the written consent of the minor's parent or guardian. In this state, as in most of the states, this statute has been broadly

and liberally construed in favor of the protection thus afforded against the obtaining of intoxicating liquors by minors. The word "sell," appearing in the statute, is, of course, not to be taken in the strict technical sense of the word. One of the elements contained in the definition of a "sale," as this term is ordinarily used in laws and court language, is competent parties. A minor not being a competent party to obtain liquor, there can be no sale to him in the technical sense. The statute, therefore, makes punishable those acts which would amount to a sale of the liquors if the minor were a competent contracting party. If a liquor dealer in county A receive an order for whisky from a lawful customer in county B, and from his store in county A ship the whisky by a common carrier to the purchaser in county B, a sale has taken place in county A. If, under the same circumstances, the order be sent by an unlawful customer—a minor—and the goods be shipped, no sale, in the strict sense of the word, has taken place, but the quasi sale contemplated by Pen. Code 1895, § 444, has been consummated at the place where the delivery was made to the carrier; hence the liquor dealer may be indicted in that county.

But the sale or quasi sale is not the only offense under this statute. To furnish liquors or cause them to be furnished is also criminal. This offense is not complete until the minor receives possession of the liquors. If a minor in De Kalb county send a private person into Fulton county to buy liquor for him, and this private person disclose to the dealer the fact that he desires the liquor for a minor, and the dealer send the liquor by this private person, who delivers it to the minor in De Kalb county, the dealer may be indicted in Fulton county for the quasi sale. Both the dealer and the private person through whom the delivery was effectuated may be indicted in De Kalb county for furnishing the liquor and causing it to be furnished. Likewise where delivery is made through a common carrier. The purpose, the unbroken judicial construction, in fact, the very language, of this statute, distinguishes the case at bar from the line of cases holding that in ordinary sales of intoxicating liquors, as well as of other commodities, the sale is complete at the place where delivery is made to the carrier. Those cases (e. g., *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; *Southern Express Co. v. State*, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146, and cases cited therein) all proceed upon the theory that the common carrier is the agent of the consignee to receive for him the goods and transport them, and therefore delivery to the carrier is delivery to the consignee. *Watkins v. Paine*, 57 Ga. 50.

If the sale be lawful at the place where the goods are tendered to the carrier, it cannot refuse them. It is a public agent for such purposes. But the carrier is not a pub-

lic agent for unlawful purposes. If it accepts for transportation liquor consigned from a dealer to a minor, it carries it, not as the minor's property, for the law will not let the title pass, but as the dealer's. *Burnett v. State*, 92 Ga. 474, 17 S. E. 858; *So. Ex. Co. v. State*, 107 Ga. 674, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146. The carrier cannot by contract, express or implied, nor by virtue of any public duty, become or agree to become the minor's agent to accept for him delivery of a thing which the law forbids that he should receive. This principle existing in the law of agency is too universally recognized to require citation of authority. The two cases just cited above make it plain that there is no legal duty on the carrier to receive and transport the liquor in such cases; that, on the contrary, the law forbids it; and, if the carrier delivers the liquor to the minor, he and the dealer are both principals in the crime of furnishing and causing to be furnished liquor to a minor. *So. Ex. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67. Since the crime of furnishing becomes complete in the county where the minor actually obtains personal possession of the liquor, venue may be laid there.

2. That a defendant who furnishes liquor to a minor happens to be ignorant of the minority is no excuse. Most states recognize no exceptions to this rule. 17 Am. & Eng. Enc. Law (2d Ed.) 335. Georgia is somewhat more liberal, and allows the accused to show, in defense, that after honest inquiry and the exercise of due diligence he bona fide believed, and was justified in believing, that the person to whom the liquor was furnished was at the time of full age. Certainly a dealer who fills an order without inquiry is not within the protection of this exception. *Loeb v. State*, 75 Ga. 258; *Harkey v. State*, 89 Ga. 478, 15 S. E. 552; *Burnett v. State*, 92 Ga. 474, 17 S. E. 858; *Blodgett v. State*, 97 Ga. 351, 23 S. E. 830.

Judgment affirmed.

(1 Ga. App. 582)

WRIGHT v. FLOYD COUNTY. (Nos. 219, 252.)

(Court of Appeals of Georgia. April 11, 1907.)

1. COUNTIES—OFFICERS AND AGENTS—POWERS—IMPLIED POWERS.

Where, by statute, jurisdiction over a subject-matter is conferred upon county authorities, and therein the power to do certain things is expressed, the further power to contract in regard to that subject-matter is to be implied; and a part of this implicit power is the authority to use discretion as to the details of such contracts, subject only to the limitations imposed by the statutes or public policy of the state.

2. BRIDGES—ESTABLISHMENT BY PUBLIC AUTHORITIES.

There is nothing in the statutes or public policy of this state which prohibits the proper county authorities from making a contract with the owner of a mill site, near which a public highway, including a bridge, is to be erected, whereby the mill owner deeds to the county the right of way for the highway and contributes

to the erection of the bridge on condition that he shall have the right to join his milldam to the piers of the bridge and use them as bulkheads, unless such an arrangement would manifestly endanger the safety or convenience of the public.

### 3. SAME.

The jurisdiction of determining whether such an arrangement will be detrimental to the good of the public, or of the county in its corporate capacity, is primarily vested in the county authorities having in charge the subject-matter of roads and bridges.

(Syllabus by the Court.)

Error from City Court of Floyd County; Hamilton, Judge.

Action by Floyd county against one Wright. Judgment for plaintiff, and defendant brings error, and plaintiff files a cross-bill. Affirmed on main bill, and cross-bill dismissed.

Seaborn & Barry Wright and W. M. Henry, for plaintiff in error. Junius F. Hillyer, for defendant in error.

POWELL, J. On May 16, 1905, by a written contract made between Wright and Floyd county, through its county commissioners, and reciting that said Wright is the owner of the lands on both sides of the Armuchee creek at the old Jones mill in said county, including the mill and water rights, and the county is the owner of a bridge across the creek, at or near said mill, on the Dalton public road; that, it being necessary to repair said bridge by substituting two stone or concrete piers for the wooden bents now in use, one pier to be located at the north end and the other at the south end of said bridge, and Wright desiring to build his milldam and race anew at or near said bridge and to use said bridge for bulkheads or stays for the same—it was agreed that Wright, at his expense, would build one of the piers, and the county, at its expense, the other, and that Wright should also build, at his expense, any additional concrete or stone pier or work which might in the discretion of either party be required to properly adjust the contemplated dam and race to the piers and to their use as safe and permanent supports to the bridge; all the work to be done according to the county's plans and specifications and subject to its approval. As a further consideration it is recited that the said Wright "hereby sells and forever quitclaims to [the county] the right to keep and maintain said bridge where now located, and to rebuild or replace the same as often as may be necessary in the future; also the right of way for a public road 30 feet wide on both sides of said creek, and along the line of the road leading through his land to and from said bridge." On the county's part, the contract states that it "agrees to allow Wright the privilege to construct his milldam at or near said bridge, and to make use of the piers before mentioned, as bulkheads or stays to his dam, the work to be done, as before stated, under the direction and subject to the ap-

proval of the county authorities," and that "this instrument shall operate as a deed of conveyance as far as applicable." With the consent of Wright, and at his instance, the county, after building the pier which they were to build, also constructed the one which Wright was to erect. The cost of building the second pier was \$517.10; and for this sum the county brought suit against Wright. The latter defended the suit on the ground that the county did not have the power to convey, or to grant to him the right to use, the portion of the bridge or public highway for the purpose set out in the contract, and that, therefore, there was no consideration for the agreement on his part to pay for building a portion of the work; it being necessary for the county to do the same in order to build the bridge. The court awarded judgment in favor of the county, and Wright excepts.

1. The whole case turns upon the one question as to whether the agreement between the parties is within the contractual capacity of the county commissioners. Wright is perfectly willing to pay the amount sued for if the county can grant him the benefits contemplated in the contract, and is unwilling to pay it unless he can get them. In fact, we gather from the argument that the suit has been brought and maintained for the purpose of settling this legal question before further money is spent by Wright in pursuance of the contemplated work necessary to the completion of the dam. The county, in the brief of its able counsel, thus presents its contentions: "That the board of commissioners had jurisdiction of the subject-matter of the contract; that its discretion was practically unlimited; that such a broad discretion includes the right to agree upon price, when to be paid, how and with what to be paid, whether with draft on the treasurer or by transfer of property, or, as in this case, by the granting of a special license; that there is no prohibition against the board granting licenses on public easements, but that it is consistent with the broad discretion granted them, and agrees with the rights of individuals, as well as the rights of the public, and is in accord with the spirit of the law, as well as the rulings of our courts; that this right applies incontestibly when the grant of a license is to the owner of the fee; further, that the record discloses that the conveyance of the right and easement specified in the contract, from the plaintiff in error to the defendant in error, was necessary to secure the public right thereto, and that this fact gives to the transaction a different character from that insisted on by the plaintiff in error." On the other hand, the distinguished ex-judge of the superior courts who appeared for Mr. Wright asserts the propositions that county authorities have no contractual powers, except such as are expressly conferred by law; that their powers are enumerated, and are limited by the enumeration; that

nowhere has any law, either general or special, ever given the board of county commissioners of Floyd county any power to make such a contract as that sued on; that the result of the contract is to create a relation in the nature of a partnership between the public and a private individual, and to grant to the latter, for purely private purposes, a use and an easement in a public bridge such as is not enjoyed by other individuals; that the use and easement would, by operation of universally known natural laws, inevitably and constantly tend to injure and destroy the bridge and to impair its usefulness for public travel, and thereby to create a public nuisance.

By the state Constitution (article 11, § 1, par. 1; Civ. Code 1895, § 5924) "each county shall be a body corporate, with such powers and limitations as may be prescribed by law"; and by article 6, § 19, par. 1 (Civ. Code 1895, § 5879), "the General Assembly shall have power to provide for the creation of county commissioners in such counties as may require them, and to define their duties." The Constitution of 1868 contained a similar provision as to county commissioners. It has been held, under these sections, that neither counties nor county commissioners possess any powers unless expressly conferred by, or fairly to be implied from, such statutes as may be passed in relation thereto. *Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270. It is therefore necessary to consider what statutes have been passed upon this subject. By act of December 13, 1871 (Laws Ga. 1871-72, p. 225), the board of county commissioners of Floyd county was established. By the fourth section (page 226) of this act it is provided: "That said board shall have exclusive jurisdiction, when sitting for county purposes, over the following subject-matters: In governing and controlling all property of the county, as they may deem expedient, according to law; \* \* \* in establishing, altering, and abolishing all roads, bridges, and ferries, in conformity to law." The fifth section of the same act confers upon them all the powers possessed by the justices of the inferior court prior to the adoption of the Constitution of 1868, so far as related to county matters; and this, by reference, gave them the jurisdiction "to appoint the places for the erection of public bridges, county ferries, turnpikes, and causeways, and to make suitable provision for their erection and repairs, by letting them out to the lowest bidder, hiring hands, or in any other way that may be for the public good and agreeable to law" (Code 1868, § 710; and see Pol. Code 1895, § 602); also "to sit at any time as a court for county purposes and for the exercise of any power they possess as a quasi corporation contradistinguished from their power as a court"; and also "to exercise such other powers as are granted by law or are indispensable to

their jurisdiction" (Code 1868, § 347; and see Pol. Code 1895, § 4240). At the time this contract was made the alternative road law was in effect in Floyd county, and therefore section 576, subds. 3, 4, of the Political Code of 1895, may be applicable, as follows: "They [referring to the county commissioners] may have said roads worked, improved, or repaired, by contracting for the same in such manner as they may deem fit, with private parties or corporations; provided, that if the work is done by contract, the contractors shall be required to employ the chain-gang, if established, and the labor of those who do not pay the commutation tax, and to pay for the same. They may employ or combine any or all of said three above-mentioned methods, or may use any other method or system that may be desired for accomplishing the work necessary to put and keep the public roads in good condition." It should be remembered, in this connection, that by Pol. Code 1895, § 5, the word "road" wherever it appears in a statute, includes all bridges thereon, unless the context requires a different construction.

These statutes manifestly purport to confer upon the county commissioners a jurisdiction, coupled with some considerable degree of discretion, over all road matters, including bridges, and the erection and maintenance thereof. *Dillon on Municipal Corporations* (section 445), taking up the contractual powers of counties, cities, towns, etc., in regard to those matters over which they are given jurisdiction by statute, asserts: "Public corporations may by their officers and properly authorized agents make contracts the same as individuals and other corporations, in matters that necessarily appertain to the corporation. Being artificial persons, they cannot contract in any other way." And, further (section 447): "The authority to enter into contracts necessary and proper to carry into effect their powers and discharge their duties is impliedly given to every such corporation." *Tiedeman on Municipal Corporations*, § 163, speaking on the same subject, says they "may, unless restricted by charter or state statute, enter into any contract which may be necessary to the execution of the powers and functions conferred. \* \* \* The general power to contract in furtherance of corporate purposes is inherent in all classes of corporations, both public and private. \* \* \* Municipal corporations have all the powers of ordinary persons in regard to the contracts they are authorized to make, except when specially restricted." We will not be unmindful, in this connection, that counties, although they are corporations, are not for many purposes to be considered as standing upon the same footing with ordinary municipal corporations, such as cities and towns (*Millwood v. DeKalb County*, 106 Ga. 743, 32 S. E. 577, and cases cited), yet we believe that the measure of their contractual



capacity, in relation to any subject-matter expressly conferred by statute, is not different from that of other public corporations. The fact that counties, which have had corporate entity thrust upon them by compulsory enactment, are not held to the same degree of liability for neglecting to perform their corporate duties as are those public corporations which have in a sense sought charters, with concurrent privileges and responsibilities, does not abridge the power of the former to execute, through contract or otherwise, the powers actually conferred, in as full and ample a manner as might the latter class of corporations under similar circumstances. We conclude, therefore, that the statements quoted above from the eminent text-writers may be relied upon as correctly declaring the contractual powers of counties in this state.

In *Justices v. Plank Road Co.*, 9 Ga. 485, our Supreme Court, speaking of the inferior court, which at that time was exercising the powers of the present county commissioners, said: "They are the agents of the county for many purposes. They are authorized by law to lay out and open roads. \* \* \* They are the supervisors and managers of the property of the county—its courthouse, jail, and public bridges, for example. They impose the county taxes, etc. These powers characterize them as agents; and for the purpose of their agency they are collectively a corporation with limited powers. The right to sue, etc., is incidental to their agency." In *Justices v. Smith*, 13 Ga. 504, it is said: "The justices of the inferior court are the agents and trustees for the control and management of various public interests in the county of which they are officers. Among these are the funds for the education of the poor. For the purposes of this agency, as this court has held in the case of *Justices v. Plank Road Company*, they are collectively, a corporation with limited powers. As such, it would seem a fair and legitimate inference that in managing these funds, which they are required by law to receive and disburse by their agents, they have authority to require a bond from any one, as a condition on which they intrust him, as their agent, with the management and disbursement of the fund; and also that as such agent, in their quasi corporate character, they have the right to bring suit upon such bond, in case of breach thereof." These early cases give recognition to the implied contractual power of the county authorities as to matters within their jurisdiction. In *Pennington v. Gammon*, 67 Ga. 456, the doctrine of implied powers is given even more explicit recognition. In that case the court held: "Any county may organize a chain gang, to be composed of convicts, who may be employed in working on the roads, streets, or other public works. The power to make provision for their safe-keeping and for their

constant and diligent employment was vested originally in the ordinaries, and is now vested, in some counties, in county commissioners. Such powers include the right to use those means and incur those expenses which may be reasonably necessary for their execution, not exceeding the constitutional limit. Hence county commissioners may incur a debt \* \* \* for the purchase of necessary tools or implements, not exceeding the limit set by the Constitution." In the opinion in that case the following language appears: "It is not contended that the amount to be borrowed exceeds the constitutional limit. But it is insisted that \$1,500 of this money is to be used in the purchase of a rock crusher and engine, and that no law has been passed authorizing such an increase of debt, and that no election has been held for that purpose. It is true that no law has been passed authorizing the commissioners to purchase the specific articles named; but there is a law authorizing the employment of the chain gang on the public roads, and the right to provide the necessary implements with which to do the work must of necessity follow. There is no law authorizing the purchase of spades, shovels, hoes, axes, or anything else needed, yet it would hardly be insisted that the right to purchase them did not exist. And if the commissioners should consider that the best and most economical method of working the public roads was to macadamize them, no legal reason has been given to us why they might not purchase such implements as would be needed and employ the chain gang in that way. We cannot see that the cost of the article to be purchased can affect the right to buy, so long as it does not exceed the limit of the amount they may have the power to levy, or the amount they are authorized to borrow to supply deficiencies in the revenues; and in this limitation lies the protection to the taxpayer." In *Carruth v. Wagener*, 114 Ga. 740, 40 S. E. 700, it was held that, under the legislative grant of authority to build a courthouse, the county commissioners might let a contract for the erection of the foundations only, "regardless of whether the county has or has not made a complete contract for the erection of the entire structure." Thus, step by step, we trace in our decisions recognition of the doctrine that, where the power is given to the county authorities to effect a given end, the power to contract for the means whereby the end is to be effected is implicit, and also that the details of such contracts, except so far as the law or public policy prescribes or prohibits some particular form, are left to their discretion. Therefore the county commissioners of Floyd county, being vested by statute with the jurisdiction of building and repairing bridges, and therefore with the implicit power to build them and repair them in such manner and under such form of contract as their discretion might

might be presented; but, as we construe it merely to give Wright the privilege to join his dam to the piers so long as the bridge is maintained, no such proposition is before us.

We cannot, in light of the record, hold that the contract is contrary to public policy, for that the erection of the dam would tend to injure, and impair the usefulness and safety of the bridge for public travel, because evidence was submitted on this issue, and the trial court found to the contrary. While we do not think that public policy would allow the county authorities to barter away the safety of the highway, still, in the nature of things, much must be left to the discretion of the local authorities in determining what will or what will not be safe. We hardly think that the mere fact that the public convenience might be slightly discommoded in times of freshets and unduly high water would be sufficient ground for declaring the contract void. The inconvenience must be substantial. Nor is the fact that the dam may cause it to be more expensive to maintain the bridge a reason for declaring the contract invalid. This feature relates to interest of the county in the bridge, as distinguished from that of the public; and as to such interest the county commissioners have the power to contract. This distinction is brought out in the case of *Justices v. Plank Road Co.*, 9 Ga. 486, as follows: "The easement in a public road is a property, in equity, belonging to the county at whose expense it is constructed. It is subject to use by the public at large; hence, as I before have said, it appertains to the public. Yet this is not inconsistent with the idea of an equitable interest or property in the county. The public use may be considered as a limitation upon the property. The interest which a county has in a public highway springs equitably out of the fact that that county, and not the whole public, have paid the costs of construction. The right to lay out and open the road is derived from the inferior court, acting under the Legislature. The easement is a legislative grant. The people of the county make the grant available by the outlay which is necessary to open the road; and, so long as the grant is unrevoked, the road—that is, the easement—is an interest or property in the county. The inferior courts are the depositories of this property, as well as any other. It is their duty to protect it, as much so as to protect the courthouse, and, if it is violated, they have the right, as the agents or trustees of the county, to go into a court of equity for redress."

On this particular phase of the question the case of *Hanbury v. Woodward Lumber Co.*, 98 Ga. 60, 28 S. E. 477, is squarely in point. Certain citizens residing in West End, Atlanta, attempted to enjoin the Woodward Lumber Company from laying, with the permission of the municipal authorities, a private railway track across a public street in

which the lumber company owned the fee; the contention being made that the track and the moving of cars thereon rendered the public use of the highway inconvenient and unsafe. The Supreme Court said: "To what extent the owner of the fee may appropriate to his own use those other incidental rights not conflicting with the public use is necessarily a matter resting primarily with the city authorities, and is referable to the broad discretionary powers conferred upon them in the conduct and management of the public ways. He may be permitted to lay gas and water pipes or drains under the roadway, and do many other acts for his own advantage, provided the use of the public is not impaired. Whether or not such uses could be enjoyed without prejudice to the public right is, as we have said, primarily a matter for the consideration of the city authorities, and, if they conceive that the proposed right of the abutting lot owner may be safely exercised without exposing to inconvenience or jeopardy the easement of the public, an injunction against the exercise of such right, at the suit of private citizens not owners of property abutting upon the portion of the street sought to be devoted to the particular private use, will not be granted. In respect to this matter the authorities represent the public, and their consent is a sufficient warrant for upholding the judgment that the entry of the owner of the fee was not per se wrongful. In the present case the parties sought to be enjoined were, the one a railroad company, the other a manufacturing company. They owned lots opposite each other and abutting on the street in question. The latter desired the construction of a spur track, so as to connect the two lots and thus give it connection with the other company's railroad. They each agreed to this, and the municipal authorities consented, by resolution declaring that the public would suffer no inconvenience from the construction of the proposed track. We think, inasmuch as the city authorities held only an easement to the extent of a right of way, that there was no abuse by them of their discretion in allowing the owners of the fee the uses of the street for the purposes above mentioned. It was a valuable right to the owner of the lot. Proper precautions were taken to protect the interests of the public, and there is no reason why he should have been deprived of that right. Of course, we cannot undertake to say that the proposed track may not hereafter, either because of the manner of its construction or the manner of its use, become a nuisance and subject to abatement as such. An increase in population or travel may bring about such a result. But under the present record we hold that in favor of the owner of the fee in the street the city authorities had the power to authorize a joint enjoyment of the property, and that their discretion was not abused when it was determined that the proposed

use by the owner of the fee was not inconsistent with the exercise by the public of its dominant right of way."

We have been led into this lengthy discussion of this case, not only by the able and earnest arguments which were presented pro and con, but also on account of the public character of the interesting questions involved; and, after considering the matter in its various phases, we hold that the contract is legal, and that the judgment rendered is correct.

Judgment, on the main bill of exceptions, affirmed; cross-bill dismissed.

(1 Ga. App. 611)

**MUTUAL LIFE INS. CO. v. STEGALL.**  
(No. 136.)

(Court of Appeals of Georgia. April 20, 1907.)

**1. INSURANCE—TERM AND DURATION OF RISK—LIFE POLICY.**

A petition brought to recover on a policy of life insurance, which shows, on its face and by its exhibits, that the policy was issued and bore date August 30, 1904, that the first premium was paid, that the condition of liability to pay the amount named in the policy was that annual premiums of a named amount should be paid in advance on August 30th in each year thereafter, that the insured did not accept the policy nor pay the first premium thereon until November 19, 1904, that no premium was thereafter paid, and that the insured died October 29, 1905, as against a general demurrer on that ground, sets out no cause of action.

**2. SAME.**

The contention that, under a policy such as above described, payment of the first premium and acceptance of the policy November 19, 1904, had the effect of continuing the policy in force for one year from that date, is unsound as a matter of law.

**3. SAME.**

A stipulation in a written application for a policy of life insurance to the effect that the contract to be issued thereunder shall not take effect until the first premium is paid is one for the benefit of the insurer; and when in response to such application the insurer accepts the same, and in due course issues a policy of which such application becomes a part, with conditions as above set out, and the insured afterwards accepts the policy and pays the first premium thereon, he must, in order to keep the policy in force, comply with its terms as to future payments of premiums.

(Syllabus by the Court.)

Error from City Court of Bainbridge; Harrell, Judge.

Action by Mrs. Claude Stegall against Mutual Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

James H. Gilbert and Pottle & Glessner, for plaintiff in error. A. E. Thornton and Russell & Hawes, for defendant in error.

**LITTLEJOHN, J.** The issues submitted for our consideration were raised by the refusal of the trial judge to sustain certain demurrers filed by the Mutual Life Insurance Company to a petition which Mrs. Claude Stegall filed in the city court of Bainbridge, seeking a recovery, in the aggregate

of \$5,000, on two policies of life insurance which the insurance company had theretofore issued on the life of her deceased husband, M. J. C. Stegall, and in each of which she was named as the sole beneficiary. There was a general demurrer that no cause of action was set out, and there were special demurrers to the alleged infirmities in particular paragraphs of the petition. As, however, we dispose of the case made by the petition on its merits, under the general demurrer, adversely to the contention of the plaintiff in the court below, it is not necessary that the grounds of special demurrer shall be considered or passed on. So far as it is necessary to determine the legal questions involved, the case made by the petition will appear in the following statement, which is compiled from the petition and the exhibits which were made a part thereof: On August 1, 1904, Martin J. Crawford Stegall made application to the Mutual Life Insurance Company of New York for the issuance of two policies on his life, one for \$3,000 and the other for \$2,000, containing, among other things, the clause: "Which [contract] I hereby agree to and accept, and which shall not take effect until the first premium shall have been paid during my continuance in good health and the policy shall have been signed by the secretary of the company and issued." On this application the policies were issued, duly executed, and bore date August 30, 1904. The body of each of the policies contains a promise to pay the plaintiff below, if living, etc., \$3,000 under one of said policies, \$2,000 under the other, upon acceptance of satisfactory proofs of the death of Martin J. Crawford Stegall "during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part hereof: The annual premium [stating the amount] shall be paid in advance on the delivery of this policy, and thereafter to the company at its head office in the city of New York on the 30th day of August in every year during the continuance of this contract. The receipt of the first payment of premium hereon is acknowledged." Among the provisions on the back of each policy is the following: "Notice. No person, except an executive officer of the company or its secretary at the head office in New York, has the power on behalf of the company to make, modify, or alter this contract, to extend the time for paying a premium, to bind the company by making any promise or by accepting any representation or information not contained in the application for this contract." Touching the payment of premiums on these policies, the petitioner alleges that "on November 19, 1904, petitioner's husband [M. J. C. Stegall, the insured] paid the premium on said policies to T. E. Morgan, defendant's agent, who received said application, by executing and delivering to said agent his two promis-

sory notes, both dated November 19, 1904 [for the stipulated yearly premiums], said Martin J. Crawford Stegall being at the time in good health, said notes paying the premiums on said policies for one year from the date of their execution and delivery," and that, "upon the execution and delivery of the said two notes, said policies of insurance were delivered to the said Martin J. Crawford Stegall, and from that date were effective." The petition alleges, further, that on October 29, 1905, "during the continuance of said policies," the plaintiff's husband, Martin J. Crawford Stegall, was shot and killed. The further allegations are made that proofs of death were duly made and that the insurance company denied its liability and refused to pay.

In support of the judgment rendered in the court below, counsel for the defendant in error insist, as a matter of law, that notwithstanding the policies of insurance bear date August 30, 1904, and provide that the annual premium to continue the policies in force shall be paid on August 30th in each year, yet, as the policies provide that they shall not become effective until the payment of the first premium and the delivery of the policies thereunder, it follows that, inasmuch as the premiums were not paid on the policies nor those writings delivered until November 19, 1904, the policies became effective on that day; that the date in the policies, by consent of parties, was changed to the day of payment and delivery of the policies, and, the premiums paying for insurance by the year, such payment held the policies in force until November 19, 1905, and, the insured having died on October 29, 1905, the beneficiary, by her petition, shows a right of recovery. We find one fatal defect in this line of reasoning. It is not in accord with the letter or the spirit of the policies. To maintain the right of recovery under the allegations of the petition, life insurance must primarily be treated as a subject of bargain and sale. As such it is frequently referred to. Yet it is not a chattel. It is not merchandise. Its object bears no relation to ordinary instances of bargain and sale, where the purchaser parts with his money for its equivalent in a material thing of intrinsic value to him; and, if it be a subject of bargain and sale at all, it is only so in a qualified and limited sense. For ourselves we prefer to treat life insurance from the standpoint of our Civil Code of 1895 (section 2114), as a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. As a contract, all of its material terms and conditions must be observed and complied with, either to create a right or a liability. Not only is it a contract, but, to be a valid one, it must be in writing. Civ. Code 1895, §§ 2117, 2089. Hence the terms and conditions of it are fixed and easily ascertainable. A policy of life insur-

ance (in this case at least) is not the whole contract. The insured made an application in writing for the two policies, which were issued. That and the policies issued constituted the contract. The contract on which the plaintiff sues, and only on the terms of which she, in any event, can recover, contains a broad stipulation in the shape of a notice that only an executive officer or its secretary at its head office in New York has the power to modify or alter the contract, or to extend the time of paying the premium, or to bind the company by making any promises. No allegation is made that any change of the kind indicated was had. Consequently the rights of the parties are to be fixed by the original written contract. This (and both parties to the suit are equally bound by it) makes a condition precedent to the liability to pay on the death of the insured that the annual premiums shall be paid in advance on delivery of the policy, and thereafter on the 30th day of August in every year during the continuance of the contract. Certainly the contemplation of the parties was that the policies for which the insured applied should have a date from which the insurance should commence. None was fixed in the application, except that the company was asked to issue the policies and the insured agreed to accept them when issued. The application was made on August 1st. Thirty days afterwards the policies were issued in New York, and bore date August 30, 1904, and carried insurance on the life of Stegall from that date, thus making the year of insurance end on August 30, 1905. It is true that the insured did not receive the policies until November 19, 1904, and it is equally true that the company was not bound, under the terms of the contract, until he had paid the premium and received the policies. He asked for the insurance on August 1st, and agreed to accept the policies and pay the premiums when issued. The company accepted his application and furnished the contracts on August 30th. He did not then receive them, but let them lie dormant until November 19th. He then paid for them, and accepted the policies as they stood, carrying insurance back from August 30th, and stipulating that, to keep the policies in force, the next annual premium must be paid August 30, 1905. He asked for no change. None was made. He knew what he received. His beneficiary stands to-day on the contracts containing these stipulations. Nothing can be clearer to our minds than that, on failure to pay the annual premiums provided for on August 30, 1905, the policies lapsed, and were not in force at the time of the death of the insured, October 29, 1905. Under our positive law in relation to life insurance, a policy runs from midday of the date of the policy, and the time must be estimated accordingly if a policy is limited to a specified number of years. Civ. Code 1895, § 2119.

We were referred to a decision in the case

of *Methvin v. Fidelity Mutual Life Insurance Association* (Cal.) 58 Pac. 387, as an authority to sustain the judgment of the court below. That decision, however, was not final; a rehearing being granted, on which the three justices who in department had rendered the decision joined with the other members of the court in bank in a unanimous decision which is in full accord with what we now decide. 129 Cal. 251, 61 Pac. 1112. In that case the policy was dated July 30, 1895, and called for quarterly premiums beginning on that date, and provided that it should not be binding until delivered and the first premium paid, and on failure to pay any premium when due the policy should be "ipso facto nul and void." The policy was not delivered nor the first premium paid until September 3d. The insured died after October 30, 1895, without paying the second quarterly premium. The holding of the Supreme Court of California is that the policy became void prior to the death of the insured, since the second quarterly premium became due October 30, 1895.

The court erred in overruling the general demurrer.

Judgment reversed.

Judge LITTLEJOHN, of the Southwestern circuit, Judge ROAN, of the Stone Mountain circuit, and Judge HAMMOND, of the Augusta circuit, were designated to preside instead of the judges of this court, who were disqualified.

(1 Ga. App. 766)

**SOUTHERN RY. CO. v. ROSENHEIM & SONS. (No. 301.)**

(Court of Appeals of Georgia. May 9, 1907.)

**1. CARRIERS—LOSS OF BAGGAGE—ACTION—DECLARATION.**

A declaration against a railway company, merely alleging the delivery of certain trunks and their contents into its custody and a failure to redeliver, but not alleging that the trunks were to be transported or carried as baggage or otherwise, does not set out a cause of action against the railway company as a carrier of baggage, but only as a warehouseman or a depository.

**2. SAME—LOSS BY FIRE.**

One who, having been a passenger, arrives with his baggage at destination, surrenders his checks, opens up the trunks in the baggage room, and afterwards leaves the trunks in the baggage room by permission of the baggage clerk, upon a statement that he will be going off again next day and will then recheck them, cannot hold the railway company responsible as a carrier of baggage, for the destruction of the trunks by fire during the night.

(a) The transaction, if not merely a personal one between the owner of the trunks and the baggage clerk, charges the railway company with no higher responsibility than that of a depository.

(b) This is so notwithstanding the owner of the trunks may have been the holder of a mileage book, good for transportation on the railway company's trains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1543.]

(Syllabus by the Court.)

58 S.E.—6

Error from City Court of Savannah; Norwood, Judge.

Action by Rosenheim & Sons against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Osborne & Lawrence and Edmund H. Abrahams, for plaintiff in error. Garrard & Mel-drim, for defendants in error.

POWELL, J. 1. Rosenheim & Sons sued the Southern Railway Company and recovered a verdict. The plaintiffs' declaration, omitting merely formal parts, is as follows: "(1) That the Southern Railway is a railroad corporation, having an office and agent for the transaction of its usual and customary business in the city of Savannah, county of Chatham, and state of Georgia. (2) That on the 6th day of February, 1905, the said defendant then was and still is a common carrier of passengers for hire, and as such common carrier of passengers for hire had, on the 7th day of February, 1905, its depot at Waynesville, in the state of North Carolina. (3) That on said 7th day of February, 1905, at Waynesville, in the state of North Carolina, in consideration that the plaintiffs would deliver to the defendant certain goods of the plaintiffs (more fully set out in an inventory hereunto annexed, marked 'Exhibit A') to be by the defendant safely and securely kept and redelivered to the plaintiffs on request, the said defendant promised the plaintiffs safely and securely to keep the said goods and to redeliver the same to the plaintiffs on request, and the plaintiffs delivered to the defendant and the defendant received the said goods for the purpose and on the terms aforesaid, and the plaintiffs afterwards, and within a reasonable time in that behalf, requested the defendant to redeliver the same to the plaintiffs, and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the said goods safely and securely kept and redelivered by the defendant to the plaintiffs as aforesaid; yet the defendant did not safely and securely keep the same and redeliver the same to the plaintiffs as aforesaid, whereby the said goods were wholly lost to the plaintiffs, to the damage of the plaintiffs in the sum of \$491.02, besides interest." Wherefore judgment is prayed, etc. The plaintiffs contend that this declaration sets out a case of liability against the defendant for a breach of its duty as a common carrier by the loss of a passenger's baggage, and insist that it is apt in form and substance for that purpose. The able and experienced attorney who appeared for the plaintiffs in this court also claims that the declaration is substantially in the form prescribed by Chitty. We think it plain that it sets out no such cause of action. It does not allege that the goods were delivered for the purpose of being carried by the defendant; and this is an es-

stantial allegation of Chitty's form in such actions. Chitty on Pleadings, \*356. The suit, as we are constrained to view the declaration, is merely for a breach of a contract of bailment.

2. The evidence was likewise insufficient to sustain a verdict holding defendant liable as for the loss of passenger's baggage. Adams was a traveling salesman for Rosenheim & Sons. He lived at Waynesville, N. C. He arrived there on the defendant's train, Sunday afternoon, February 5, 1905, and with him came his trunks as baggage. The next morning he surrendered the checks, took charge of the trunks, opened them up in the depot, and sold a customer a bill of goods from the samples contained therein. He did not take the trunks away, but left them in the storage room of the depot, telling the agent, who also performed the duties of baggage clerk, that he would be going off again next morning to Addie, or to some other place west, and that he would leave them in the storage room over night and check them the next morning. The train next morning was due at 9:15 o'clock. That night the depot was burned, and the trunks and their contents were thereby destroyed. Adams had a mileage book, good on the Southern Railway. The trunks and their contents belonged to Rosenheim & Sons. The court charged the jury that under these circumstances, if the agent consented to the trunks remaining in the depot overnight, the company would be liable, unless the fire was occasioned by act of God. At common law, as well as by the law of this state, no excuse avails a carrier for the loss of the baggage of one who sustains to it the relation of passenger, except act of God, irresistible accident, or destruction by public enemy. Civ. Code 1895, § 2280; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460. A similar rule prevails in North Carolina. See Revisal 1905, § 2624. For baggage in possession of the carrier, and not within the protection of the above rule, the liability of the carrier is that of a depository for hire (warehouseman), with the duty of only ordinary diligence, or that of a naked depository, with responsibility attaching only in a case of gross negligence, according to the circumstances of the case. Georgia R. Co. v. Thompson, 86 Ga. 328, 12 S. E. 640. See, also, Civ. Code 1895, §§ 2921, 2922, 2923. We presume that the same rule prevails in North Carolina, as it is a matter of general law. If there has been no delivery to the carrier, but his agent, without authority, agrees to take care of the baggage as a matter of accommodation, the agent pro hac is the agent of the owner of the baggage, and not of the carrier, and no responsibility against the latter attaches to the transaction. Georgia R. Co. v. Thompson, supra. A baggage clerk has implied authority to receive baggage on behalf of the carrier only for a reasonable time prior to the departure of the train on which it is to be carried. Hutch.

Carr. (3d Ed.) § 1256; Lake Shore Ry. Co. v. Foster, 104 Ind. 315, 4 N. E. 20, 54 Am. Rep. 319.

From the instructions to the jury, appearing in the record, it is manifest that the trial court entertained the view that because Adams had a mileage book, good on the defendant's lines of railway, he was entitled to the rights of a passenger as to these trunks and their contents. Let us see if any such relation was sustained. "The owner of the property must, of course, stand in relation of passenger to the carrier, in order to fix upon him liability as a carrier of baggage. The carriage of the baggage is ex vi termini incidental to the carriage of the owner as a passenger." Hutch. Carr. (3d Ed.) § 1274; Atlanta Terminal Co. v. American Baggage Co., 125 Ga. 677, 54 S. E. 711. "The passenger has the right to deliver his baggage to the carrier such time before the starting of the train upon which he intends to take passage as may be reasonably necessary for obtaining a ticket and checking the baggage. From the time delivery is thus made, the carrier will be responsible for its safety as a common carrier. If, however, an earlier delivery to the carrier be made, his custody will be that of a warehouseman only, unless he has consented to hold it subject to his common-law liability. But the question as to when the carrier's liability as such with respect to baggage will begin will frequently depend upon his custom or manner of doing business at the particular station where it is received, and in order to impose upon the carrier the liability of an insurer of the baggage, it must be delivered to and accepted by an agent who is authorized to receive it, or delivery must be made under such circumstances that an acceptance by the carrier will be implied." Hutch. Carr. (3d Ed.) § 1281. The mere fact that one has a ticket, or that he has paid the price of transportation, or that he has made a contract of carriage, does not render him in all cases a passenger. He must have submitted himself to the carrier's protection and have imposed upon himself an obligation to the carrier for performance of his own side of the contract of carriage. "But so long as the party merely entertains the wish or intention, no obligation has arisen on either side, and he is at liberty to change that intention at any moment." Hutch. Carr. (3d Ed.) § 1015; Webster v. Fitzburg R. Co., 161 Mass. 298, 37 N. E. 155, 24 L. R. A. 521, and cases cited in the footnote; Central R. Co. v. Perry, 58 Ga. 461. In the Webster Case the person alleged to be a passenger had a 10-trip ticket, which establishes a similarity to this case, wherein Adams had a mileage book.

We think it manifest that Adams did not, under the facts stated, place or intend to place himself under the obligations of a passenger at the time he left the baggage in the depot. His intention to do so on the morrow did not place the carrier under the immediate

duty. He did not ask for a check for his baggage then, although the North Carolina statute prescribes that "a check shall be affixed to every parcel of baggage when taken for transportation by the agent of a railroad company, and a duplicate thereof given to the passenger." Revisal 1905, § 2623. If the agent had checked the baggage, the carrier would have had a lien upon it, not only for the freight thereon, but also for the owner's transportation to the point to which it was checked. Adams was not in a position at that time to make a definite contract on this subject; for he had not then decided whether he was going to Addie, or to some other place, on the next morning. It is true he had a mileage book, and that he was in a position to claim transportation for himself on the company's trains, and to have his baggage placed in the company's responsibility a reasonable time in advance of the departure of the train on which he should elect to travel; but the mere possession of this mileage book did not hold him in the relation of a passenger, wherever he might be, but only at such times and under such circumstances as it was reasonable for the relation to be regarded as existing. What a mileage book is falls within common knowledge. It may be that prior to the enactment of our anti-pass law the judiciary of this state did not have sufficient personal information as to mileage books to take accurate judicial cognizance of them; but now the judges share with the general public this common knowledge. A mileage book is a contract of carriage, having attached thereto coupons, one for every mile; each coupon being in two parts, one part for the passenger's fare, the other for his baggage. When the baggage is checked, the baggage portion of sufficient coupons, according to the distance, is torn off; and no more baggage can be checked upon the mileage book until the remainder of these coupons, representing the carriage of the passenger, has been detached. This explains why Adams naturally did not wish to check his baggage before he definitely decided where he was going. It would have cost him something to have changed his mind or to have abandoned the trip. It was not bad business judgment for him, under the circumstances, to leave the trunks in the care of the depot agent overnight at his own risk, instead of placing them in the company's care and paying for the resulting protection by a surrender of baggage coupons out of his mileage book; but, having taken this risk, neither he nor his employers, who actually owned the trunks and their contents, but who must claim through him, can now charge the railway company with a liability which he was unwilling to pay them to assume. Applying the facts as they appear in the record to the law as we find it, we are constrained to hold that the transaction was either a personal one between Adams and the station agent, or, if there was enough in the circum-

stances to make the agent's custody that of the railway company, the latter held the trunks as a mere naked depository; and in neither event is the railway company liable for the loss, no gross negligence appearing. Judgment reversed.

(1 Ga. App. 821.)

**GLENN v. WESTERN UNION TELEGRAPH CO. (No. 67.)**

(Court of Appeals of Georgia. March 2, 1907.)

**1. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—ACTION BY WIFE—DAMAGES.**

As a wife cannot maintain an action to recover the earnings of her husband, it follows that she cannot recover damages for wages or salary he might have earned but for a defendant's tort or negligence. Consequently an allegation that "by reason of defendant's negligence aforesaid she was specially injured and damaged \* \* \* the amount of his salary for 12½ months as a member of the police force, which her husband would have received and contributed to the support of his family \* \* \* but for the defendant's negligence aforesaid," was properly stricken on demurrer.

**2. DAMAGES—MENTAL ANGUISH.**

Under the decisions in *Chapman v. Western Union Telegraph Company*, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, 88 Ga. 763, and *Giddens v. Western Union Telegraph Company*, 35 S. E. 638, 111 Ga. 824, there can be no recovery in this state for mere mental pain and anguish; and this court is bound by these decisions. This court, however, does not, on principle, approve the doctrine therein, but yields to these decisions only because by law it is obliged so to do, and respectfully suggests legislation upon this subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

**3. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—NOMINAL DAMAGES.**

It was error to sustain a general demurrer to, and dismiss, a petition which set forth a breach of contract implied from public duty on the part of defendant, and which, if proved, would entitle the plaintiff to recover nominal damages, if no more.

(Syllabus by the Court.)

Error from City Court of Macon; Hodges, Judge.

Action by Mattie J. Glenn against the Western Union Telegraph Company. Judgment for defendant. Plaintiff brings error. Reversed.

Nottingham & McClellan, for plaintiff in error. Joseph H. Hall and Warren Roberts, for defendant in error.

RUSSELL, J. The plaintiff in error filed the following petition:

"Mattie J. Glenn, hereinafter designated as 'plaintiff,' against the Western Union Telegraph Company, hereinafter designated as 'defendant,' brings this complaint, and to this honorable court respectfully sheweth as follows, to wit:

"(1) Defendant is a corporation engaged in the operation of a system of telegraph lines through various sections of this country, embracing, among other fields covered, the territory in, through, and from the cities of Macon, state of Georgia, to Memphis, state

of Tennessee, and was such corporation and so engaged on the occasion and dates hereinafter named.

"(2) The business of defendant as it so was on the dates hereinafter specified is the immediate transmission and delivery of intelligence from point to point on its various lines by electricity; said defendant holding itself out to the public as undertaking, for hire at such rates and charges as it fixed, to promptly transmit and deliver such messages as may be delivered to it.

"(3) Defendant is and was, on dates and occasions hereinafter named, conducting its said business in said county of Bibb, state of Georgia, aforesaid, and has, and on said dates and occasions had, in said state and county an agent, an agency, and a place of business.

"(4) Defendant has injured and damaged plaintiff in the full sum and amount of \$3,000, in manner and form and by reason of facts hereinafter set forth, for that:

"(5) For many years prior to the 18th day of July, in the year 1903, plaintiff, together with her husband, R. E. Glenn, her children, and her mother, was a resident citizen of the city of Macon aforesaid, where her said family lived happily, being lovingly provided for by her said husband, his only source of revenue being his position as a member of the police force of said city, at a monthly salary of \$70; said income being the only means of living possessed by said family.

"(6) On said last-named date her said husband, in a remarkable and unusual spirit of anger, left his home and family; and for a period of about nine months remained so absented.

"(7) Two days after her said husband's departure, plaintiff received through defendant, by its messenger boy, a telegram from her husband, of which the following is a copy: 'Memphis, Tenn., July 20, 1903. Mrs. R. E. Glenn, 202 Cole St., Macon, Ga. Have just gotten right see mayor about job, answer at my expense care Western Union Telegraph Co. R. E. Glenn. 2:40 p. m.'

"(8) On the envelope inclosing said message was written by defendant's agent in said Macon, Ga., these words: 'Please send reply by bearer.'

"(9) Plaintiff then and there immediately penned the following reply to her husband's said telegram: 'Macon, Ga. July 20, 1903. R. E. Glenn, care Western Union Telegraph Co., Memphis, Tenn. Job all right. Moseley just left and told me so. Been in bed two days. Thank God you are coming. Hun.'

"(10) Plaintiff, having ascertained that her said husband's said position on the police force was still open for him, wrote the above message, as a reply to said message received from him, gave it to the bearing messenger boy, as instructed, to be delivered to the office and agent of defendant in said city of Macon, for transmission to her said husband.

"(11) Plaintiff confidently expected her said

husband to immediately return home upon receipt of her said message answering his; but as the days wore on, and after her husband, as she has since learned, had left Memphis in despair of any reconciliation with her, and hopeless of recovering his said position on the police force, to her consternation and horror she discovered that defendant had negligently failed to transmit her said message within a reasonable time, and in time to reach her said husband while he was yet in the city of Memphis, and in fact had utterly failed to transmit, or even start, said message from said Macon office.

"(12) Long thereafter, some nine months, plaintiff, after having vainly inquired by letters, telegrams, and otherwise, for the whereabouts of her said husband, found that he was in Ft. Worth, Tex., where, in the month of March, 1904, she was enabled to reach him with a letter.

"(13) As soon as her said husband received her letter, and as soon as he could recover from an illness that was then upon him, he promptly returned to his home and family in the said city of Macon, and in a few months thereafter resumed his position on the police force, as aforesaid.

"(14) Had defendant received her said message he would have promptly returned to his home, family, and position.

"(15) After her husband's final return, plaintiff learned for the first time the exact condition of affairs which had for so long cruelly separated her husband from his home and family; learned, and here charges, that for several days after sending his said message to her, to wit, from Monday, July 20, 1903, to the Thursday following, her said husband had literally haunted the office and agency of defendant in the said city of Memphis, visiting same several times day and night, vainly inquiring for an answer to his said message, for which he had prepaid the charges, and finally, in despair of both reconciliation with her and recovering his position in said city of Macon, had gone to other parts of the country in search of work.

"(16) Plaintiff here charges defendant with negligence in failing to transmit her said message to her husband, and charges that said negligence was the proximate cause of depriving her of the companionship, protection, and support which her said husband afforded her and her family when with them.

"(17) Plaintiff charges that the negligence of defendant aforesaid was the direct and proximate cause of her husband's failing to return to his home and family, and his failing to have and hold his said position on the police force of Macon, from the said 20th day of July, 1903, to about the first part of August, 1904, when he was restored to his said position.

"(18) Plaintiff shows that the conduct of defendant, in failing to transmit her said message, which was delivered to defendant about 3 p. m. on the said 20th day of July,



1903, was attended with aggravating circumstances, for which she asks exemplary damages, in addition to the general and special damages she is entitled to recover, under the law and facts.

"(19) Plaintiff shows that the circumstances show that defendant was abundantly put upon notice of the purpose and importance of her message, both to her husband and herself, and submits, as part of the facts bringing home said notice to defendant, the prepayment by her husband of the charge of transmitting her said answer, his information to defendant's agent at Memphis at the time of its importance, the message to her on envelope as aforesaid, and the very wording of her message, as well as the wording of both her husband's and her message.

"(20) Plaintiff shows that because of the negligent conduct of defendant she was forced to endure all the pain and humiliation of an enforced separation from her husband for the long period of time aforesaid, was forced to endure the hardships incident to the withdrawal of his support and his protection of his family, and to endure many other painful things necessarily incident to such a condition of affairs.

"(21) By reason of this absence of her husband, brought about by defendant's negligence as aforesaid, plaintiff was forced to work and struggle to furnish to herself and family that provision and maintenance always theretofore afforded by her husband. Plaintiff, being unused to work of the character she was forced to resort to, in her distressing condition necessarily suffered great humiliation from the bare fact of the necessity.

"(22) In the effort to properly provide for her children during said absence of their father, she was forced to live for a time separate and apart from them, and was thus deprived, not only of the presence, companionship, and comfort of her husband, but of that of her children as well.

"(23) The negligent conduct of defendant aforesaid placed plaintiff in the false and humiliating attitude of a deserted wife, and brought upon her the usual suspicion and unkind things inseparably incident to so unfortunate a condition.

"(24) During said absence of her husband, by reason of defendant's negligence aforesaid, plaintiff was forced to give up her home, in her efforts to provide for her family without the necessary assistance of her husband.

"(25) Plaintiff submits that by reason of defendant's negligence aforesaid she was specially injured and damaged in the sum of \$375, the same being the amount of his salary for 12½ months, as a member of the police force, which her husband would have received and contributed to the support of his family, from July 20, 1903, to about August 1, 1904, but for the defendant's negligence aforesaid.

"(26) Plaintiff cannot undertake to describe the mental anguish and suffering endured by her during the said exile of her husband, brought about by defendant's negligence aforesaid.

"(27) Wherefore plaintiff says that defendant has injured and damaged her in the sum of \$3,000, for which she prays the judgment of the court, and to that end prays process requiring defendant to appear at the next term of this court to answer this complaint."

The defendant company demurred as follows:

"(1) Said petition sets forth no cause of action against this defendant. The damages claimed do not flow from, nor are they immediately connected with, any act of negligence alleged on the part of this defendant.

"(2) Defendant demurs specially to the twenty-fifth paragraph of said petition, in that it sets forth no cause of action against this defendant, for the reason that the damages therein claimed were not suffered by the plaintiff, but by the plaintiff's husband."

Upon hearing the demurrer, the judge of the city court sustained the same and dismissed the case, with judgment for costs. To this judgment the plaintiff in error, by her bill of exceptions, excepts, and assigns error in that the court erred in not overruling the general demurrer, in not overruling the demurrer setting forth that the alleged damage did not flow from and was not connected with any alleged act of negligence of the defendant, in not overruling the demurrer to the twenty-fifth paragraph of the petition, and in dismissing plaintiff's case.

We think that the court properly sustained the demurrer to the twenty-fifth paragraph of the plaintiff's petition; for it is clear that the damage therein alleged was not sustained by her. She had no interest in the contract mentioned in that paragraph, and was not entitled to maintain an action for it. The salary of her husband as a member of the police force was due and payable to him; and as the obligation to support wife and family is upon the husband, and not upon the wife, if it be true that the plaintiff and her family were deprived of support, the right of action therefor would be in her husband only. But we do not think that all of the damages alleged are so remote as that the general demurrer reaches all of the paragraphs of plaintiff's petition. We are quite sure that the court should not have dismissed the petition upon the ground that it set forth no cause of action, because the allegations of the petition showed a breach of contract by the defendant which entitled plaintiff to recover at least nominal damages. Civ. Code 1895, § 3801. This being true, the cause should not have been dismissed. The Supreme Court has frequently refused to reverse a judgment denying a new trial simply to allow plaintiff an opportunity to recover

nominal damages; but such a rule has never been applied to the grant of a nonsuit, where the plaintiff was entitled to recover nominal damages. In *Howard v. Dayton Coal & Iron Co.*, 94 Ga. 416, 20 S. E. 336, it was held that, "the evidence showing that the plaintiff was probably entitled to recover at least nominal damages to vindicate his right, it was error to grant a nonsuit." In this respect the same principle is applicable to the dismissal of an action on demurrer as that applied where a nonsuit has been awarded.

A declaration against a telegraph company, which alleges that the message delivered to the company for transmission was never transmitted, may be amended by striking allegations of damage which are too remote for recovery, and by inserting any new matter amplifying the plaintiff's allegations as to defendant's breach of contract or public duty; and if the petition, after being thus amended, is consistent, and sets forth a cause of action (either as to breach of contract or breach of public duty), such a petition, subject to such amendment, should not be dismissed on general demurrer, though most of the paragraphs of this plaintiff's petition would be subject to be stricken on special demurrer thereto, under the ruling in *Chapman v. W. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183. The suit in that case was brought to recover damages for mental suffering caused by the company's failure to deliver a message to the addressee. There was also a count for the statutory penalty. The plaintiff obtained a verdict for the penalty, but a demurrer to the counts for special damage, arising from mental pain and anguish suffered by the plaintiff, *Chapman*, was sustained; and this judgment was affirmed by our Supreme Court. The effect of this decision is to relieve a telegraph company, no matter how flagrant its neglect of duty, no matter how ruthless its violation of its contract, and no matter how harrowing or aggravating may be the results, from any liability whatever, unless there be a money loss—an injury to the person, reputation, or property of the injured party. We are bound by the decision in the *Chapman Case* as precedent, but we are in no sympathy with the principle upon which it is based or the reasoning by which it is sustained. To our minds it is monstrous that you can recover damages if you sustain loss on your car load of oxen by reason of unreasonable delay or failure to deliver a message relating to this, your property, but if you are summoned to the deathbed of your mother (whose dying blessing you would not exchange for all the cattle upon a thousand hills), and a telegraph company sees fit not to send or deliver the message which might have brought you to her side, you are completely helpless. The decision in the *Chapman Case* is too ultra material for even this material age, in which the acquisition of

wealth seems well-nigh the only yardstick by which individual achievement is measured. It is not only in conflict with a long line of authorities, eminently respectable, and which are supported by consideration of the most mature legal reasons, but it is at variance with sound public policy.

In our opinion, mental pain and anguish should afford good basis for an action for damages, and the jury can safely be trusted to measure the amount. It is useless for us to cite the (to our mind) unanswerable argument afforded by the decisions of the courts of last resort of our sister states, but we are impressed with the necessity for legislative inquiry into this matter. We hope such definite legislative action will be taken at an early date as will entitle a citizen of this state to recover (as in other states) for mental suffering, as well as for pecuniary loss. Whether the default as to the message causes pecuniary loss or mental anguish, a party entitled to sue must be the real party in interest, and must be either a party to the contract or a beneficiary named therein. He may be a party to the contract by being either the sender whose name is signed to the message, or the principal who paid for the message, or by whose order the message was sent; for very frequently the signer of a message is a mere agent or messenger, who is not damaged and cannot recover damages. It is, of course, too well established for discussion that, before there can be a recovery, the telegraph company must have notice that the particular result alleged as the basis of the claim was to be apprehended from delay in transmission or failure to deliver and that there should be notice, also, of the beneficial interest of the particular person who claims compensation for suffering. The purposes for which telegraph companies are created cannot be ignored. Where disappointment, sorrow, and anguish are the natural result of negligence, they must be held to have been contemplated by a telegraph company when its agent received the message and agreed for a stipulated compensation to promptly transmit and cause the same to be delivered. "Otherwise, in a large class of cases most grievous wrongs may be inflicted in matters as vitally affecting the welfare of individuals as in other matters to which a pecuniary value, a market price, can be fixed; and this in disregard of a duty voluntarily assumed to the public, to secure the due performance of which many privileges, not possessed by persons generally, are conferred by the state upon the offending party." *Stuart v. W. U. Tel. Co.*, 66 Tex. 584, 18 S. W. 352, 59 Am. Rep. 623. "Telegraph companies exercise and enjoy special franchises and privileges under the law. The very purpose of their organization is to furnish for compensation the means of rapid and prompt communication. Its use is expensive, and is rarely resorted to except in matters of importance to the par-

ties. Hence the resort to this mode of transmitting information should of itself be held sufficient notice to the company's agents that, as between the sender and the party to whom sent, the message is deemed to be of some importance, unless the contrary is made known by strict information or strong implication, as time is the usual consideration that prompts parties to the use of the wire." *So Relle v. W. U. Tel. Co.*, 55 Tex. 313, 40 Am. Rep. 805. "A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English judge: 'A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.'"

Were it not for the decisions in the *Chapman* and *Giddens* Cases, we should unhesitatingly hold that injury to the feelings resulting from mental suffering and anguish constitute ground for general damages, recoverable under a general averment of damage; and though this doctrine of mental anguish in telegraph cases is of comparatively recent origin (having heretofore been deemed contrary to the principles of common law), it must be borne in mind that it must possess inherent merit, for the reason that it has made constant progress, in opposition to the preconceived ideas of courts and jurists. To our minds there is no good reason why mental suffering should be differently treated from physical pain. Indeed, in cases of physical injury the mental suffering is taken into view. Why should it be disregarded because it does not originate from a physical injury or is entirely disconnected from it? As remarked by Justice Lumpkin in the *Chapman* Case: "On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical." It is interesting to note how the doctrine, first announced in the cause celebre of *So Relle v. Telegraph Co.*, supra, of recovery of damages for mental anguish, has extended by its acceptance by courts of the greatest erudition. The doctrine has been followed in Texas in more than 50 cases; and in Tennessee, Alabama, Kentucky, Iowa, Louisiana, Nevada, North Carolina, South Carolina, and

Washington, so far as our investigation has gone, it has been expressly approved and followed. And while there has been no decision upon the question in New York, so far as telegraph companies are concerned, the Court of Appeals of New York, in the learned opinion in *Gillespie v. Railroad Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503, unequivocally affirms the principle that a plaintiff can recover for purely mental suffering, without any physical pain whatever, resulting from breach of public duty by a common carrier; and railroad and telegraph companies (considered as corporations organized for public purposes and fixed for a public use) are essentially similar in nature. It has not been decided in Georgia what a telegraph company is. Three different opinions were held by the three members of the Supreme Court in *W. U. Tel. Co. v. Fountaine*, 58 Ga. 438, 439; but whether a telegraph company be a common carrier (as held by Judge Jackson), a bailee (as held by Chief Justice Warner), or a corporation sui generis engaged in taking and delivering messages, "receiving orders for work and labor and executing them" (as held by Judge Bleckley), the nature and importance of its business with the public, in our opinion, demands that such a corporation should, by appropriate legislation, be required to answer for mental suffering, as well as for pecuniary loss, caused by and due to the acts or omissions of its servants and agents.

The decision in the *Chapman* Case was not only rendered at a time when a statutory penalty (discussed in the opinion) was of force, but it is distinguishable from the present case in several other respects, which are adverted to therein and which doubtless affected the conclusion reached. The plaintiff in this case was the sender of the message, while *Chapman* was the party to whom the message was sent; and, in discussing the various decisions upon the subject of recompense for mental anguish, Justice Samuel Lumpkin mentions, as one of the elements of difficulty in determining that case, "whether the person to whom the message is sent, as well as the sender, can recover." 88 Ga. 765, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183. And again, still discussing the questions of difficulty (p. 766 of 88 Ga., page 901 of 15 S. E.), he says: "Some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation." Again, it was not held in the *Chapman* Case that a plaintiff could not recover nominal damages, but only that the plaintiff in that case could not recover them, for the express reason stated, to wit, that to give nominal damages necessarily denies any further recovery, and in that case the plaintiff already had a verdict for the penalty. And further on it is held, in express terms, that a plaintiff in such a case as this, while she cannot recover for wounded feel-

ings and mental anguish, can recover nominal damages. To quote from the opinion (page 775 of 88 Ga., page 904 of 15 S. E.): "It seems there is no public policy to be subserved by giving damages for mental suffering as a general rule, and the law does not allow it. But it is urged that the public occupation of telegraph companies creates between them and the public a special relation, in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is that in the exercise of a public employment they undertake for hire to serve the feelings of their customers, and therefore ought to pay for negligent nonperformance or misperformance of this peculiar function. This reasoning is unanswerable in so far as it proves a right of action to arise out of the breach of duty." This last sentence unquestionably sustains our view with regard to the error of dismissing the plaintiff's petition in response to the general demurrer. The judge then proceeds to say that the penalty act of 1887 gives a conventional redress of some money value in lieu of mere nominal liability, thus again inferentially referring to one of the considerations which had influenced the decision in that case, to wit, that the plaintiff could not sue at once for the penalty and for nominal damages, as the nominal damages were included in the penalty and the plaintiff benefited thereby.

Unquestionably in this case, according to the allegations of the petition, the telegraph company, by receiving the dispatch, owed the plaintiff a duty the breach of which will support an action for damages. *Langley v. W. U. Tel. Co.*, 88 Ga. 778, 15 S. E. 291. The damages recoverable would be controlled by the law of tort; the contract of the company (implied by acceptance of message) being merely inducement, creating the relation between sender and the company as carrier of the message, and fixing a public duty of the company. Telegraph companies pursue a public employment, and their public duty to a special patron is raised by the contract (implied by the acceptance of the message for transmission and delivery). *Gray v. W. U. Tel. Co.*, 87 Ga. 351, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259. While not bound as insurers, they, as well as all common carriers, are liable for negligence. In every breach of contract duty, nominal damages (that is to say, general damages) are recoverable, and therefore the court erred in dismissing the present case. *Civil Code 1895, § 3801*; *Lilly v. Boyd*, 72 Ga. 83 (1); *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58 (1, 2). Deposit of the telegram and failure to transmit being shown, the burden would be upon

the company to justify. This petition certainly could resist a general demurrer. It showed a public duty arising out of a contract to transmit the message, assumed by defendant company. It alleged a breach of that duty, growing out of the failure to transmit the message, and thereby imposed on the telegraph company the burden of showing diligence; and the breach of the duty entitled the plaintiff to recover for the tort. The petition met every requirement necessary to charge the company with notice of the relationship of the parties, as well as with actual knowledge of the vital importance of the misplaced message; and, but for the ruling in the *Chapman Case*, we would unhesitatingly say that if, on the trial of the case, the evidence sustained the allegation, the facts as alleged would justify the imposition of exemplary damages. According to the allegations of the petition there can be no doubt that the failure of the company to perform its duty was the *causa causans*, the proximate cause, of such mental pain and anguish, as well as inconvenience, as common carriers are well-nigh universally held responsible for in our courts. But, though the plaintiff may not recover this, she is entitled to recover at least nominal damages, and her petition should not have been dismissed.

Judgment reversed.

(1 Ga. App. 832)

**GEORGIA RY. & ELECTRIC CO. v. BAKER.** (No. 256.)

(Court of Appeals of Georgia. May 9, 1907.)

**1. EVIDENCE—RES GESTÆ—ACTS ACCOMPANYING TRANSACTION.**

It is error to allow a witness in an action brought to recover damages for an insult, alleged to have been given on a street car, to testify as to conduct of the conductor subsequent to the transactions alleged in the petition, and disconnected therewith. An objection to such testimony, that it was irrelevant and inadmissible, should have been sustained.

**2. TRIAL—CONDUCT—REMARKS OF JUDGE.**

While reasonable latitude of expression must be allowed a trial judge in ruling on the admissibility of evidence, still the immediate and positive affirmation by the court of a statement of counsel that a given fact (not relevant to the issues) would be evidence of discourtesy, and which could be well understood by the jury as an expression of an opinion as to the effect of the testimony, was error.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 46, Trial, §§ 439-443.]

**3. SAME—INSTRUCTIONS—PROVINCE OF COURT AND JURY—COMMENTS ON EVIDENCE.**

It was error, in instructions to the jury, for the court to charge that the Supreme Court had passed upon the fact that the things set out in the declaration made a case in court, and especially where, as a matter of fact, the particular case submitted had not been to the Supreme Court.

**4. DAMAGES—SUBJECTS OF COMPENSATORY DAMAGES—MENTAL SUFFERING.**

It was error to charge the jury that if the words and actions of the defendant's servant were such as to insult and annoy the plaintiff,

and to worry her and humiliate her, she would be entitled to damages. There can be no recovery for annoyance and worry; and the jury should also have been instructed that the facts and circumstances should not only have been such as did humiliate and insult the plaintiff, but such as would reasonably tend to humiliate any person in similar circumstances. The damages recoverable for tort, in this state, are restricted to injuries to person, property, and reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121; vol. 15, Damages, §§ 101-103.]

##### 5. SAME—INSTRUCTIONS.

It is error, after giving in charge section 3906 of the Civil Code of 1895, and without any other or further instructions as to the measure of damages, to charge the jury that this section would be the rule under which the jury would assess damages, in case they found the defendant liable. In every case the jury should be properly instructed as to the measure of damages applicable to the facts of the particular case.

##### 6. CARRIERS—TRANSPORTATION OF PASSENGERS—PERSONAL INJURIES—ACTS OF CARRIER'S EMPLOYEES.

While the conductor of a common carrier is clothed with police power, that fact affords no immunity to the carrier for damage resulting from his wrongful or illegal discharge of his duty, either as servant of the company or under color of the police power delegated to him by law. Consequently it was not error for the court to refuse a request to charge that the defendant was not liable for its conductor's acts in carrying out the law requiring the separation of white and colored passengers; the request being only a partially correct statement of the law.

##### 7. TRIAL—INSTRUCTIONS—NECESSITY—DUTY OF JUDGE.

It is error for the court to omit to charge the principles of law applicable to proper contentions of either party to a cause, where such contentions are authorized by the pleadings, and are sustained by testimony, and thus become issues in the case.

(Syllabus by the Court.)

Error from City Court of Atlanta; Calhoun, Judge.

Action by A. L. Baker against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Rosser & Brandon and Walter T. Colquitt, for plaintiff in error. Burton Smith and J. A. Branch, for defendant in error.

**RUSSELL, J.** Mrs. A. L. Baker recovered a verdict for \$775 against the Georgia Railway & Electric Company. The defendant company moved for a new trial, and excepts to the judgment denying and overruling the motion. There are 21 grounds of the amended motion; but, as the decision of some of them is determinative of the merits of the question involved, it will not be necessary to pass upon all of these numerous assignments of error.

Mrs. Baker sued (in the language of her declaration) for annoyance, humiliation, mortification, and insult. No attempt was made to prove any special damages. The case proceeded upon her right to recover whatever actual damages she sustained to her feelings,

and whatever vindictive damages, if any, the circumstances might authorize the jury to assess. It appears, from the evidence of the plaintiff, that Mrs. Baker was under treatment from a physician, to whose office she went at stated intervals; that she went to the office of the physician from her home, a distance of about a mile and a half, unaccompanied; that on the day in question she had been to the office of the physician, and walked back from his office, something more than two blocks, to take the car; that her husband, at the telegraph office, and her brother, at a wholesale house, were at work within less than 100 yards of where she passed along to take the car; that she got on the car and sat down on one of the rear seats, set apart for the use of colored passengers, and which she knew to be set apart for the use of colored passengers; that she was too sick to move forward while the car was in motion; that the conductor went to her soon after the car started, and said, "Move up to the front, please;" that she paid no attention to this request and made no response to the conductor; that the conductor shortly afterwards went to her again and requested her to move up to the front, whereupon she told him that she was too sick to move while the car was in motion, but that she would move when it stopped; that the conductor came to her again and requested her to move, and threatened to have her arrested if she did not move; that the car stopped again after this at Mitchell and Whitehall streets, and she did not move up while it was stopped; that after this time she heard the conductor, upon the back platform of the car, remark to another man in uniform, "Damn her, if she don't move I am a good notion to throw her through the window;" that she did not move at any of the subsequent stops of the car until it had become practically filled with people and had traveled about a mile, where some negro passengers got on, which necessitated her moving to the extreme front of the car in order to reach a vacant seat, all the other places, in the meantime, having been filled up by passengers at the various stops of the car. The foregoing presents the salient features of the case, as testified to by the plaintiff. No other witness testified as to the circumstances of the transaction, except the defendant's conductor, whose testimony was materially in conflict with that of the plaintiff, but which, having been disregarded by the jury, will not be considered by us.

The plaintiff in error insists that the verdict is excessive, and a new trial ought to be granted; that the most that the plaintiff ever claimed was that the conductor had requested her, two or three times, to move, which requests she disregarded, and kept her seat until she was forced to move by the advent of the negroes, after the car had traveled more than a mile; that the oath which she quoted was not addressed to her,

but to some person outside of the car, on the back platform, and not intended for her ears at all. There is some force in the argument of counsel for the plaintiff in error that, even conceding that the defendant's conductor swore falsely when he denied the use of the oath, and conceding that the plaintiff, in her excited and nervous condition and at her comparatively remote distance from the conductor, did not misunderstand what he said, still the fact remains that the remark was not addressed to her and was not intended for her hearing; and it is most probable, as suggested, that, if it had been uttered in a tone of voice loud enough to warrant the inference that it was intended to be heard by her, the remark would have been resented by the other passengers on the car. Although a verdict for \$775, under the evidence disclosed by this record, does seem to us rather large, still our obligation to recognize the right of the jury to assess the damages in every such case is so strong, and our regard for the right of passengers to protection from insult or abuse is so profound, that we would be extremely reluctant to set aside this verdict upon the ground that it is so excessive as by its very amount to show that the finding was the result of bias, prejudice, or other improper influences. We are not prepared to say that we would do so, were this the only question in the case. For reasons hereafter stated, it is not necessary that the question of amount be passed upon. Upon another trial, in which the errors now complained of will doubtless not be again committed, the jury can determine, not only liability, but amount. While any one of the various assignments of error certified by the trial judge might of itself be considered a harmless error, taken altogether it must be apparent, from the general countenance of the case, that the defendant did not have a fair legal trial, and that the errors complained of probably induced the verdict rendered, and perhaps greatly contributed to increase the amount of the recovery. A brief review of some of the grounds of the motion will sustain this statement.

It is complained in the first and second grounds of the motion that the court permitted the plaintiff to testify that the conductor would not stop the car long enough for her to get her feet on the ground. The defendant objected to this evidence as irrelevant and immaterial, but the court overruled this objection. The following colloquy occurred in the presence of the jury. Plaintiff's attorney, combating the objection, said that "to hurry her before she alighted safely would be an evidence of, discourtesy," and the court replied, "Yes; I will let it stay in." There was no allegation in the petition which authorized this evidence. The plaintiff's allegation of discourtesy concluded in the petition with the statement of acts on the car and before she proceeded to alight. The transaction complained of had closed. Dis-

courtesy on one occasion cannot be shown by proof of discourtesy on another occasion. To admit the evidence at all had necessarily the effect of adding weight to plaintiff's contention that the conductor had been discourteous to her on the occasion from which the suit arose, as against his contradictory evidence that no discourtesy was shown. The objection that the evidence was irrelevant and immaterial was well taken; and when the judge, in making his ruling, stated in immediate sequence, and almost in concert with the counsel for the plaintiff, that to hurry her before she alighted would be evidence of discourtesy, and that for that reason he would let the evidence stay in, the jury could not have failed to understand the language of the court, under the circumstances, as being an opinion expressed by the court on the evidence. This was a violation of section 4334 of the Civil Code of 1895.

The third ground of the motion is not fully approved by the trial judge, and for that reason will not be considered. Nor is it necessary to discuss the fourth and fifth grounds.

In the sixth ground of the amended motion, as approved by the court, it is stated that counsel for the plaintiff argued before the court that the case then being tried had been to the Supreme Court, and that the Supreme Court had decided that in this declaration they had a good case; and in the seventh ground complaint is made that the court, in charging the jury, emphasized this error and gave additional weight to it, as against the defendant, by stating that the Supreme Court had passed upon the fact that the things set out in the declaration made a case in court. At the time of the argument of plaintiff's counsel the defendant asked a mistrial on account of the statement and argument complained of, upon the ground that it deprived the defendant of a fair trial, would inevitably affect the opinion of the jury, and could have no other effect than to bias the minds of the jury against the defendant. We are not prepared to say that the court should have granted a mistrial upon the statement made by plaintiff's counsel; but we are quite sure that the remark made was, in its tendency, prejudicial to the defendant's case, and that the court should have clearly and explicitly, at the time that his attention was called thereto, explained to the jury that they had no concern with what might have been the decision of the Supreme Court, that they should pay no attention to the remark made, and should receive the law only from the court, when it should thereafter be given to them in charge. So far as the language in the seventh ground is concerned, we are quite sure that the able trial judge was endeavoring to do what he should have done the day before—trying to withdraw from the jury any impression which might have been created as to the decision of the Supreme Court referred to. Upon examination of the

whole charge we are constrained to this opinion. But the language used, that "the Supreme Court passed upon the fact that the things set out in the declaration made a case in court," in view of all the circumstances of the case, was peculiarly unfortunate, and not suited for the purpose doubtless intended by the court. The effect of this language was to state broadly to the jury that the Supreme Court had said that the plaintiff had a case, and that it was only necessary, in order to recover from the defendant, to prove the physical facts set out in her petition. It tended to deprive the defendant of that fair and impartial trial before a jury to which every litigant is entitled. Its natural effect was to bias the opinion of the jury towards a decision that a recovery should be had, in order that they should obey and properly respect what they thought was the opinion of the Supreme Court; and as a matter of fact, though plaintiff's husband's case had been taken to the Supreme Court (*Georgia Railway & Electric Co. v. Baker*, 120 Ga. 991, 48 S. E. 355), it appears from the record that this plaintiff's case had never been passed upon by that tribunal.

We think that the charge complained of in the eighth ground is too broad. It put too great a burden on the defendant, and made the effect on the plaintiff the test of the insult, without leaving the jury to pass upon the question of what would be an insult to a normal person of ordinary sensibility, under the facts and circumstances shown in the case; and it allowed plaintiff to recover if she was annoyed, whether she had reason to be annoyed and insulted or not. The language used by the court was as follows: "If you determine, from the evidence in the case, that the words, actions, etc., were such as to insult and annoy her, and to worry her and humiliate her, then you give her such damages as you think she is entitled to recover." As has heretofore been ruled by this court, in *Glenn v. Western Union Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83, we are bound by the decision in *Chapman v. W. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, while we do not approve it. We think that the peace of mind, the feelings, and the happiness of every one should be guarded by giving recovery of damages for mental anguish or suffering produced either intentionally or negligently. But the doctrine of the *Chapman Case*, that only the body, reputation, and property of the citizen are protected by liability for damages on the part of the wrongdoer, is expressly affirmed in *Cole v. Atlanta & West Point R. Co.*, 102 Ga. 479, 31 S. E. 108, in which a right of recovery is sustained on the express ground that the allegations of the petition affirm a "wanton and inexcusable injury to [Cole's] person, viz., a flagrant attack directed towards his reputation."

The next ground of complaint which we will consider is the exception taken to the

following charge of the court: "Now, in passing upon the question of damages, if you should find that the railway company is liable, I give you this law of our state: 'In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff.' And that would be the rule under which you are to assess damages." We will consider this ground (which relates to the court's giving section 3906 of the Civil Code of 1895 in charge to the jury) in connection with the next succeeding ground, in which complaint is made that the court gave no measure to the jury by which they could estimate the plaintiff's damages in case of recovery, except section 3906 of the Civil Code of 1895. While it was not erroneous to submit the principle contained in this section, it was error on the part of the court to instruct the jury that this section would be the rule under which they were to assess damages. It was a clear expression of opinion on the part of the court that there were aggravating circumstances in the case being tried, and that additional damages should be given, and withdrew these questions from the jury by virtually saying to them that, if they believed the plaintiff was entitled to recover at all, damages should be given, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff; and this without anywhere having instructed the jury as to any measure of the original damages to which the proposed addition, arising from aggravation, should be made.

We think, too, that it was error for the court to charge the jury (though it was no doubt due to inadvertence, and perhaps thus understood by the jury, and consequently harmless) that they would be governed by the facts as they knew them to be and heard them from the stand. The court, doubtless, intended to say the facts as the jury knew them from hearing them from the stand.

Judgment reversed.

(1 Ga. App. 761)

**BASHINSKY v. WESTERN UNION TELEGRAPH CO. (No. 297.)**

(Court of Appeals of Georgia. May 9, 1907.)

**1. TELEGRAPHS—DELAY IN TELEGRAM — ACTION FOR DAMAGES—PLEADING.**

The action being for damages on account of failure to deliver in reasonable time a telegram for the purchase of cotton, by which failure the plaintiffs were prevented from effecting a sale of the cotton and lost a contract from which, if the message had been correctly delivered, they would have made certain commissions, and the terms and conditions of the contract not being alleged so as to inform the defendant of its character and the amount of commissions contracted for, if any, and so as to enable it to be determined whether a contract or a proposal to contract was the subject-mat-

ter of the suit, a special demurrer to the petition was properly sustained.

#### 2. SAME—CIPHER TELEGRAM.

While a telegraph company is bound properly and promptly to transmit and deliver a message sent in cipher, if it undertakes to transmit the same, such company is not chargeable with knowledge of the contents and meaning of words used in sending messages in cipher, and which are purposely unintelligible except to the addressee. In such case the only presumption with which the telegraph company is chargeable is knowledge of the importance of the message.

#### 3. SAME.

Consequently, in a case where it is alleged that damage has resulted from failure either to transmit or promptly deliver a message in cipher, which message either embodies or completes the contract, and the fulfillment of which contract as alleged would have been profitable to the plaintiff, and the loss whereof, as alleged, has endangered him, it is incumbent upon the plaintiff to translate such cipher telegram in the petition, so as to put the defendant upon notice of its contents and properly enable him to prepare his defense.

#### 4. SAME.

Where the alleged loss and damage, and the question as to whether there was a contract or not, and as to whether such contract, if shown to exist, and if it had been performed by the addressee, included profits or commissions, as alleged, can be determined only by a knowledge of the contents of such telegram, and such cipher message is unintelligible, a special demurrer to the allegations that a contract was lost by reason of delay in delivery of the message, and that by said contract the plaintiff would have made commissions, is properly sustained upon the ground that the allegations are too vague, indefinite, and uncertain.

(Syllabus by the Court.)

Error from City Court of Sandersville; Hyman, Judge.

Action by Bennett & Co. against the Western Union Telegraph Company. On the death of Bennett, Bashinsky, surviving partner, was substituted as plaintiff. Judgment for defendant, and plaintiff brings error. Affirmed, with direction.

Evans & Evans, for plaintiff in error.  
Joseph H. Hall and Warren Roberts, for defendant in error.

RUSSELL, J. Bennett & Co. sued the telegraph company in the city court of Sandersville for \$1,999.99 damages for an alleged delay of 2 hours and 30 minutes in the delivery of the following cipher message: "Minnoten, Sandersville, Georgia. Devium Lichbades digrassa licoperdo gabbiola marntium argeorum liabamus balance haspicoll bemen." Plaintiffs alleged that this telegram was from a broker in Bremen, for the purchase of 200 bales of middling lint cotton, each weighing 500 pounds, at the price of 6.20d. per pound for middling cotton and 6.25d. for good middling. Plaintiffs alleged further that they immediately wired their acceptance of the offer for the purchase of said cotton, but, by reason of the delay in delivering the original telegram sent them from Bremen, their reply reached Bremen too late, and they were thereby prevented from effecting

the sale of the cotton, and lost a contract by which they would have made commissions of \$1,999.99 had the message to them been promptly delivered. Plaintiffs further alleged that, if the message had been delivered in a reasonable time, or even an hour sooner, they would not have sustained any loss, but would have been able to make and carry out the contract, and make their commission in the sum aforesaid. The defendant demurred to those portions of the third and fourth paragraphs of plaintiffs' petition in which it is alleged that, by reason of the delay in the delivery of the message, a contract was lost, by which contract plaintiffs would have made commissions, upon the ground that the allegations as to the contract and the commissions are too vague, indefinite, and uncertain, and do not put the defendant specifically on notice as to the character and terms of the contract, the amount of the commissions contracted for, or what would have accrued to the plaintiffs upon the completion of the contract. This demurrer was sustained; and, no amendment being offered, the trial judge dismissed the suit, and this judgment is now alleged to be erroneous.

It cannot be seen, from the allegations of the petition, how the plaintiffs were damaged. No right to recover damages is alleged. It is nowhere distinctly alleged that the plaintiffs had a contract with the sender of the message. On the contrary, from the distinct averment in the fourth paragraph of the petition that they "would have been able to have made the contract," etc., it can only be inferred that they did not have such a contract as would have bound the sender of the message. They lost nothing but a chance to make something. It was a case of lost opportunity; but the plaintiffs were in the same condition after receiving the telegram as they were before, except the expense of their reply, which was sent "at a venture." It is averred that, if the plaintiffs had received the telegram in time, they would have made \$1,999.99. They might have done this, if they had been able to make the contract, or they might not. No contract is set out. The defendant had the right to be informed. From the fact stated in the petition, that a reply had to be sent and received at Bremen by 10:30 o'clock a. m., it is evident that there was no contract, but only a proposal to contract. Thus viewed, plaintiffs' complaint is that the defendant failed to deliver in time the offer of the Bremen cotton buyers to take 200 bales of cotton at the price named; and the ruling in *Richmond Mills v. Telegraph Co.*, 123 Ga. 222, 51 S. E. 293, becomes applicable. "Compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell, \* \* \* as they are contingent upon its acceptance." *Beatty Lumber Co. v. Telegraph Co.*, 52 W. Va. 410, 44 S. E. 309, and cit. And in the *Beatty Case* (page 414 of 52 W. Va., page 310 of 44 S. E.) the court



says further, "The trouble \* \* \* is that there was no finished contract between the parties, but only a proposal for a contract; and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummate contract. It only prevented one that might or might not have been made." The whole question is most clearly stated by Justice Evans, in *Wilson v. Western Union Tel. Co.*, 124 Ga. 131, 52 S. E. 153. In that case the plaintiff, Wilson, had an understanding with a bridge construction company that the company could procure his services when wanted, at a stated salary. The bridge company later, desiring Wilson's services, sent to Wilson at Waycross, Ga., a telegram in these words: "Can you commence work next week? Answer." The delivery of this message was delayed 10 days from the date of its reception, although it could have been delivered in a very few minutes either at Wilson's residence or at his place of business, and when it was delivered the senders of the telegram had made other arrangements. As said in that case: "The telegram, in connection with the averments on this subject, would not evidence a closed deal. \* \* \* Suppose it had been promptly delivered, and the addressee had replied in the affirmative; still there would have been no contract between the bridge company and the plaintiff. \* \* \* The failure to get employment with the bridge company was not proximately caused by the delay in the delivery of the telegram." In the trial court the case was dismissed on general demurrer, and the judgment was affirmed.

We think that the defendant had the right to be informed in the petition as to what was the meaning of the cipher telegram, so as to be enabled to properly prepare its defense. The language is absolutely unintelligible, except to those who may have been instructed in the particular cipher code used. A telegraph company is required to transmit and promptly deliver telegrams sent in cipher, but the telegraph company is not presumed to be advised of the contents or meaning of the message, further than that it is to be presumed important. If the importance of the message is recognized, and it is promptly delivered, it is immaterial whether the telegraph company knows the meaning of a single word therein contained, because it is none of its concern. But if it be claimed that the message was not properly or promptly transmitted or delivered, and that, by reason of negligence in any respect, injury or loss resulted, and suit is brought to recover damages therefor, then knowledge of the contents of the message becomes material to the defendant in preparing his defense, as it will be material to the jury on the trial, in determining whether there is any damage, and, if so, how much. The defendant has the right to be plainly apprised,

in the petition, of every matter necessary to be proved on the trial; and, as it must be admitted that the words would have to be translated for the court and jury on the trial, so they should have been translated in the petition for the defendant. For failure to so interpret the cipher message and embody the translation in the petition, the demurrer of the defendant that the allegations as the contract do not put defendant on notice as to the terms or character of the contract was well taken and properly sustained. So far as we are aware, it has never been held that a company, engaged in the transmission of a message, is chargeable with knowledge of the contents of telegrams sent in cipher. The decision in the *Fatman Case*, 73 Ga. 285, 54 Am. Rep. 877, was based on the earlier ruling in *Western Union Telegraph Company v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, that the telegram, though in singular and unintelligible language, put the company on notice that it related to important commercial business, and required reasonable and ordinary dispatch.

We not only have no hesitation in holding that the trial judge was right in sustaining the special demurrer, but we think that the petition would be subject to even a general demurrer or oral motion to dismiss, as setting forth no cause of action. It was settled in the *Clay Case*, 81 Ga. 287, 6 S. E. 813, 12 Am. St. Rep. 316, that profits anticipated from a contract from which, if the contract had been made, profit would have accrued, afforded no basis for the recovery of damages as against one who merely prevented the contract. In the *Clay Case* (in which the allegations as to the exact point now being considered were similar to those in this case) the declaration was demurred to orally, on the ground that it set forth no cause of action. And this petition could safely have been dismissed upon the same ground, if the ruling in the *Clay Case* was sound. It is based on the settled principle that the damages are too remote and uncertain to be the basis of recovery.

Judgment affirmed, with direction.

(1 Ga. App. 446)

MISSOURI STATE LIFE INS. CO. v. LOVELACE. (No. 39.)

(Court of Appeals of Georgia. March 22, 1907.)

1. JUDGMENT — CONCLUSIVENESS — MATTERS CONCLUDED.

The sustaining of a general demurrer to a petition for equitable relief filed in the superior court, upon the ground that the petitioner was not able to set up by way of defense in a city court the things which it sought to prove in order to cancel a policy of insurance, and the consequent dismissal of the petition, do not make the questions therein involved *res judicata*, so as to require the dismissal of a writ of error brought to review errors alleged to have been committed in the city court, even though the subject-matter of the suit was in both cases the same policy of insurance.

## 2. SAME—IDENTITY OF CAUSE OF ACTION.

The judgment sought to be set up as *res judicata* must be the result of an actual and fair trial of the issues. It is not sufficient that there is an inference of a decision upon the same points. There must not only be identity of subject-matter, of persons, and of parties, but identity of cause of action.

## 3. CONTRACTS—VALIDITY—WHAT LAW GOVERNS—JUDICIAL NOTICE.

Parties are presumed to contract with reference to the place of the contract. If the contract is valid there, it is valid everywhere. The *lex loci contractus* controls as to the nature, construction, and interpretation of a contract.

(a) By comity the laws of a sister state will be applied in the enforcement of any contract to be performed in that state, so long as such laws do not conflict with the statutes, powers, or rights of this state, its well-settled public policy, or the public conscience.

(b) "The court on the trial of a cause may proceed on their knowledge of the laws of another state, and it is not necessary in that case to prove them."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 724; vol. 20, Evidence, § 51.]

## 4. INSURANCE—CONTRACT—CONSTRUCTION—MOST STRONGLY AGAINST INSUREE.

In cases of doubt as to whether the common law or the statutes of another state shall prevail, the law will be construed more strongly against the framer and proposer of the contract, always preferring, in contracts of insurance, that construction most favorable to the insured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 295.]

## 5. CONTRACTS—VALIDITY—WHAT LAW GOVERNS.

Where the laws of another state *pro hac vice* apply, an answer to a suit based upon a contract to be performed in another state should be stricken, unless a meritorious defense, as judged by the laws of that state, is presented.

## 6. INSURANCE—PENALTY—RIGHTS OF INSURED—WHAT LAW GOVERNS.

The penalty is one of the inherent rights attaching to a contract of insurance (in case there is groundless refusal to pay), to enable the beneficiaries to obtain, free from deduction, the original benefits of the provision in their favor according to the tenor of the policy. Such damages and attorney's fees as would be recoverable by citizens of another state can likewise be recovered by citizens of this state, where the contract sought to be enforced is to be performed in such sister state. Citizens of this state will not be deprived of any rights allowed citizens of the place of the contract, when the laws of that state are being administered at the choice of the insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 293.]

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by Ophelia Lovelace against the Missouri State Life Insurance Company. Judgment for plaintiff, and defendant brings error. Motion to dismiss writ of error. Motion overruled, and judgment affirmed.

J. W. Preston and Payne, Jones & Jones, for plaintiff in error. Edgar Latham, for defendant in error.

RUSSELL, J. We will first consider the motion of the defendant in error to dismiss

the writ of error. The motion is predicated upon the following grounds: "(1) That on the 30th day of April, 1906, the Missouri State Life Insurance Company, the plaintiff in error in the above-stated case, filed its petition against this defendant in error in the superior court of Fulton county. A copy of said petition is hereto attached and marked 'Exhibit A,' and is made part of this motion. (2) That since the date of suing out the writ of error in the above-stated case by said company the said case of the said company against this movant came on to be heard in the said superior court of Fulton county, and that the same was heard on a general demurrer made by movant to the said petition on the 14th day of September, 1906, and during the September term, 1906, of said superior court, on which day this movant avers the court made and entered the following judgment therein, to wit: 'The general demurrer in this case coming on to be heard, it is ordered that the same be sustained, and plaintiff's bill is dismissed. September 14, 1906. J. T. Pendleton, J. S. C. A. C.' (3) This movant avers that every contention which was made by said company in its plea and answer to the suit brought by her against it in the city court of Atlanta, and that every issue involved in his case, was averred in said petition filed in the said superior court as aforesaid. (4) That the judgment of the said superior court, hereinbefore set forth, was not excepted to nor appealed from by said company, and that the September term of said superior court has expired, and that said company is now concluded, and cannot except to nor appeal from said judgment. (5) That every issue involved in the above-stated case was determined adversely to said company by the said judgment of the said superior court aforesaid, and that said judgment is now *res adjudicata*, and said company has no right to have two tribunals determine the issues involved in the two different proceedings. (6) That said plaintiff in error has no right to further prosecute the writ of error in this case, for the reason that it is concluded as to all assignments of error contained in the bill of exceptions in the above-stated case. (7) The said Mrs. Ophelia Lovelace avers that the various exhibits referred to in the petition filed by said company in the superior court aforesaid are contained in the record in the case at bar, and are, therefore, already before this honorable court. (8) Wherefore she prays that said case be dismissed for and on account of the reasons herein alleged."

If we were to consult our own ease, we would cheerfully avoid the voluminous record in this case by sustaining the motion to dismiss the writ of error; and estoppels by judgment are favored. "In *Lampen v. Corke*, 7 Eng. S. L. R. 209, Holroyd, J., says that estoppels are odious in the law. It is often

so said, and truly said, of estoppels by recitals in deeds, admissions in pleadings, and all of that class. They are not to be readily allowed. Estoppels by judgments are, however, not odious. They are to be received with as much favor as any other defense, because it is the interest of the commonwealth that litigation should cease." *Evans v. Birge*, 11 Ga. 265. On the other hand, "matters which have received a judicial determination cannot be called again into controversy"; and this "applies with full force, not only in the same jurisdiction, but also as between courts of law and equity." *Pollock v. Gilbert*, 16 Ga. 402, 60 Am. Dec. 732. In *Evans v. Birge*, supra, Judge Nisbet delivered the opinion, and announced the following rule of decision as to the plea of *res adjudicata*, and established its limitations: "It is very well settled that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties or their privies, in the same or any other court. A judgment, therefore, of a court of law, or a decree in chancery, is an estoppel to the parties thereto and to those who are in privity with them. This is the rule. It is, however, carefully and strongly fenced. The judgment must relate to the same question, and must clearly decided it. If it came collaterally under consideration, or was only incidentally considered, there is no estoppel. And if the decision of the question is ascertained inferentially, by arguing from the judgment or decree and the pleadings in the case, there is equally no estoppel." And in *Brooking v. Dearmond*, 27 Ga. 58, it is held that "a judgment in one suit is not a bar to another suit, if, \* \* \* although the parties in the two suits are the same, they sue or are sued in one suit in a right different from the right in which they sue or are sued in the other."

Applying Judge Nisbet's rule to the judgment of the judge of the superior court dismissing the equitable petition, as well as to the record in that case, we cannot dismiss the writ of error on the ground of former adjudication, or hold that that judgment, although unexcepted to, is a bar to the right of the plaintiff in error to prosecute its writ of error in this court. The suit which was brought in the city court of Atlanta was an action upon a contract, to which the insurance company filed substantially four defenses: (1) That the insured had made certain false representations in his application, which avoided the policy; (2) that the insured committed suicide, which should reduce the amount of the recovery; (3) that the insured became intemperate, and that this caused his death, and by the terms of the contract avoided the policy; (4) that the policy never became effective, because the premium was not paid. The suit filed in the superior court for equitable relief by the company sought (1) to enjoin Mrs. Lovelace from prose-

cuting the case in the city court, (2) to cancel the contract of insurance upon the life of her husband, upon various grounds, and (3) to have the superior court take jurisdiction of the entire cause in equity and by appropriate decree establish the rights of the insurance company in the premises. While there are many statements in the company's petition in the superior court which are similar to those contained in its answer to the suit in the city court, they may all be considered as only incidental to the gravamen of the suit. The twenty-second paragraph of the petition states the reason why it is sought to have the intervention of the court of equity, to wit, that by virtue of the common-law character of the city court of Atlanta the petitioner was unable to avail itself of various matters of equitable relief sought in the superior court. There was no trial in the superior court, and the reasons which controlled the judgment of the judge in dismissing the petition can only be reached by inference, which by Judge Nisbet's rule cannot be done. The judgment which it is sought to set up as *res adjudicata* must be the result of an actual and fair trial of the issues. It is not sufficient that there is an inference of a decision upon the very point. 21 Am. & Eng. Enc. of Law, 129. And, if we were to infer anything, it might fairly be presumed that the dismissal of the petition by the judge of the superior court was due to his opinion that there was no reason for equitable interference with the cause then pending in the city court, and now, by writ of error, brought to this court. However this may be, the suit in the city court was one cause of action, and the petition to the superior court presented a different cause of action, and, wherever a judgment is sought to be set up as *res adjudicata*, not only must identity of subject-matter, of parties, and persons be shown, but identity of cause of action must also clearly be established. The motion to dismiss the writ is overruled, because, as was so well said by the Court of Appeals of New York in *Palmer v. Hussey*, 87 N. Y. 303, "the conclusive character of a judgment as a bar extends only to identical issues, and they must be such not merely in name, but in fact and substance. If the issue in the later litigation is intrinsically and substantially an entirely different one, even though capable of being described in similar language or by a common form of expression, then the truth is not excluded by the judgment."

Mrs. Lovelace sued the defendant company for \$2,000 principal, \$200 damages, and \$500 attorney's fees, on a policy of life insurance issued in June, 1904, on the life of Edwin Lovelace, her husband, and in which she was named the beneficiary. One of the stipulations of the policy was in these words: "This contract shall be governed by and construed according to the laws of Missouri; the place of this contract being expressly

agreed to be the home office of the company"—which, as appears from other portions of the policy, was the city of St. Louis, Mo. To this suit the defendant filed demurrer and answer. The demurrer contains several grounds specially demurring to the various paragraphs of the petition, as well as the general ground that the petition contains no cause of action. The demurrer was overruled. Exceptions pendente lite were filed, but were not presented and certified until after the opening of the next term of the trial court. This was too late to enable this court to review the order of the court upon the demurrer. The answer, besides denying the essential allegations entitling the plaintiff to recover, set up that the policy was void because of false and fraudulent representations made by Lovelace in the application for the insurance—namely, that he was at that time in good health, and usually enjoyed good health, that he was not then and never had been addicted to the use of narcotics or intoxicants, and that no company had ever declined to issue a policy upon his life, all of which statements were alleged in the answer to be untrue; that before the death of said Lovelace the company demanded from him a cancellation of the policy and received his promise that he would surrender it; that no consideration had ever passed to the company for the policy, because the premium thereon had never been paid; also that one of the conditions of the policy was that the policy should become null and void if within one year after its date the said Lovelace became intemperate in the use of narcotics or alcoholic drinks, that Lovelace did become so intemperate within such time, and that his death was the result of such intemperance. The company further answered that said Lovelace distinctly stipulated that all the statements in his application for insurance were warranted to be true and complete, that no information or material facts were suppressed, and that the same was offered to the company as a consideration for the contract of insurance; that all of said statements were false and fraudulent, and made with the design of deceiving the insurance company, and did so deceive it; that one of the provisions of the policy was that if death occurred from self-destruction, while sane or insane, within one year from the date of the policy, only the reserve (computed according to the Actuaries' Table of Mortality, with interest at 4 per cent.) should be due upon the surrender of the policy; and that Lovelace did in fact destroy his own life within one year of the date of the policy. The plaintiff filed a general and special demurrer to the plea and answer of the company. The general demurrer was sustained, and the plea and answer dismissed, except in so far as the answer denied liability for attorney's fees and damages.

The plaintiff subsequently amended her petition, by averring: That each and all of

the statutes of the state of Missouri in force at the time the policy was issued became a part of the policy as effectually as if they had been incorporated therein. That at the time the policy was issued, section 7896 (chapter 119, art. 2) of the Revised Statutes of the state of Missouri of 1899 [Ann. St. 1906, p. 3750] was as follows: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it should be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy; and any stipulation in the policy to the contrary shall be void." And section 7890 of said Revised Statutes was as follows: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case shall be a question for the jury." That section 7929 of said Revised Statutes is as follows: "Every corporation, company, or association transacting business under the provisions of this article shall, upon the issuance of every policy, attach to such policy or indorse thereon the substance of the application upon which such policy was issued, and which is made a part of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy." That the substance of said application was not attached to or indorsed upon this policy. That the stipulation contained in the policy, making said application a part of the contract, is void. That the policy alone constitutes the entire contract of insurance. Plaintiff further set up section 7867 of the Revised Statutes of Missouri, providing for the registration of policies, and that the policy sued on was a registered policy, and that the insurance company was estopped from claiming that the premium had not been paid thereon. Upon the allowance of these amendments the defendant renewed its demurrer, and, besides the general demurrer that the petition contained no cause of action, demurred specially on the grounds: (1) That there is a misjoinder of causes of action, for the reason that the petitioner has brought suit upon the alleged contract of insurance and also upon an alleged tort for which she prays special punitive damages; (2) that section 8012 of the Revised Statutes of Missouri, referred to in paragraph 8 of plaintiff's petition, is unconstitutional, in that it operates to deprive insurance companies of property without due process of law, and denies to them equal protection of the law, and requires them to pay attorney's fees and damages in certain cases to parties

successfully suing them, while it gives them no corresponding benefits; (3) that the city court of Atlanta has no jurisdiction to enforce a penalty of the state of Missouri. This demurrer was, after a hearing, overruled by the court. Exceptions pendente lite to this judgment were filed in due form and in due time.

The case went to trial before a jury, therefore, upon the one question whether the plaintiff should recover the penalties fixed by the Missouri statutes. A verdict was found for the plaintiff for the amount of the insurance, with interest, and for \$100 damages, and \$500 attorney's fees; and a motion for new trial was made. The motion contains the usual general grounds, and, by amendment, the following additional grounds of alleged error: (1) The admission of the testimony of Edgar Latham and the refusal of the court to exclude his testimony that he is familiar with the insurance laws of the state of Missouri, and that the statutes pleaded in the cause and now before the court were the laws of force in that state at the time this policy was issued. (2) The admission in evidence of a book offered by the plaintiff, entitled "Insurance Laws of the State of Missouri, 1903," upon the front leaf of which book was printed: "Insurance Laws of the State of Missouri, 1903. Including Laws Governing and Regulating Fraternal Beneficiary Associations, Trust Companies, and Pools, Trusts, and Conspiracies. R. G. Yates, Supt. of Insurance. [Seal of State.] Jefferson City, Mo., Tribune Printing Co., State Printers and Binders." And on the second page of said book: "Insurance Laws of the State of Missouri, Revised Statutes of 1899 and Acts approved 1901 and 1903"—said book being admitted for the purpose of proving what the laws of that state were. The motion for new trial was overruled; and by the writ of error we are called upon to review the action of the court upon that motion, and those rulings of the court to which exceptions pendente lite were taken, as well as the overruling of an oral motion to dismiss that portion of the plaintiff's petition which sought to recover damages and attorney's fees; said motion being upon the ground that the allowance of the same was a matter of remedy governed by the laws of the forum, under which they could not be recovered.

We are clearly of the opinion that when the general demurrer was overruled, and this judgment was not excepted to during the term at which it was rendered, the petition became the law of the case so far as the defendant was concerned. *Sims v. Georgia Ry. & Electric Co.*, 123 Ga. 643-645, 51 S. E. 573, and cases therein cited. If we are right in this, the subsequent demurrer offered by the company could not be considered by the court below, because in conflict with its prior ruling. Section 8012 of the Revised Statutes of Missouri, which was a ground of the second demurrer, was pleaded

in the original petition and passed upon in overruling the first demurrer. As to the ground that there was a joinder of suit upon the contract of insurance with suit upon an alleged tort, we think it was properly overruled by the court. The ground that the court had no jurisdiction to enforce the penalty of another state will come more properly under what we shall have to say further on with reference to the application of the laws of Missouri to the case as a whole. Suffice it to say here that the law of Missouri was the selection of the company itself, and will be enforced, unless in conflict with our law or our public policy.

Much stress is laid by learned counsel for the company on the fact that certain of the Missouri statutes use the term "citizens of this state," and it is contended that by reason of these words the benefits which would accrue to the plaintiff in this case, were she a citizen of Missouri, are denied to her, because she is a citizen of Georgia. From the place assigned these sections in the Revised Statutes of Missouri it is evident to our minds that these words are used merely because it would naturally be presumed that generally the persons to be affected by the provision of the Missouri statutes would be citizens of Missouri; and as the plaintiff is forced, by the very contract prepared and proposed by the company, to have the contract construed and her rights adjudicated by the laws of Missouri, it is apparent that the words "citizens of this state" may be treated as mere surplusage and rejected as such. The guaranty in the fourteenth amendment of the Constitution of the United States, which declares that "No state shall deny to any person within its jurisdiction the equal protection of the laws," was said by Justice Bradley, in *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. Ed. 989, to include "the equal right to resort to the appropriate courts for redress." "It means," as was further said by the court, "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." The same court, in *United States v. Cruikshank*, 92 U. S. 542, 555, 23 L. Ed. 588, per Waite, C. J., used the following language, in discussing the foregoing constitutional clause: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there." In our view of this case the city court of Atlanta was for the time being a Missouri court, so far as the "validity and effect" of this contract is concerned. Under article 4, § 2, of the Constitution of the United States, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Sitting, as it were, in

Missouri, so as to give "effect" to the contract, the trial court could not consider Mrs. Lovelace as other than a citizen of Missouri, at least in so far as to accord her any "privileges" appertaining to such citizenship, and to enforce the laws of Missouri, construing them most favorably to the insured. In the language of our Supreme Court in *Champion v. Wilson*, 64 Ga. 188, "The law of New York entered into this contract, as it was \* \* \* to be executed there, and our courts will enforce it, whatever it may be; and this contract must stand or fall as the test of that law is applied to it." And, applying the language of the decision in that case to Missouri instead of New York: "When so applied it becomes, as the law of the contract, Georgia law; and it matters not where it comes from. For this case—pro hac vice—it is our own law."

We do not see either that the demurrer, which had at a former term been overruled, could be renewed at a subsequent term, or that it can be justly claimed that the plaintiff's petition set forth two causes of action merely because the plaintiff offered an amendment setting up certain statutes of the state of Missouri in amplification and aid of rights already claimed in the original petition. Foreign statutes may be pleaded by amendment. *South Carolina R. Co. v. Nix*, 68 Ga. 572. And the amendment in that case was expressly approved because allowable by the laws of South Carolina. *Conlin v. City Council of Charleston*, 15 Rich. Law, 201. The amendment did not materially change the cause of action, and gave no right to dig up a dead demurrer and have its sufficiency again passed upon. Civ. Code 1895, § 5068. The motion to dismiss that part of plaintiff's petition that sought to recover damages and attorney's fees was properly overruled, because, even as a matter of remedy and as governed by the laws of the forum, such penalty and damages can be recovered in Georgia; and the defendant's motion was made upon the distinct ground that they could not be so recovered.

We come next to the amended grounds of the motion for a new trial, which relate to the method of proving the laws of Missouri. It is settled that, where either party claims a benefit under a foreign law, the statute must be pleaded; and, of course, where the laws of a foreign state are specially pleaded, they must, as any other material matter, be proved. *Champion v. Wilson*, supra. But according to prior decisions of our courts there is no inexorable rule which demands a certain kind of proof or prescribes the exact quantum of proof required to satisfy the trial court as to the authenticity of the statutes of one of our sister states. The court's own knowledge may give testimony and supply the proper verification of the law. "The courts, on the trial of a cause, may proceed on their knowledge of the laws of another state, and it is not necessary in that case to

prove them; and their judgment will not be reversed, when they proceed on such knowledge, unless it should appear that they decided wrong as to those laws." *Herschfeld v. Dixel*, 12 Ga. 582. Three methods of proof have been recognized. One is by proof of witnesses, testifying as to their familiarity with the law in reference to a certain subject. A second method is by certified copy of the statute in question. And the third method of proof is, we think, clearly authorized by the Code, which is judicial recognition. Civ. Code 1895, § 5231. An instance of the first appears in *Chattanooga, Rome & C. R. Co. v. Jackson*, 86 Ga. 681, 13 S. E. 110, where the Supreme Court approved proof by attorneys, who testified as to the law of Tennessee (as Latham did in this case as to the law of Missouri), except that they testified that they had practiced law in Tennessee, and Latham did not testify that he had practiced in Missouri. In that case Justice Simmons, in dealing with the exceptions to the testimony of the attorneys proving the law of Tennessee, lays down the following rule: "The public laws of the United States and of the several states thereof, as published by authority, shall be judicially recognized without proof." While, therefore, the trial judge might have resorted to the statutes and the decisions of the Supreme Court of Tennessee, we cannot say that it was error to receive the testimony of skilled attorneys who practiced in the courts of that state, to aid him in arriving at a proper conclusion as to what was the law of that state, and especially as to the practice of the courts thereof in regard to appeals and their dismissal. The testimony was not for the jury, but for the information of the judge; and he was not bound by the opinions of these attorneys, but it was his duty at last to decide the law himself, aided by these opinions and such other sources of information as were accessible to him. Knowing, as we do, the great difficulty under which courts labor in arriving at the true law of a case, and especially the difficulty encountered here, as well as by the court below in this case, we cannot condemn the trial judge for resorting to any sources of information which will aid him in coming to a correct conclusion as to the law." The learned Justice cites *Hanley v. Donoghue*, 115 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535, and *Chicago & Alton Railroad v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519, as authority approving this method of proof, and refers to the fact that in other states that have no statutes like ours, evidence of this kind is the proper mode of proving the laws of another state. And in *Thomas v. Clarkson*, 125 Ga. 77, 54 S. E. 77, 6 L. R. A. (N. S.) 658, the same method of proof is recognized, and the only criticism passed upon it by the court was that the evidence of the witness did not refer to or show what the law was at the time of the contract.

The method of proving the laws of other

states by copy thereof, "under the great seal of their respective states," is provided for by Civ. Code 1895, § 5233; but this mode of proof is not, as has sometimes been supposed, exclusive of every other means. That the court may consider the law as proven, by judicial recognition of its terms and provisions, is shown in *Massachusetts Benefit Life Association v. Hale*, 96 Ga. 802, 23 S. E. 849, where it was decided that a stipulation in a policy (which, like this, was to be governed by the *lex loci contractus*) that no suit should be brought under the contract, unless within one year from the death of the member, was void, because the law of Massachusetts allowed such suit to be brought within two years. In that case, "while it does not appear in the reported decision \* \* \* that the Massachusetts statute was not invoked in the trial court, an examination of the original record shows that no reference whatever was made to this law in the pleadings of the parties." *Seaboard Air Line Ry. v. Phillips*, 117 Ga. 101, 43 S. E. 494. See, also, *Barranger v. Baum*, 103 Ga. 466, 30 S. E. 524, 68 Am. St. Rep. 113. No authoritative ruling was made by our Supreme Court upon this subject in *Seaboard Air Line Ry. v. Phillips*, supra, because it was not required; but we think that the reasoning of Justice Cobb is unanswerable, and that section 5231 of the Civil Code of 1895 means just what it says, and is founded upon sound reasoning. "If a book containing the laws as published by authority is not accessible, then, in the absence of a copy of the law under the great seal of the state, the case would generally have to be determined by a presumption that the common law prevailed in the other state." We think it absurd that a court of this state should be required to administer, as the law of a sister state, that which is not the law, when it has before its eyes an open book showing what is the law, refusing to see what may be seen by all men, merely because it was not formally offered as evidence on the trial. We think, then, that our view that there is no merit in the amended grounds of the motion for new trial is sustained by ample authority; and we come to the question which, after all, must determine the case—whether the court erred in the rulings which were the subject of the exceptions pendente lite. That question is: Did the court err in trying the case by the laws of Missouri; and, if so, how?

The policy of insurance prepared by the company named the situs in which it preferred its right to be administered, and made the state of Missouri the place of the contract. Having made choice, it is bound by its selection, and estopped to vary or retract its own contract from its written provisions. The policy, in its concluding paragraph, says: "This contract shall be governed by and construed according to the laws of Missouri; the place of this contract being expressly agreed to be the home office of the company."

All contracts of insurance are to be construed most strongly against the insurer and in favor of the insured; and if, therefore, the court had entertained doubt as to which law prevailed as to any phase of the case, the company having selected in the contract, which it prepared itself, the laws of Missouri, the court was bound to construe the contract by those laws of Missouri, most favorably to the insured. If this means anything, it means that the validity, form, and effect of the contract are to be determined by the laws of the state of Missouri. Georgia enforces the laws of another state only by comity. But that comity will extend, in passing upon a contract made to take effect and be performed in another state, so as to give effect to every law of that state applicable to the subject-matter of the litigation, except such as conflict with our laws or such as are opposed to the well-known public policy of the state. The question is: Was the court right in trying the case by the law of Missouri; and, if so, to what extent should the law of Missouri have controlled? The company selected the law of Missouri as its choice. Can it complain if that law is administered? And while he who claims a benefit under the law of a foreign state must plead and prove that law to the satisfaction of the court in some one of the modes to which we have referred, still, in the administration of such laws as collaterally, rather than directly, affect the case, it cannot be questioned that the court may in any way possible inform itself as to what is the law. The means of finding it are immaterial, provided, only, that the true and correct law is found. The court must inform itself; and, judged by this rule, the learned judge of the trial court was right in striking all of the defenses of the defendant company. The court had previously overruled the demurrers to the plaintiff's petition, and (no exception having been duly taken thereto) the right of the plaintiff to stand on her petition, both as to the law and as to the facts, was established. If her rights as to either were questioned before as to any portion of the petition, her rights as to both were extended to the extreme boundary lines fixed by the petition. This petition the plaintiff had the right to amend, and that right was not abused.

The plaintiff in error excepted pendente lite to the allowance of certain amendments, for reasons given in its demurrer; and error is assigned thereon in the bill of exceptions. We think the court was right in overruling the demurrers and allowing the amendments. The gravamen of the defendant's objection must have been that contained in the first demurrer, that there was a misjoinder of causes of action; the defendant contending that, joined to the suit on the contract of insurance, the plaintiff was praying for punitive or vindictive damages. The damages were alleged and asked for, and section 8012 of the Revised Statutes of

Missouri was specially pleaded in the original petition, the special and general demurrer to which had been overruled, and, therefore, to offer this demurrer again was to ask the court to reopen what had already been settled as the law of the case. But, waiving this, we see no error in overruling this demurrer to the petition. The plaintiff was entitled to the damages if she established the allegations with reference to vexatious refusal, under Civ. Code 1895, § 8. It was one of the effects of the contract which our courts will enforce. The question of the constitutionality of the very statute of Missouri which was pleaded in this case, and which allows damages and attorney's fees, has been passed upon by the Supreme Court of the United States in *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, and it is not repugnant to our Constitution. The contract in the *Daggs* Case was one of fire insurance, instead of life insurance; but section 8012, cited *supra*, includes both. Its wording is: "In any action against any insurance company \* \* \* under a policy of fire, life, marine or other insurance, \* \* \* the court or jury may allow damages." The decision likewise covers life insurance as well as fire insurance; for the Supreme Court of the United States, in *Farmers', etc., Ins. Co. v. Dobney*, 189 U. S. 305, 23 Sup. Ct. 566, 47 L. Ed. 821, citing and referring to the *Orient* Case, says the statute of the state of Missouri was upheld, "not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify."

In reference to the plea of suicide, the statute (Rev. St. Mo. § 7896) voids any suicide provision in policies of life insurance. But it was insisted that the provision in this case is not in the nature of a defense to the action, but simply provides for an apportionment of the loss in case of suicide—simply reducing the amount to be recovered, without defeating recovery itself. This same question has been decided by the Court of Appeals of Missouri, passing upon a provision identical with the contents of the policy under our consideration. In *Keller v. Travelers' Insurance Co.*, 58 Mo. App. 557, the Missouri court held as follows as to reductions in cases of suicide: "A provision in a policy of life insurance, which reduces the amount of the insurance in case of the suicide of the insured below that otherwise contracted for, makes the suicide a defense to the extent of the reduction, and is, therefore, contrary to the statute on the subject and invalid." In the *Keller* Case the only question presented was whether or not the contract sued upon was in contravention of section 7896 of the Revised Statutes of Missouri, but, as in the present case, was embodied by the plaintiff in her petition. That section

is as follows: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy; and any stipulation in the policy to the contrary shall be void." The clause of the policy relied on in the answer in this case is as follows: "But if death occurs from self destruction, while sane or insane, within one year from the date of issuance of this policy, then in such event only the reserve (computed according to the Actuaries' Table of Mortality, with interest at 4 per cent.) will be due on surrender of this policy."

The plaintiff in error urges that the clause of the policy invoked in this answer is a mere contractual limitation of the amount of the recovery to be had, and not a defense. Under the above-quoted decision of the Court of Appeals of Missouri we cannot agree with this contention. "The plain purpose of the statute quoted above was to prevent the insertion in policies of life insurance of exceptions of liability on the ground of the suicide of the insured, unless it could be proven 'that the insured contemplated suicide at the time he made the application for the policy.' This was in effect a legislative declaration of the public policy" of Missouri, the state which the company itself selected as the place of contract. In the *Keller* Case, above cited, the Court of Appeals of Missouri says: "That it was intended to limit the power to contract for a lesser liability in cases of death by suicide, not within the limitation expressed in the statute, is also apparent from its terms, to wit: 'And any stipulation to the contrary shall be void.' That it is not within the power of the parties to change or annul this statutory provision with reference to life insurance in this state has been held in a well-considered case in the circuit court of the United States. *Berry v. Knights Templars', etc., Co.* (C. C.) 46 Fed. 439. In construing the statute in question, that court said: 'The statute is mandatory, and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies, and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties.'"

For the same reasons as heretofore stated, we think that the question of attorney's fees and damages should also be determined by the laws of Missouri. As Chief Justice Jackson said in the case of *Champion v. Wilson*, *supra*, the court was pro hac vice sitting in Missouri, and the finding of the jury is in accordance with that law, which



the Supreme Court of the United States has held to be constitutional and valid. "It was for the Legislature \* \* \* to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best. We do not see any arbitrary classification or unlawful discrimination in this legislation; but, at all events, we cannot say that the federal Constitution has been violated in the exercise, in this regard, by the State of its undoubted power over corporations." *Hancock Insurance Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955. The reasoning in *Railway Co. v. Ellis*, 165 U. S. 150-153, 154, 17 Sup. Ct. 255, 41 L. Ed. 666, says the court, in *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 326, 22 Sup. Ct. 669, 46 L. Ed. 922, does not apply to life insurance companies. "The ground for placing life and health companies in a different class from fire, marine, and inland companies is obvious, and we think that putting them in a different class \* \* \* rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit, \* \* \* and lodges and associations of a mutual benefit or benevolent character, having in mind, also, the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." And in *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, the interpretation and construction of the Supreme Court of Missouri as to a similar statute was upheld. In *Farmers' Insurance Co. v. Dobney*, 189 U. S. 304, 23 Sup. Ct. 565, 47 L. Ed. 821, the Supreme Court of the United States, having under consideration the question of the allowance of attorney's fees and damages, and answering argument contending, as here, that such allowance was unconstitutional for various reasons, says: "But the unsoundness of these propositions is settled by the previous adjudications of this court. *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Insurance Co. v. Warren*, 181 U. S. 73, 21 Sup. Ct. 535, 45 L. Ed. 955; *Insurance Co. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922. In the *Orient Case*, a statute of the state of Missouri which subjected fire insurance contracts to an exceptional rule was upheld, not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren Case* a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance

companies. In the *Mettler Case* a statute of the state of Texas was sustained, applicable alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but, also of 12 per cent damages after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts, or to authorize a classification of insurance contracts so as to subject one character of such contracts, when put in one class, to one rule, and other varieties of such contracts, when placed in another class, to a different rule."

We come now to the complaint with reference to the striking of defendant's plea. If the court was right in adjudicating the case according to the laws of Missouri, it was clearly right in striking the defendant's answer, upon the ground that it constituted no defense. The defense was based upon five propositions:

(1) That Lovelace had made false statements in his application and failed to pay his premium. Under the statute of Missouri the company could not plead the application as a part of the contract, for it was not indorsed or the substance of the application entered on the policy. We hold, further, that it could not plead nonpayment of the premium, because the receipt of the premium was acknowledged in the policy, and it was estopped from denying this fact, especially in view of the death of the insured. The further portion of the fourth paragraph of the answer, that the policy was issued by reason of the false and fraudulent representations of Lovelace, and that the policy was procured by fraud, could not be considered after death of the insured. "The statements made in the application \* \* \* were not warranties, and, before the company can be permitted to show that these false statements and answers contributed to the contingency on which the policy was to become due and payable, it must plead such defense, and, besides, it must deposit in court the premiums it received on the policy. And unless the company meets both these requirements the court should exclude the testimony \* \* \* as to the cause of the insured's death, and as to his physical condition before and after his death, and give a peremptory instruction to find for plaintiff." "The company may, during the life of the insured, but not afterwards, bring a suit to set aside the policy on the ground that it was procured by fraud." *Kern v. Legion of Honor*, 167 Mo. 472, 67 S. W. 252.

(2) The fifth paragraph of defendant's answer denied that the premium was ever paid, and, as we said above, we think the recital of the policy that the premium had been paid es-

tops the company to deny the receipt of the premium after the death of the insured.

(3) The sixth paragraph of the answer set up as a defense that "one of the conditions of said alleged contract of insurance was that, if within one year from the date thereof said Edwin Lovelace should become intemperate in the use of narcotic or other stimulants, any policy issued thereunder should be null and void; and this defendant alleges that the said Edwin Lovelace did become intemperate in the use of narcotic, alcoholic, or other stimulants, and that his death was the result of narcotic, alcoholic, or other stimulants." Counsel for plaintiff in error, in their very exhaustive brief, say: "We are at a loss to know how counsel for defendant in error ever convinced the court below that this one of the defenses was not good." We think that under the decision in *Kern v. Legion of Honor*, cited above, the answer should have been accompanied by the deposit in court of the premiums received; and without this, it is held unequivocally by the Supreme Court of Missouri that this defense should be dismissed.

(4) The seventh and eighth paragraphs of the answer were correctly stricken under the laws of Missouri—the seventh for the reason that the application was not indorsed upon the policy, and the eighth because the anti-suicide provision of the policy, as has been shown heretofore, is, under the laws of Missouri, void and of no effect. We have carefully examined all of the contentions of the learned counsel for the plaintiff in error, grouped in three heads: First. That the statute of the state of Missouri, allowing the recovery of damages and attorney's fees, will not be enforced by the courts of Georgia. Second. that the court erred in striking the defenses, which is assigned to be error upon three grounds: (a) That the main defenses, if proved, were good; (b) that the statutes of Missouri relative to misrepresentations and procurement of the policy by fraud, and relative to the suicide of the insured, are confined to citizens of Missouri; and (c) that the provision in the policy sued on, relative to the matter of suicide, was not in violation of the laws of Missouri. Third. That the evidence was not sufficient to authorize the verdict allowing the plaintiff damages and attorney's fees, because it did not show vexatious refusal on the part of the company to pay. For the reasons already heretofore stated we think the case was to be tried as if in Missouri and before a Missouri court, and that to deprive a citizen of Georgia of any rights belonging to a citizen of Missouri cannot, under the Constitution of the United States, be countenanced. Parties are presumed to contract with reference to the place of the contract. If it is valid there, it is valid everywhere. The *lex loci contractus* controls as to the nature, construction, and interpretation of the con-

tract. The laws of one state have force in the territory of another, as long as they do not come in conflict with the power or right of that state, or violate its policy or conscience. *Cox v. Adams*, 2 Ga. 158. Where a contract is made in one state to be performed in another, the laws of the latter state govern as to the validity, nature, obligation, and construction of the contract (*Dunn v. Welsh*, 62 Ga. 241; *Herschfeld v. Dixel*, 12 Ga. 584); and they will be enforced by comity, unless contrary to our statute law, our general public policy, or violative of the conscience of the state called on to give it effect. We see no reason why a new trial should be granted because of the recovery of the attorney's fees and damages, especially as the Missouri statute is practically identical with our Georgia law upon the same subject. The only difference is that the state of Missouri imposes the penalty for a vexatious refusal, and the Georgia law (Civ. Code 1895, § 2140) makes bad faith in the refusal the basis for damages and attorney's fees. The various grounds of the second contention of the plaintiff in error have already been discussed, and so we come to the third.

Was the evidence of vexatious refusal sufficient to authorize the verdict upon the subject of damages and attorney's fees? We think that where it appears, as it does in this case, that the defendant had no ground of defense, or at least could set up none, to the payment of the policy, and yet declined to pay it, and thereby imposed upon the beneficiary a burden not contemplated in the original contract with the insured, and, without establishing any good reason for delay, subjects the widow and children of the dead to the expense of collecting by law what was contracted to be paid upon proofs of death, and extensively prolongs the litigation, it would be a great hardship if this loss and expense should be deducted from the provision made by the deceased for his family. On the other hand, we think that the expense necessary to collect the policy should be paid by the company, unless it establishes some good reason for an apparently frivolous refusal to pay promptly. In other words, the burden of proof, where unusual and unnecessary delay is shown, should be upon the company to give reason for the delay; or, after the delay is shown, it will be presumed to be vexatious, as in this case, or in bad faith, if under our Georgia statute. It must appear, from the evidence in this case, that the refusal or the neglect to pay was frivolous. The purpose of the law is to force prompt payment of such losses, after the lapse of a reasonable time, to enable the company to ascertain good grounds, if any, for not meeting the demand, and if no such cause existed for the refusal of compliance with the demand, and it refuses to respond, the company does so subject to the further

claim for damages. *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 231. The meaning of the term "bad faith" is "any frivolous or unfounded refusal in law or in fact to comply with the requisition of the policy holder to pay according to the terms of his contract and the conditions imposed by the statute." We can hardly imagine anything that would be more "vexatious" than the treatment—the silent contempt—the plaintiff received at the hands of the company up to the time the suit was brought. We think the evidence authorized the jury to find that there was a vexatious refusal; and it was a benefit to the company that the penalty was affixed by the Missouri statute, instead of under the provisions of our Code, which would have allowed a larger penalty. For the decision in *Phenix Insurance Co. v. Hart*, 112 Ga. 765, 38 S. E. 67, holding section 2140 of the Civil Code of 1895 to be unconstitutional, was based entirely upon the decision of the Supreme Court of the United States in *Gulf, Colorado & Santa Fé Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 668, as controlling authority; and, since the decision in the *Phenix Case*, the Supreme Court of the United States has held, in the *Mettler Case*, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, that the ruling in the *Ellis Case* is confined to railway companies only, and has no application whatever to penalties imposed on insurance companies.

Judgment affirmed.

POWELL, J. (concurring specially). I cannot agree with all the reasoning by which my Brethren of this court arrive at the result in this Case. Indeed, it is only with hesitation that I am able to concur at all. It does seem, however, that if the insurance statutes of Missouri are to be read into the contract of insurance as a part thereof, these laws, as construed by the decisions of the courts of review in that state, authorize an affirmance of the judgment. The difficulty is that these statutes do not on their face purport to include the plaintiff within their purview. By express language they are applicable only to policies of insurance written upon the lives of citizens of Missouri; and it is presumed that as to policies of insurance not written upon lives of its own citizens the common law still prevails in that state. But I have finally come to the conclusion that, since policies of insurance are to be most strongly construed against the insurer, the language of the policy, wherein it contracts that the rights of the parties thereunder shall be determined in accordance with the laws of Missouri, contemplates these statutes, and not the common law merely; in other words, that the policy contracted to give to Lovelace the same rights which he would have if he were a citizen of Missouri.

In this view of the question I am able to concur in the judgment.

(1 Ga. App. 350)

**BAILEY & CARNEY BUGGY CO. v. GUTHRIE. (No. 149.)**

(Court of Appeals of Georgia. March 2, 1907.)

**1. BILL OF EXCEPTIONS—FORM AND ARRANGEMENT—WRIT OF ERROR—DISMISSAL—STATUTORY PROVISIONS.**

Under Civ. Code 1895, § 5532, taken in connection with Acts 1893, p. 52 (Civ. Code 1895, § 5534), it is mandatory that the trial judge certify the bill of exceptions to be true; but the remainder of the prescribed form of the certificate is directory only, and no error or misdirection therein contained will operate to cause a dismissal of the writ of error in the appellate court.

**2. WRIT OF ERROR—REVIEW—PRESUMPTIONS—MAKING AND FILING BILL OF EXCEPTIONS.**

Unless the contrary affirmatively appears, the certifying, serving, and filing of a bill of exceptions are to be regarded as having taken place in their proper chronological sequence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3795-3803.]

**3. PLEADING—MOTION TO STRIKE—GROUNDS.**

While a plea or answer which sets up no legal or equitable defense, being bad in substance, may be stricken on motion at the trial term, yet such a motion is not available where the plea states a substantial defense, but is merely deficient in certainty or particularity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1102-1110.]

**4. SAME—PLEA—CONSTRUCTION.**

The plea in this case was not subject to the construction that it admitted a sum to be due by the defendant to the plaintiff in excess of the amount found by the jury in the latter's favor.

**5. WRIT OF ERROR—REVIEW.**

The objections to the evidence were not well taken, the charges complained of are not erroneous for any of the reasons assigned, and the verdict is not without sufficient evidence to support it.

(Syllabus by the Court.)

Error from City Court of Nashville; Peoples, Judge.

Action between the Bailey & Carney Buggy Company and one Guthrie. From the judgment, the Bailey & Carney Buggy Company bring error. Affirmed.

Alexander & Gary, for plaintiff in error. Hendricks, Smith & Christian and Bule & Knight, for defendant in error.

POWELL, J. Since we have deemed it unnecessary to elaborate in the opinion the points decided in the headnotes 3 to 5, inclusive, we shall set forth only so much of the facts as are necessary to an understanding of what is decided upon the motion to dismiss the bill of exceptions. The assignment of error is to the overruling of a motion for a new trial, and no evidence is contained in the bill of exceptions, but the brief of the evidence is specified by the plaintiff in error as a necessary part of the record. The certificate of the judge, in addition to verifying the bill of exceptions, certifies that it "contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of," and concludes in regular form. The point is made that the certificate, in referring to the

evidence, employs the word "contains," instead of the word "specifies." Civ. Code 1895, § 5534 (Acts 1893, p. 52), provides: "It shall be the duty of the judge, to whom any bill of exceptions is presented, to see that the certificate is in legal form before signing the same; and no failure of any judge to discharge his duty in this respect shall prejudice the rights of the parties by dismissal or otherwise." Prior to the adoption of this statute compliance with the prescribed form of certificate to a bill of exceptions was mandatory, and a certificate in the form used in the present case would not have been sufficient. *Gresham v. Turner*, 88 Ga. 160, 18 S. E. 946; *Lovingood v. Roberts*, 89 Ga. 417, 15 S. E. 495; *Holland v. Van Bell*, 89 Ga. 223, 15 S. E. 302. Since the adoption of this statute the Supreme Court has, reluctantly at first (see *Pusey v. Sweat*, 92 Ga. 809, 19 S. E. 816, and *Gregory v. Daniel*, 93 Ga. 795, 20 S. E. 656), but finally fully, yielded its assent to the principle that as to everything in the certificate presented by the Civil Code of 1895, § 5532, except the actual verification of the bill of exceptions, the form is directory only. *Scott v. Whipple*, 116 Ga. 214, 42 S. E. 519.

The further point is made, in the motion to dismiss, that "the writ of error is not dated, and there is no way to ascertain whether the writ was signed before the acknowledgment of service or not, or to ascertain whether the bill of exceptions was filed in the clerk's office before acknowledgment of service." "The presumption is that the different steps taken in having the certificate signed, service acknowledged, and the bill of exceptions filed were in their proper chronological sequence." *McCain v. Bonner*, 122 Ga. 843, 51 S. E. 36. The cases of *Vickers v. Sanders*, 106 Ga. 266, 32 S. E. 102, and *Cooper v. State*, 121 Ga. 578, 49 S. E. 707, holding to the contrary, were expressly overruled in *Porter v. Holmes*, 122 Ga. 784, 50 S. E. 923. *Bush v. Keaton*, 85 Ga. 296, was decided prior to the passage of the act of 1881, touching this subject-matter. So that the bill of exceptions will not be dismissed; but, under our holding as contained in the last three headnotes above, the judgment will be affirmed on the merits of the case. Judgment affirmed.

(1 Ga. App. 476)

BENNETT v. CRUMPTON. (No. 122.)

(Court of Appeals of Georgia. March 22, 1907.)

1. SLANDER—JUSTIFICATION—FACTS CONSTITUTING.

A. brought suit against B. for slander for using of and concerning him the following words: "It is the general belief among the negroes and a great many white people that A. broke open the smokehouse of C., a negro, and stole therefrom a quantity of meat and syrup." A plea of justification was insufficient which alleged that B. had used such words and that his statement as to the existence of such belief of A.'s guilt was the truth. The plea should

have averred further that A. was in fact guilty of the crime imputed to him by the report and belief which B. had repeated. The proof necessary to establish a plea of justification in such case would be A.'s guilt of the crime imputed to him as shown by a preponderance of the testimony. Proof of the fact that it was the common report and belief in the neighborhood that A. was guilty would not be sufficient. "Tale-bearers are as bad as tale-makers," and it is no defense that the speaker did not originate the slander, but heard it from another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 104, 222.]

2. SAME.

The court erred in instructing the jury that the plea of justification would be established by a preponderance of the evidence showing that the statement made by B. as to the existence of the general belief that A. was guilty of the crime imputed to him, was true.

3. SAME.

The court erred in refusing a written request to charge embodying the principle stated in the first headnote.

4. SAME—ACTIONS—EVIDENCE—ADMISSIBILITY.

The court also erred in admitting testimony to the effect that it was "the general belief and report of the neighborhood that A. was guilty of breaking open the smokehouse of C., and stealing his meat and syrup," in support of the plea of justification. Such evidence would be admissible in mitigation of damages.

(Syllabus by the Court.)

Error from City Court of Dublin; Burch, Judge.

Action by K. H. Bennett against R. H. Crumpton. Judgment for defendant, and plaintiff brings error. Reversed.

George B. Davis and Ira S. Chappell, for plaintiff in error. John S. Adams, for defendant in error.

HILL, C. J. K. H. Bennett brought suit against R. H. Crumpton, in the city court of Dublin, for slander in using of and concerning him the following words: "It is the general belief among the negroes and a great many white people that K. H. Bennett broke open the smokehouse of Lee Tillery, a negro, and stole therefrom a quantity of meat and syrup." The defendant filed the following plea: "That he did \* \* \* use the words of and concerning the plaintiff as set out in the \* \* \* petition, and he asserts that the report concerning the plaintiff \* \* \* is and was true; and defendant stands ready to prove the same." The plaintiff demurred to this plea because "it is too vague and uncertain, and does not amount to a plea of justification, because it does not admit the truth of the charge and imputation of burglary and theft as charged in the declaration, and offer to prove the same, but admits only the report concerning the plaintiff, and offers only to prove that said report is true." The court overruled this demurrer, and allowed the plea to stand as a sufficient plea of justification. The court instructed the jury that the plea would be sustained if the preponderance of the evidence established the truth of the

admission, to wit, that it was the general opinion among the negroes and a good many white people that the plaintiff had stolen the meat and syrup from the negro mentioned. The error assigned in this charge was that it confined the jury to a consideration of the question of opinion in the community as to the plaintiff's guilt, creating the impression on the minds of the jury that, if the defendant succeeded in proving that such was the opinion in the neighborhood, the plea of justification would be fully proved; whereas the court should have charged that, in order for the plea of justification to avail, it was necessary for the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of the burglary and larceny as set out in the declaration. The court refused a written request to give the following charge: "In order for defendant to sustain the plea of justification, it is necessary for him to prove, by a preponderance of the testimony, that Bennett is guilty of breaking open Tillery's smokehouse and stealing therefrom his meat and syrup. Then your verdict must be for the defendant, for then the defendant would have made good his plea of justification by proving to your satisfaction that Bennett is guilty as charged in the declaration, and he was justified in using the language concerning Bennett, because it was the truth. If, on the other hand, a preponderance of the testimony convinces you that Bennett is not guilty of breaking open Tillery's smokehouse and stealing his meat and syrup, then your verdict should be for the plaintiff in some amount. It makes no difference what the common belief is or the current reports in the community." It is also claimed that the court allowed, over the plaintiff's objection, certain witnesses to testify that "it is the common report or belief in the neighborhood that Bennett stole Lee Tillery's meat and syrup, and the people generally believe that he did it." The objection made to this testimony was that "it was hearsay and inadmissible, and incompetent to prove a charge of burglary and larceny."

We do not think the plea or the evidence submitted in support thereof sufficiently averred or proved justification. One who repeats a charge imputing to another a crime, when called upon to account, cannot legally justify by showing that the alleged slander originated with others, and that he merely repeated it. Under the plea of justification he must go further, and prove by a preponderance of the testimony that the plaintiff did as a matter of fact and truth commit the offense with which he is charged. "Every repetition of a slander originated by a third person is a willful publication of it, rendering the person so repeating it liable to an action. 'Tale-bearers are as bad as tale-makers.' And it is no defense that the speaker did not originate the scandal, but heard it from another, even though it

was a current rumor and he in good faith believed it to be true." Newell on Slander and Libel, 350. "Thus, if the libel complained of be 'A. B. said that plaintiff had been guilty of fraud, etc.,' it is no avail to plead that A. B. did in fact make that statement on the occasion specified. Each repetition is a fresh defamation, and the defendant by repeating A. B.'s words has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer to the action must not merely allege that A. B. did in fact say so, but must go on to aver with all necessary particularity that every word which A. B. is reported to have said is true in substance and in fact." Odgers on Libel and Slander, 173.

This rule, as declared by these standard authorities, is abundantly supported by the courts. A few decisions hold that slanderous words may be justified by giving another as the author by whom the assertion had previously been made, but it is generally held that this is not the law, both by the courts of England and this country. *Bennett v. Bennett*, 6 C. & P. 588; *De Crespigny v. Wellesley*, 5 Bing. 392, 2 M. & P. 695; *Dole v. Lyon*, 10 Johns. (N. Y.) 447, 6 Am. Dec. 346; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Graves v. State*, 9 Ala. 450. In *Waters v. Jones*, 3 Port. (Ala.) 442, 29 Am. Dec. 261, the words were: "It is the general opinion of the people in Jones' neighborhood that he burnt Coleman's gin-house"—and it was held that they were actionable, and that proof that such was the belief would furnish no defense. In the case of *Brewer v. Chase*, 121 Mich. 523, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527, it was held that "where one publishes that he has heard that another has been guilty of certain disgraceful conduct, though he give the source of his information, he makes the charge his own, and must show, in an action for libel, to constitute justification, not merely that he has in fact heard it, but that the charge itself is true." In *Kenney v. McLaughlin*, 5 Gray (Mass.) 3, 66 Am. Dec. 345, the court says: "The 'story' uttered or repeated by the defendant contains a charge against the plaintiff of a nature to destroy her reputation. \* \* \* It is no answer, in any forum, to say that she only repeated the story as she heard it. If the story was false and slanderous, she must repeat it at her peril. There is safety in no other rule." In *McPherson v. Daniels*, 10 Barn. & C. 263, it was held that if A. said of X. that he was a thief, and C. published that A. said of X. that he was a thief, in a certain sense C. would publish the truth, but not in a sense that would constitute a defense. See, also, *Giddens v. Mirk*, 4 Ga. 364. But we do not think it necessary to multiply authorities on this point. Our own Supreme Court, in *Cox v. Strickland*, 101 Ga. 482 (3), 28 S. E. 655, declares the law to

be as herein contended—that, to justify the repetition of an accusation of crime, the proof must show, not only the fact of the accusation, but the truth of the accusation. From what we have said it follows that, in our opinion, the charge of the court complained of, and the refusal to give the charge requested, were erroneous.

We also think that the court erred in admitting the testimony to the effect that it was the general belief and report of the neighborhood that the plaintiff was guilty of breaking open the smokehouse of Lee Tillery and stealing his meat and syrup. Common fame may probably be given in evidence in mitigation of damages, but not in support of a plea of justification.

The judgment of the trial court refusing a new trial is reversed.

(1 Ga. App. 162)

ATLANTA, K. & N. RY. CO. v. SMITH.  
(No. 26.)

(Court of Appeals of Georgia. Feb. 13, 1907.)

1. DEATH—PARTIES TO ACTION—BENEFICIARIES.

Under the statutes of Tennessee, the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing of another, would have had against the wrongdoer in case death had not ensued, does not abate, or is not extinguished, by his death, but passes to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin. Therefore, when the employé of a railway company is killed in Tennessee by the negligence of the company, either his administrator or his widow can bring suit for such negligent homicide. In either case the recovery inures to the beneficiaries designated by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 38, 42.]

2. PARTIES—DESCRIPTION—AMENDMENT.

Where such a suit was brought in this state by the widow, suing as administratrix, for the benefit of herself as widow, an amendment striking the descriptive word "administratrix" from the declaration, and leaving the suit to proceed in the individual name of the widow, was properly allowed. Civ. Code 1895, §§ 5106, 5105, 3361. The right of amendment, being remedial and pertaining solely to the method of procedure, is governed by the *lex fori*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 165.]

3. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—AMENDMENT AS TO PARTIES.

Such amendment does not substitute a new party for the original plaintiff, or make a new cause of action, so as to open the case to the statute of limitations, but the amendment relates back to the commencement of the action, so as to defeat the bar of the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 543.]

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by Mrs. Maude Smith against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. Arnold & Arnold, for defendant in error.

HILL, C. J. On August 11, 1902, Mrs. Maude Smith, as administratrix of Clyde Smith, deceased, brought suit in the city court of Atlanta against the Atlanta, Knoxville & Northern Railway Company. The suit was for damages resulting from the homicide of said Clyde Smith, who was killed in a wreck on the line of the defendant's railway in the state of Tennessee. The injuries were inflicted September 25, 1901, and the deceased died therefrom September 26, 1901. The statutes of Tennessee, under which the suit was brought, were set up in the declaration, and are as follows: Code of Tennessee 1858, § 3130: "The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing of another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin, free from the claims of creditors." Section 3131: "The action may be instituted by the personal representative of the deceased; but if he decline, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed by paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution." It will be seen that these statutes give the personal representative the right to prosecute the cause of action "which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing of another, would have had against the wrong-doer in case death had not ensued." The right of action survives, to be prosecuted by the personal representative of the deceased for the benefit of his widow, and, in case there is no widow, to his children; and, in the event of neither widow nor children, for the benefit of the next of kin of the deceased, "free from the claims of creditors." In other words, the personal representative is the nominal plaintiff, the recovery being for the beneficiaries named; and in order that the rights of the beneficiaries might be fully protected, and to guard against the failure of the personal representative to sue, the widow and children are allowed to use his name without his consent, and bring the suit, under certain conditions as to costs, etc.

To the original petition filed in this case by the administratrix, for the benefit of the widow and two minor children, the defendant submitted certain special demurrers. These

demurrers were all overruled, and, on exceptions, this judgment was carried to the Supreme Court. That court decided adversely to all the demurrers, except as to misjoinder of parties. The court held that the allegations setting forth the names and ages of the minor children were irrelevant, and should be stricken as surplusage, that the fact that there is a widow is all that is necessary to give a right of action to the representative, and that whether a recovery by the representative, upon the ground that there is a widow, would inure to the benefit of the children, as well as to that of the widow, are matters of no concern to the defendant. The court held that the petition, with surplusage stricken, set forth a good cause of action, under the Tennessee statutes, by the administratrix, for the benefit of the widow. *Atlanta, Knoxville & Northern Ry. Co. v. Smith*, 119 Ga. 669, 46 S. E. 853. The petition was amended in accordance with the foregoing decision of the Supreme Court, and the case came to trial in the city court of Atlanta, March 6, 1905. The plaintiff tendered in evidence temporary letters of administration on the estate of Clyde Smith, issuing out of the court of ordinary of Fannin county, Ga. To this evidence the defendant objected, and, pending argument on this objection, plaintiff amended her declaration by striking therefrom the word "administratrix," and leaving the suit to proceed in the name of Maude Smith, as widow. In support of this amendment, the plaintiff set up the statute of Tennessee (1871) authorizing such suits to be instituted by the widow in her own name. The defendant objected to this amendment on the following grounds: (1) Because the effect of said amendment was to substitute a new party plaintiff to prosecute the cause of action originally instituted. (2) Because said amendment was not germane to the original suit, and sets up a new cause of action. (3) Because the original suit was not such a suit as is contemplated by the Code of Georgia authorizing amendments as to striking, and insertion, of representative capacity as found in section 5106, such section having reference solely to actions brought by or against estates for the recovery of, or relating to, property or assets of such estates. (4) Because said amendment shows on its face that, if allowed, the cause of action was barred by the statute of limitations, no suit having been brought in behalf of the widow within two years of the time of the injury resulting in the death of her husband, Clyde Smith, and said cause of action being subject to the bar of the statute of limitations of two years. (5) Because the statutes of Tennessee, pleaded by the plaintiff and relied upon by her to maintain the cause of action in said case, only authorize the widow to institute a suit, and do not authorize her to be made a party to the suit brought by the personal representative. (6) Because said amendment sets forth a new cause of action.

(7) Because, under the pleadings and the proof tendered by the plaintiff prior to said amendment, said proof being temporary letters of administration in behalf of Maude Smith as temporary administratrix of the estate of Clyde Smith, deceased, no suit had been brought, up to the time said amendment was offered, that could be maintained under the said statutes of Tennessee. These objections were overruled, and said amendment allowed on March 6, 1905, and said case allowed to proceed in the name and behalf of Mrs. Maude Smith, as widow of Clyde Smith, deceased. To the judgment allowing said amendment over the objections of the defendant exceptions pendente lite were made, allowed, and certified, and proper assignment of error made thereon in the bill of exceptions. After the amendment was allowed the defendant made a written motion to dismiss the whole case, on the ground that, as amended, it set forth no cause of action. The court overruled this motion, and the defendant then excepted, now excepts, and says that the court erred in not sustaining said motion. Exceptions pendente lite were duly tendered, allowed, and made part of the record; and error on this judgment is properly assigned in the bill of exceptions.

Defendant then tendered a plea of the statute of limitations, which was, on plaintiff's motion, rejected, and defendant likewise excepted to the order rejecting said plea, duly tendered exceptions pendente lite, which were allowed and made part of the record, and error is properly assigned in the bill of exceptions on this order and judgment. The averments of this plea are here set out in full: "(1) While said original suit on its face purports to have been brought by Maude Smith as administratrix of Clyde Smith, deceased, the said Maude Smith at the time said suit was brought was not in fact the administratrix of said Clyde Smith, deceased, and was not then the personal representative of said Clyde Smith, deceased. Said Maude Smith was on the 5th day of December, 1904, appointed administratrix of the estate of Clyde Smith by the ordinary of Fannin county, Ga.; and until said appointment she was not the personal representative of said Clyde Smith, deceased. (2) Until said suit was so amended as to convert same into a suit by Maude Smith as widow of Clyde Smith, deceased, no suit had been instituted upon said cause of action by the widow of Clyde Smith, suing as such, or by the personal representative of Clyde Smith, suing for the benefit of his widow, and the personal representative or the widow of Clyde Smith, as the case may be, alone are entitled, under the law of Tennessee, to maintain the suit upon said cause of action, as appears from the copies of the statutes of Tennessee, set forth in pleadings of the plaintiff in said case. (3) At the time said amendment converting said suit into a suit by Maude Smith, as the widow of Clyde

Smith, as plaintiff in said case, was allowed and filed, to wit, on March 6, 1905, more than two years had elapsed since the injuries resulting in the death of Clyde Smith were received by him, to wit, on September 25, 1901, and more than two years had elapsed since the death of said Clyde Smith, to wit, September 26, 1901, and more than two years had elapsed from said dates of injury and death as aforesaid before said Maude Smith was appointed administratrix of the estate of said Clyde Smith, deceased, to wit, on December 5, 1904. (4) The statute of limitations applicable to said cause of action is two years, and the same began to run from the date of said injuries."

After this preliminary skirmish of pleading, the real battle took place, and resulted in a substantial victory for the plaintiff in a verdict for \$20,000. The trial court, in the exercise of its discretion, set aside this verdict and granted a new trial. On the second trial, April 9, 1906, plaintiff obtained a verdict for \$5,000. The defendant made a motion for a new trial, which was overruled, whereupon the defendant excepted and brings to this court the whole record, including exceptions pendente lite to rulings on the first trial. In this court the plaintiff in error abandoned all assignments of error, except, first, the order of the court allowing the plaintiff to amend her declaration by striking therefrom the allegation that she was suing in her capacity as "administratrix" of Clyde Smith, and inserting in lieu thereof herself as widow of Clyde Smith; second, the overruling of the motion to dismiss the petition as amended; and, third, the rejection of the plea of the statute of limitations. These assignments constitute the gravamen of the case to be reviewed by this court.

1, 2. Did the court err in allowing the amendment to the petition, striking therefrom the allegation that Mrs. Maude Smith was the administratrix of the estate of Clyde Smith, and inserting in lieu thereof herself as the widow of Clyde Smith, and allowing the suit to proceed in her individual name? Under the original petition based on the sections of the Tennessee Code therein set up and proved the suit was brought by the administratrix for the benefit of his widow and two minor children. The Supreme Court of this state held that this was a good suit in behalf of the widow. *Atlanta, K. & N. Ry. Co. v. Smith*, 119 Ga. 667, 46 S. E. 853. The administratrix was only a nominal plaintiff; the real plaintiff being the widow. Under the law of Tennessee, the right of action given to the husband passed, by virtue of this statute, to his personal representative, for the benefit of his widow. And even under the law prior to the act of 1871 the widow had the right to prosecute the suit in the name of the personal representative under certain conditions. The act of 1871 (page 70, c. 78, Acts Tenn. 1871) amended the

law on this subject by providing that the right of action which the deceased husband would have had if he had not died shall pass to his widow, and allowing the widow to prosecute the suit in her own name. The Supreme Court of Tennessee in *Webb v. Railway Co.*, 88 Tenn. 128, 12 S. W. 430, construing the old law and the act of 1871 amendatory thereof, says: "Both before and since the amendment, the administrator is in fact a nominal plaintiff, the recovery being for the widow and children. \* \* \* When we consider the object in view, and when we take the language of the amendatory act itself, we are led to the conclusion that the Legislature intended merely to give the cause of action to the widow in her own name in preference to any administrator, but not to the exclusion of an administrator where the widow elected not to sue."

When this suit was filed, either the administratrix or the widow had the right to bring it. The plaintiff, as administratrix, filed the suit as the nominal plaintiff, for her individual benefit as the real party at interest. The amendment allowed under the act of 1871 simply eliminated from the case the nominal party, and substituted therefor the real party. There was no change of persons, but the real party interested in the suit, and in whom was placed the right of action, took the place of the nominal party. The substance was exchanged for the shell. While such change secured and perfected the rights of the real plaintiff, we cannot see how it injuriously affected any of the rights of the defendant. It is well settled that the question presented by the allowance of this amendment must be determined according to the remedial statutes of this state. The right to sue, and the persons authorized to bring suit, are governed by the laws of Tennessee, where the cause of action arose. The method of suit is determined by the laws of the state where the suit is brought. "The practice of the *lex fori* in respect to pleadings, amendments, and the general mode of procedure will control, if it differs from the practice in the state where the cause of action arose." This rule is so perfectly familiar as to render citation of authority unnecessary. *South Carolina Railroad Co. v. Nix*, 68 Ga. 572 (4a); *O'Shields v. Railway Co.*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152. This being true, section 5106 of the Civil Code of 1895 applies and conclusively settles the question. This section is as follows: "In an action by or against an executor, administrator, or other representative, the declaration may be amended by striking out the representative character of such plaintiff or defendant. And in an action by or against an individual, the pleadings may be amended by inserting his representative character." The amendment in this case simply struck the representative character of the plaintiff, who was only the nominal plaintiff, and left the suit to proceed in the



individual name of the widow, who was the real plaintiff, and, so far as the defendant was concerned, the only person who had any right to the recovery or any interest therein. *Atlantic, K. & N. Ry. Co. v. Smith*, 119 Ga. 669, 46 S. E. 853, *supra*.

But it is insisted that under the law of Tennessee, presumably the common law, a temporary administrator was not such personal representative as was authorized to bring the suit. The declaration in this case alleged generally that the plaintiff was the administratrix of Clyde Smith, deceased; and for the purpose of deciding the question made by the amendment, in the absence of a special demurrer, we must assume that she was the regular or permanent administratrix; but, conceding that the suit was brought by her as temporary administratrix, and that by the laws of Tennessee such administratrix could not bring the suit, she being also the widow, clearly entitled to bring the suit under said laws, the right to strike the word "administratrix," merely a word *descriptio personæ*, and leave the suit to proceed in her name as widow, is manifest. In other words, the allegations of the declaration with this word left out making a good cause of action in behalf of the widow, such word can be stricken out as a misdescription, and the suit stand as a good one in the name of the widow. The widow has an individual right to recover under the Tennessee statute, without reference to whom the proceeds are afterwards to be distributed. Certainly she would have such right as to her own individual interest in the proceeds, and the suit, as amended, would therefore be a perfectly good suit as to her. *Act 1871*, p. 70, c. 78, *Acts Tenn.*; *Webb v. Railway Co.*, 88 Tenn. 119, 12 S. W. 428; *Greenlee v. Railroad Co.*, 5 Lea (Tenn.) 418; *Hooper v. Railroad*, 107 Tenn. 712, 65 S. W. 405; *A., K. & N. R. Co. v. Smith*, 119 Ga. 669, 46 S. E. 853. We might therefore well hold that the suit as originally brought was by the widow in her individual capacity, and that the amendment was really unnecessary, on the assumption that she, as the temporary administratrix, was not authorized to bring suit, but as the widow she was so authorized.

The case of *Flatley v. Memphis & Charleston Ry. Co.*, 9 Heisk. (Tenn.) 230, is relied upon by counsel for plaintiff in error. That was a suit before the act of 1871, and was by the widow of the deceased who had been negligently killed by the defendant. Under the law as it then existed, she had no right to bring a suit as widow of the deceased, except in the name of the personal representative, and to prevent the defeat of such suit an amendment was made, substituting the administrator as plaintiff. The amendment was allowed, but the court held that prior to such amendment no suit had been brought for this cause of action that could be maintained, and the statute of limitations of Tennessee was sustained. When the present suit

was brought, the widow did have the right of action under the law of Tennessee, and, after the words of description had been stricken out by the amendment, it left the cause of action in the name of the widow substantially as it had been from the filing of the original declaration. It is also insisted by counsel for plaintiff in error that the amendment substituted the widow as the personal representative of the deceased, as plaintiff, for the widow as an individual. If this be true, such right is fully given by the latter part of section 5106 of the Civil Code of 1895, which says: "And in an action by or against an individual, the pleadings may be amended by inserting his representative character." We think it wholly immaterial, under this section of the Code, and under section 3361, whether the amendment changes the character of the suit from that of an individual into a suit by the personal representative, or by the administrator as personal representative into a suit by the widow as personal representative, for all of these changes are clearly provided for under Code sections, *supra*.

3. If, therefore, this amendment was properly allowed, it follows as a corollary that it did not open up the suit to the statute of limitations. The amendment relates back to the date of the original declaration, and, if it be not barred, the amendment will be not barred. That an amendment properly allowed does relate back to the date of the filing of the original declaration is too well settled to admit of doubt. That this amendment did not substitute a new party nor set up any new cause of action we have endeavored to show. The cause of action was that of the deceased, passing at his death to his widow or personal representative. Unnecessary words of description, describing the plaintiff as administratrix, were stricken out, leaving the same person as an individual, in her individual right, to prosecute the suit. That such an amendment relates back to the filing of the suit so as to prevent the bar of the statute of limitations has been repeatedly held by our Supreme Court. *Colley v. Gate City Coffin Co.*, 92 Ga. 664, 18 S. E. 817; *Verdery v. Barrett*, 89 Ga. 349, 15 S. E. 476; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Rutherford v. Hobbs*, 63 Ga. 243; *Flatley v. Railroad Co.*, 9 Heisk. 230; *Hooper v. Railway Co.*, 107 Tenn. 712, 65 S. W. 405.

We have given to the able argument of the counsel for the plaintiff our earnest and careful consideration. We do not in this opinion think it necessary to follow him in the many phases of the objections which he has so forcibly urged against the allowance of the amendment in question, nor in his contention that the statute of limitations, after the amendment had been allowed, was fatal to the suit. We think there can be no doubt that the vital question in this case, to wit, the allowance of the amendment, is fully governed by the provisions of our Civil

Code, *supra*, on the subject. These provisions are liberal in behalf of the substantial rights of parties. Subtle distinctions or overnice constructions, which tend to destroy or render doubtful the enforcement of right and justice, should not be favored. The trend of modern judicial utterance is to make plain the pathway of the law, and to make impossible the defeat of substantial rights by mere technicalities. Apply these observations to the facts of this case. A man is killed in Tennessee by the negligent conduct of the railroad company. The law of that state plainly says that the right of action for such wrong is in the deceased, but shall not die with him, and survives to his widow or personal representative. Either one can set in motion the legal machinery to enforce the right of action against the wrongdoer, or, to use the expressive language of the learned counsel for plaintiff in error, "either one is the legal conduit through whom the fruits of recovery could reach the beneficiaries entitled." The widow begins as the administratrix, merely as a formal party. Preferring to proceed as the real party at interest, she simply strikes from her declaration the useless word of description, "administratrix," but with that word gone she leaves the suit, in the name of the widow, complete and perfect as to form and substance. Conceding her undoubted right to recover as the widow, can it be possible that in getting rid of the descriptive word she thereby gives the death-blow to her right? To so hold, it seems to us, would not only be the death of the spirit of the law and the exaltation of its mere form, but would result in the infliction of a great wrong, and would be violative of the express letter of our Code sections, *supra*, on the subject of amendments.

For the reasons above given, we hold that the court did not err in allowing the amendment and overruling the motion to dismiss the suit, and in rejecting the plea of the statute of limitations.

Judgment affirmed.

(1 Ga. App. 380)

**NORTH BRITISH & MERCANTILE INS. CO. v. TYE.** (No. 24.)

(Court of Appeals of Georgia. Feb. 13, 1907.)

**1. INSURANCE—POLICY CONSTRUCTION.**

Insurance is a matter of contract. An insurance policy is a contract of indemnity for loss, and the intention of the parties, if it can be ascertained, must determine the sense in which the terms employed are used. This intention of the parties must be sought for in accordance with the true meaning and spirit in which the agreement was made and expressed in the written instrument, and the ordinary and legal meaning of the words employed must be taken into consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 172, 292.]

**2. SAME—PROPERTY INSURED.**

In the absence of proof that it was the intention of the parties to include houses disconnected with a "two-story frame building and its

additions adjoining and communicating," a contract thus describing the insured property will not be construed to include a servant's house 150 feet distant from the two-story frame building, although occupied exclusively by domestic servants employed in the dwelling house of the assured, and although connected therewith by a system of call bells.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 339-341.]

**3. SAME.**

In some cases the valuation of the property and the premium collected thereon may be submitted to the jury, in ascertaining the intention of the parties, in addition to the intention to be drawn from the words used to describe the property insured in the policy.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by Carrie W. Tye against the North British & Mercantile Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

King, Spalding & Little, for plaintiff in error. Spencer R. Atkinson and John L. Tye, for defendant in error.

**RUSSELL, J.** The question in this case is one of liability or nonliability under a state of facts undisputed. Mrs. Carrie W. Tye brought suit on two policies of insurance which she had on her dwelling at 740 Peachtree street, in the city of Atlanta, and the result of the issue depends upon the construction which is to be placed upon the descriptive terms of these insurance policies. The property insured was described in one of them as "\$4,000 on her two-story frame, shingle-roof building and additions thereto, occupied by assured as a dwelling only, and situated at No. 740 on the west side of Peachtree street in Atlanta, Georgia," the other as "\$4,000 upon the two-story shingle-roof frame building and its additions adjoining and communicating, while occupied as a dwelling-house, and situated at No. 740 on the west side of Peachtree street, Atlanta, Georgia." The lot upon which the dwelling in question stood fronts 80 feet on Peachtree street, and extends back 400 feet to another street. The main dwelling occupied the front; and commencing at the rear of the house and extending around the entire lot to the rear of the house was a plank inclosure. In the rear of the dwelling and within this inclosure, at a distance of about 150 feet, was a one-story two-room servant house, which at the time of the fire was occupied by the domestic servants of the assured. This servant's house, which was entirely apart from the dwelling or any other building, was connected with the dwelling by two wires and electric call bells, by which the servants might be called and could respond. On the other side of the lot there was a barn, 40 or 50 feet from the house, used for stables and the storage of the family vehicles. It was not connected with the house by means of electric bells or otherwise. A chicken yard about 15 feet square, surrounded by a wire net fence, was situated

between the dwelling and the servant's house, about 50 feet from the dwelling. It was in proof that no one dwelt in the barn. On November 22, 1903, a fire occurred, partially destroying the servant's house. The amount of the loss was \$228. A demand was made for indemnity. One other insurance company, which had issued a policy for a like sum as these two policies above described, paid its pro rata share of the loss, leaving \$152 claimed to be due by the defendant company. The company admitted the amount of the loss, but on January 8, 1904, denied its liability, placing its denial on the ground that the servant's house above referred to was not within the terms of and was not insured by its policies. The case was tried in the city court of Atlanta on March 29, 1906. At the conclusion of the plaintiff's evidence, which presented the case above stated, the defendant moved for a nonsuit, upon the grounds that the plaintiff had not made out a case, and that the facts showed that the servant's house was not insured by the policies introduced. The court refused to nonsuit the case, and, on plaintiff's motion, directed a verdict in her favor for \$152, with interest from January 8, 1904. The defendant company, now plaintiff in error, brings the case here, alleging error in the refusal of nonsuit and in the direction of the verdict; the error, as insisted, being that the servant's house is not covered by the policies sued on. The sole question for determination, it will be seen, is this: Was the servant's house, above referred to, covered by the terms of the policy?

The policies are slightly different in form of expression. They are both upon the same building, and in one the insurance extends to "additions thereto," and in the other to "its additions adjoining and communicating." To put the question more exactly from the contract of insurance: Do the words "the two-story shingle-roof frame building and its additions adjoining and communicating," and "her two-story frame shingle-roof building and additions thereto," cover a servant's house situate 150 feet distant, and only connected therewith by two small wires? The plaintiff in error contends that the words do not so signify; that such a separated independent structure is in no legitimate sense either an "addition to the two-story frame shingle-roof building" or one of "its additions adjoining and communicating." The defendant in error insists that either form of expression necessarily includes the house in question, as a component part of the domestic establishment, and that without the use of the word "addition," whether communicating or adjoining, or otherwise; "that the subject of the insurance was a dwelling house, and that, as the words 'dwelling' and 'dwelling house' signify habitation, the meaning of neither can be confined by construction to a single apartment, but comprehends the entire congrega-

tion of buildings, main and auxiliary, used for the purpose of abode."

Led into a comprehensive view of the question by the very scholarly brief of the learned counsel for the defendant in error, we have made a somewhat extended examination of the authorities, and have been much interested in the definition of the term "dwelling house." We have carefully considered the various authorities cited by the counsel for defendant in error to sustain his position, and it is plain that in certain senses the term "dwelling house" may embrace a cluster of buildings. In the case of *Workman v. Insurance Company*, 2 La. 507, 22 Am. Dec. 141, it was held that the word "house," in the common, ordinary acceptation of the term, embraces everything pertinent and accessory to the main building, and that this is the significance that must be given to it when used in policies of insurance. And Mr. Bishop defines a "dwelling house" as "a permanent building or cluster of buildings in which a man with his family resides. He need not so construct his habitation that all the shelter he requires will be under one roof. Therefore the words 'dwelling house' embrace in law the entire congregation of building, main and auxiliary, used for abode." And upon the same line the words "dwelling house" will be found to be defined by numerous other law-writers, such as Bouvier, Angell, and Black. In our opinion the words have a meaning in Georgia which varies with the sense in which they are used. There is one significance attached to the word "dwelling" when considered in connection with the charge of burglary. There the breaking of any house within the curtilage makes complete the offense, provided such breaking be with the criminal intent specified in the statute. There is another meaning in connection with the offense of arson, dependent upon its occupation; and, excepting these two special meanings, there is the use of the word and its significance as commonly used and popularly understood, which, as we will show hereafter, will not include houses disconnected from those occupied by the family. But we think the decision of this case does not depend upon the definition of the word "dwelling house," because the building insured is not only said to be a "dwelling," but it is further described and identified by the words "her two-story frame, shingle-roof building and additions thereto," in one policy, and "the two-story shingle-roof frame building and its additions adjoining and communicating," in the other policy. So that the real question is, not whether a cluster of disconnected houses may or may not in some instances constitute a "dwelling house" (to which proposition we fully agree), but whether it can be fairly understood as a part of the contract of insurance that "a two-story frame building and its additions," used as a dwelling house, shall also include a servant's house

150 feet away, so as to render the insurer liable for damage by fire to the servant's house, though there was no fire or damage to the two-story frame building. Wherever there is a doubt as to the meaning of words, they are to be given their ordinary significance; and policies of insurance, notwithstanding the peculiar language in which they are generally couched, are at last but written contracts, to be interpreted by the same rules as other contracts, and to be enforced according to the intention of the parties; that construction most liberal to the insured being preferred wherever there is ambiguity in the language used. We do not think there is any ambiguity here. We cannot bring ourselves to the conclusion that, giving to words their reasonable and ordinary intentment, the servant's house can be called an addition to the two-story frame shingle-roof building situated at No. 740, on the west side of Peachtree street, Atlanta, Ga. It was on this construction that our learned Brother of the trial bench directed the verdict for the plaintiff; but we are compelled to differ with him, not only by our understanding of the ordinary and general meaning of the descriptive words used in the policy, but because that view is enforced by a consideration of the disastrous effect of any other construction as a matter of public policy.

We are aware that in some states buildings that are disconnected have been connected by legal construction; and we are cited to the cases of *Phenix Insurance Co. v. Martin* (Miss.) 16 South. 417, *Mutual Insurance Co. v. Roe*, 36 N. W. 594, 71 Wis. 33, and *Gross v. Milwaukee Mechanics' Ins. Co.*, 66 N. W. 712, 92 Wis. 656. We have examined these cases, and in doing so were led into a wide field of research by a consideration of cases therein mentioned. It may be safely asserted that the general principle deducible from the rulings in all the states except one is that there has been an inseparable identity of use, no matter what the nature of the structure, where insurance on one building has been made to cover another. In *Phenix Ins. Co. v. Martin*, supra (decided by the Supreme Court of Mississippi), a policy on a two-story brick building and additions thereto, occupied as a dwelling, was held to include the building partly occupied by assured's servants, one of the rooms of which was used as a laundry, although not annexed to the brick building. The opinion in the case is very brief, and the judgment was based entirely on the conclusion that the word "additions" must have operation, and, construing it most favorably to the insured, could only refer to the building nearby, when there was "no other building in assured's yard which could be claimed as an addition to the main building, not built in it as a part of the house originally." In the other cases the issue naturally turned on the identity of use, and the inclusion, by that use, of all the articles destroyed, in a term

of description applicable alike to all of them. We are not prepared to adhere to the principle laid down by either the Supreme Court of Mississippi or the Supreme Court of Wisconsin; though, if we were inclined to do so, these cases are clearly different in several respects from the one now under our consideration. An "addition" means something added to another. It implies physical contact. "Adjoining" means when things meet at some line or point of juncture. Objects are adjacent when they are close to each other, not necessarily in actual contact. It is true that one of the policies used the word "communicating," and the evidence showed that there was communication by call bells between the dwelling and the out-house. But in this age, when communication by wire can be had, no matter what the distance nor what the intervening objects, by telegraph and telephone, it would hardly be that the word "communicating" could be said to be used in an insurance policy in the sense insisted upon by the defendant in error. At least we are not prepared to so hold. As we understand the common acceptance of the word "communicating," as referring to the different portions of dwelling houses (whether constructed originally all under one roof or not), they are houses so connected by some structure, forming a part of both, as to afford a passageway without going into the yard or getting on the ground. The Wisconsin case cited could have well been decided, as it was, upon the descriptive terms of the policy. There the property insured was a manufacturing plant described as "a planing mill and its machinery," and, of course, this did not have as much reference to the buildings as to the entity used for manufacturing purposes, to wit, a planing mill and its machinery. In the Mississippi case, though the distance was less than in the case before us, and there was no other building upon the lot, the court seems to have rendered the decision upon the idea that the word "additions" had to have something upon which to operate, which was then in esse. We are not prepared to follow this doctrine, even were it necessary to decide that question in this case. As we have above stated, the whole question here is embraced in the inquiry as to whether the word "additions," when coupled with the "two-story frame building," will include the servant's house. If the description had been simply the dwelling house of the assured, we confess that we might have been in a sea of doubt, because so many considerations have been urged by different authorities as to the meaning of that term. It appears from the record that the policies upon which this suit was brought were for five years, and it is more reasonable to presume that it was in contemplation that additions might be made to the main two-story building within five years than that it was the intention of the parties to include a discon-

nected building used by servants 150 feet away. In *Workman v. Insurance Co.*, 2 La. 507, 22 Am. Dec. 141, a number of cases are cited to sustain a decision holding that certain outhouses which were damaged by fire were included in the description of the policy, which was as follows: "Two houses situated in Dorsier street adjoining the City Hotel between Custom House and Canal Sta., being number 5 and 7 in the city of New Orleans, in equal proportions of \$10,000." The first reason given for the decision is based upon the fact that the assured paid a premium commensurate with the entire value of the outhouses, as well as the main buildings. And as the greater and lesser buildings were all included with a common brick wall which formed part of the buildings, and as it required the valuation of the lesser houses to be added to the greater in order to conform with the premium, the court held that the company was liable for the damage to the smaller houses, but, in doing so, concluded the decision with these words: "But it must be confessed that we have arrived at this conclusion not without doubts." In the decisions cited to sustain the judgment of the Louisiana court importance is attached in some cases to the distance from the dwelling house, and much to the use. In some cases, also, the necessity of a common inclosure is commented upon. The greater weight of authority seems to be that the use of the building must be accessory to the dwelling. In all of these cases (and most of them are criminal cases) the doctrine of the court seems to be supported by the use of the word as applied to cases of burglary. Nearly all of the cases referred to are prosecutions for arson or burglary; for it is in such cases that the terms "house" and "dwelling house," etc., are most frequently defined. It is obvious, however, that cases of insurance furnish a means of construing the term "house" which is not found in criminal prosecutions. Insurance is a matter of contract, and the intention of the parties, if it can be ascertained, must determine the sense in which the terms employed are used. From the context or from circumstances it may be clear that a policy on a house was intended to cover only a single structure, or, on the other hand, that it was designed to cover accessory and contiguous structures; and it would only be in the absence of special indication of the intention that the term would be interpreted in accordance with the rules adopted in burglary and arson. The method of interpretation as applied to the word "house," and kindred terms, in insurance cases is very well indicated in the following decisions which sustain our view of the meaning of the word "additions" as conveying the idea either of identity of use or of something added to a building by adjoining it and being in some manner connected with said building. In *Liebenstein v. Baltic Fire Insurance Co.*, 45 Ill. 301, in-

surance effected on stock in a certain chair factory was held to cover also stock contained in an engine house appurtenant to the main building and connected with it by a platform and by belting extending from the engine wheel to the machinery in the factory. The court in that case said that the word "factory" does not necessarily mean a single building or edifice, but may apply to several, where they are used in connection with each other for a common purpose and stand together in the same inclosure. On the other hand, in *Liebenstein v. Aetna Insurance Co.*, 45 Ill. 303, which was a case of insurance on a part of the same stock, the policy described the stock as "contained in the two-story frame building occupied by the assured as a chair factory situated on the north side of Superior street"; and it was decided that the stock in the engine house was not covered by the insurance. Here were policies in favor of the same assured, where the test was applied, and to our mind the latter case is nearly identical with the case at bar. In *Blake v. Exchange Insurance Co.*, 12 Gray (Mass.) 285, a policy was issued on goods "in a brick building situated on Main street in Cambridgeport, Mass., known as the Davenport & Co.'s Car Factory"; and it was held that it covered goods in the building erected as a wing against the rear wall of the main building, with opening between about three feet square, commonly inclosed with an iron door; it appearing that both buildings were used in manufacturing cars and were known under the general name of "Davenport & Co.'s Car Factory." In *Washington Mutual Insurance Co. v. Merchants' & Manufacturers' Ins. Co.*, 5 Ohio St. 450, insurance was effected on a "steam flouring mill"; and it was left with the jury to say whether a fire kiln for drying corn or meal, in addition with a corn meal mill, was known or usually incident to a "steam flouring mill." In *White v. Mutual Fire Ins. Co.*, 8 Gray (Mass.) 566, part of property insured was described as a woodhouse, but, while the house was in fact a wood and carriage house combined, the two parts were only separated by a loose partition and the structure was known to the tenants and the neighborhood as "the woodhouse." In *Home Mutual Insurance Co. v. Roe*, the insurance was for a certain amount on a planing mill and addition, and a certain amount on machinery therein. The disconnected building, which was 22 feet away, was the engine room, and the court inferred the intention of the parties to insure the additional building (after defining the mill to be "the building with its machinery where some process of manufacturing is carried on") in the following words: "It conclusively appears that the engine room was the only motive power for propelling any of the machinery in either of the buildings. The engine was used for no other purpose. It was therefore an essential part of the mill. Without it there would have

been no complete mill. The insurance was upon the 'planing-mill building and addition,' and upon the 'machinery, including shafting, gearing, belting, saws, tools, force-pump, and hose therein.' It is claimed that the engine room cannot be construed to mean an 'addition' to the 'planing mill building,' because it does not join directly upon the same; but, as we have seen, they were both essential to the completion of the mill. The motive power was by means of pulleys, belts, and shafts transmitted from the engine room to the machinery in the main building. And the waste shavings, etc., were conveyed from the latter building to the engine room to generate heat to propel the engine. Thus the two buildings were not only connected, but the machinery in each were inseparable, while the whole continued to be a planing mill. The words 'planing-mill building' would seem to be broad enough to include the engine room."

The words, therefore, of this contract, are to be construed according to their general ordinary meaning, bearing in mind the other rule that the contract is to be construed according to the understanding and the intention of the parties, and remembering that even in cases of doubt, while contracts of fire insurance are to be construed more strongly against the insurer (*Northwestern Insurance Co. v. Ross*, 63 Ga. 204), still, in construing the contract, the court cannot go further than a fair construction of the language used will permit (*Behling v. Northwestern Nat. Ins. Co.*, 117 Wis. 24, 93 N. W. 800; *Guarantee Co. v. Bank & Trust Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253). In *Roberts v. Willink*, 21 Ga. 103, Justice McDonald, delivering the opinion, says: "The contract must be construed by the words, unless there be some reason for taking the case out of this first great ruling for the construction of contracts." And in the case of *Clay v. Phoenix Ins. Co.*, 97 Ga. 53, 25 S. E. 420, Justice Atkinson says: "There is no greater sanctity and no more mystery about a contract of insurance than any other. The same rules of construction apply to it as to other contracts; and the true rule for their interpretation may be stated to be that stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intentment, and are to be so construed, if possible, as to avoid forfeitures and to advance the beneficial purposes intended to be accomplished." We may be pardoned for saying that, in our judgment, were the rule of construction so extended beyond what we conceive to be the ordinary meaning of a "two-story frame building and its additions" as to include as an addition a house occupied by servants 150 feet away, it would certainly be an unreasonable intentment, and create forfeitures, instead of avoiding them. If these policies cover this separate servant's house, then, under their covenants, a breach of any condition of the poli-

cies as to the servant's house would vitiate the whole policy. The policy is an entire and indivisible contract. *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216. And a breach of a condition which would work a forfeiture would avoid the entire policies, and not simply authorize an apportionment of the loss. Under the stipulations now before us, if mechanics had been employed for more than 15 days in building, altering, or repairing the servant's house without permission, then the policy on the house would have been void. *Imperial Ins. Co. v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231.

It is a fact, so generally known that the courts may take notice of it, that all over our state dwellings are insured which have outbuildings situated in more or less proximity to the main dwelling, that policies of insurance on these dwellings have provisions the violation of which imposes a forfeiture of their benefits; and to hold then that the word "dwelling" would include the outhouses (generally not intended to be insured in the same policy) would be to put it within the power of the insurers to avoid payment for the loss of the dwelling house should any of the acts prohibited by the policy be done in the outhouses. For instance, if the owner of a dwelling had a disconnected servant's house, and the dwelling was destroyed by fire, and the policy had in it a provision against the keeping of gunpowder or dynamite or naphtha or other explosives, if the insurance company could show that in these outhouses (perhaps never visited by the owner or his family and yet occupied by his servants) there was gunpowder or kerosene or dynamite, and the dwelling house should burn, the policy would be void and there would be no indemnity by reason of the violation of these stipulations of the policy. There would be a breach of the contract and a forfeiture of the policy which it would be impossible for the insured (so far as the outhouses are concerned) to either foresee or prevent. It is a fact well known that at the present time menial servants in this state are in no such state of control as formerly, and that the supervision of their acts or responsibility therefor, unless they be immediately under the eye of the employer, is, at best, but an ill founded legal fiction. Learned counsel for the defendant in error rely upon the principle of an identity of use, and insist that the servant's house is a part of the dwelling house, because it was always occupied by the menial servants of the family; for, quoting from 2 Joyce on Insurance, § 1738, they say: "The word 'house,' as used in a policy of insurance, embraces everything appurtenant and accessory to the main building and used as a part and parcel thereof, even though separated therefrom." Counsel argue that this construction and application of the words "dwelling house" and "house" is peculiarly appropriate to our traditions and social con-

ditions. It is insisted that, under the facts in the case, "the servant's house in question was accessory and one of the appurtenances of the main building," because of the fact that in "this country, in which the policies sued upon were issued, and where they are sought to be enforced, from time immemorial the master has been accustomed to provide shelter for his menials under a roof, within the curtilage, separate from his own." The former existence of the conditions and relations referred to can well be considered a matter of judicial knowledge. But the point is no longer of any effect, except to suggest mournful reflection. Unlike the learned counsel, the writer is too young to recall from personal recollection those days (of which we know only from family tradition and history) when throughout the South the position taken by him was sustained by experience and observation so general as to make it a matter of common knowledge. In the halcyon days which he recalls, the household servants were indeed members of the master's family. The servants' health and happiness were to the master a matter of prime importance, and the care and comfort of the master, the "mis-sus," and their children was to the servant a matter of constant affectionate consideration. And in sickness, it mattered not whether it was master, and none the less if it was the servant, who was stricken by disease; either and each with affectionate tenderness and absorbing interest nursed and ministered to the other until health was restored, or, if the dread Reaper could not be arrested, paid, with grief unaffected, the last painful services to the dead. In those days the out-houses occupied by domestic servants of the family could be well said to be accessory to the domus mansionalis around which they clustered. There was identity of use. Then the old definition, "A dwelling house is a building or cluster of buildings in which a man with his family resides," was applicable. But such are not present existing circumstances.

"Those happy days shall nevermore return,  
Those happy days that you have seen."

We have no wish to elaborate unfortunate conditions. Suffice it to say that it is well known that the habits, services, and feelings of those who intermittently can be induced to perform menial domestic service are generally wholly repugnant to the idea that they are domestic servants, and so subject to obey and be controlled by the master as to be even in any legal sense members of his family. While there may be separated instances to the contrary, the relation sustained by the hired help to the employer is such that now the practice of servants occupying houses within the curtilage is neither general nor usually desirable. But even in those instances where the servant occupies an out-house near the main building the control over the former is, from the nature of the case, so slight that to hold that such a servant's

house is included as a matter of course in the stipulations of a policy of fire insurance on a dwelling house and its additions would virtually destroy the protection of thousands of homes in this state by exposing them to risks of forfeiture for violations of stipulations in the policy by irresponsible persons at the servant's house, whose conduct could be neither foreseen, controlled, nor prevented by the insured. Even if the words of the policy, construed by their ordinary meaning in general use, did not fully satisfy us (as, however, they do) that the "two-story building and its additions" cannot include a one-story servant's house 150 feet away, which was damaged by fire, we are fully persuaded that, under the evidence, no such identity of use was shown as would indicate that it was the intention of the parties to contract in reference to said servant's house. In our opinion neither the words "two-story frame building with its additions, adjoining and communicating," etc., used in one of the policies, nor the "two-story \* \* \* building and additions thereto occupied by assured as a dwelling only," in the other policy, can include the servant's house 150 feet away; and it was error to direct a verdict in favor of the plaintiff under the evidence submitted.

Judgment reversed.

(1 Ga. App. 403)

#### KING MFG. CO. v. WALTON. (No. 60.)

(Court of Appeals of Georgia. March 11, 1907.)

##### 1. MASTER AND SERVANT—INJURY TO SERVANT—ACTION—VARIANCE.

There is no fatal variance between any material allegation of the petition and the proof.

##### 2. SAME—CONTRIBUTORY NEGLIGENCE.

An act of the servant within the scope of his duties, entirely harmless except in connection with certain physical conditions of danger caused by the antecedent negligence of the master of which the servant was ignorant when he performed the act, will not as a matter of law defeat his right to recover, although it may have contributed in some degree to his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

##### 3. SAME—DUTY OF MASTER.

Masters owe to their servants the duty of providing them a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment. This is a positive duty. It is not one of the risks assumed by the servant, and the servant has the right to rely on the fact of its performance by the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-175.]

##### 4. SAME.

This duty is not discharged in a particular case where the facts show that the master negligently left an excavation on his premises in a dangerous place and condition, where he knew the servant would probably be engaged at night in the proper performance of his duties, and that the master, although he had reason to believe that the servant did not know of the excavation, failed to give him warning in respect thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 209, 228.]

**5. SAME—ACTS OF SERVANT.**

The law is not quick to condemn acts of employes as negligence, when such acts result from a zealous, rather than a careless, performance of duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 674.]

**6. TRIAL—QUESTIONS FOR JURY.**

"Juries have no higher function than to solve mysteries," and perplexing problems of fact are wisely submitted to their decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 337-345; vol. 36, Negligence, §§ 277-286.]

**7. MASTER AND SERVANT—INJURY TO SERVANT.**

The court fully and clearly instructed the jury on the law of negligence and contributory negligence; and the verdict was not contrary to the physical facts of the case, and was warranted by the evidence.

(Syllabus by the Court.)

Error from City Court of Richmond County; Eve, Judge.

Action by one Walton against the King Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lamar & Callaway, for plaintiff in error. Austin Branch and A. L. Franklin, for defendant in error.

**HILL, C. J.** The plaintiff brought suit for damages resulting from personal injuries received by him while in the discharge of his duties as an employé of the defendant. There was a demurrer, which was overruled, and exceptions pendente lite were filed. On the trial a verdict was rendered for the plaintiff. The defendant filed a motion for a new trial, which was overruled. The defendant excepts to the decision overruling the demurrer, and also to the decision refusing a new trial. In the amended motion for a new trial several assignments of error are made as to the verdict of the jury, as being contrary to certain portions of the charge, and also that certain portions of the charge were erroneous. These assignments were not argued, and are not covered by the brief, and will be therefore considered as abandoned. It was insisted before us that "the verdict was contrary to the physical facts as disclosed by the evidence, as follows: Plaintiff testified that he was the outside night-watchman, and that his duties required him to look after the boilers, clean them out, and fire them up every morning, and have steam ready for the dynamos and to supply the slashers, and that he also had to keep water in the boilers; and, when there was too much water in the boilers, it would whistle, and when there was not enough it would whistle. He was injured about a quarter to 5 o'clock Tuesday morning, February 14th. He had kept a fire in the boilers all of Monday night before he was scalded the next morning, in order to keep steam in the pipes and prevent their bursting on account of the cold weather. He had tried to revive the steam in the boilers that morning, and succeeded with two of them, but the other he failed

to make hold water, after he had cleaned the clinkers out of the furnace, and then went to the blow-off valve, located on the outside of the brick wall which inclosed the boilers, to see if he could find out where this particular boiler was leaking. This blow-off valve was about two feet above the ground, in the pipe which led from the boiler that failed to generate steam. He caved into the hole which had been dug into the ground around this pipe, where it led down to a horizontal waste pipe. This blow-off valve was used only to empty the water from the boiler, and not to put water into the boiler. The boiler was supplied by water from pumps located in another part of the structure. He did not turn the valve, but got his hands on it, and found it was shut. Then he knew it was burst. Gresham, master mechanic, testified that he reached the boiler at half-past 5 on the morning plaintiff was injured, and found the blow-off valve about half open and the water running out, and that the water had got below the safety plug in the boiler, and that he immediately shut off the water and drew the fire to keep from burning the boiler. The blow-off valve could not have turned itself, but required some human agency to turn it. The leak in the pipe was below the valve, and the valve was between the leak and the boiler. The leak in the pipe at that time would not have emptied the boiler without the valve being open. Reese, the foreman under the master mechanic, testified that the water from the boiler had to pass the valve before it got down to the crack in the pipe; and, when the valve was shut off, the leak, which was below the valve, would not have any effect on the water in the boiler. So long as the valve was shut and closed the water could not get to the leak. The blow-off valve has nothing to do with regulating the water or steam or anything else in the boilers. No water could get to the crack unless the valve was open. It would be impossible unless the valve was out of fix, and he was sure it was in good fix; and, if the valve had been left open all day, the night watchman could not have fired up at all, as it would have let out all the water. If that boiler had been heated up, and furnished heat and steam all night long Monday night, and up to the time of the injury, then that valve could not have been open; for, if the valve had been open from Monday evening, or any time Monday night, up to 5 o'clock that morning, no steam would have been generated in there at all, and the boiler would in that case have burned out before 4 o'clock in the morning. I am a practical mechanic. (a) The fact that plaintiff had been generating steam with the boiler in question all Monday night, without the boiler blowing up, proves conclusively that the blow-off valve, which was used only for emptying the boiler, had not been open during the night. (b) The valve was not out of fix, and could not turn itself, but required some



human agency to turn it. (c) The valve closed prevented any water from reaching the crack in the pipe, which was on the other side of the valve from the boiler. (d) Plaintiff says he found the valve closed and the hole full of hot water. (e) The hot water in the hole below the valve and around the leak could not have been the accumulations from the day before; for it was outside, exposed to the air, during a very cold spell of weather. (f) Some human agency necessarily opened the valve and allowed the water to reach the crack in the pipe below the valve. The night watchman was supposed to be the only human agency on the premises, and his explanation of the water from the boiler filling the hole through the burst pipe will not reconcile with the undisputed physical facts; for water will not flow through a closed valve. (g) Some human agency must have opened the valve before the water could have reached the leak and filled the hole. Whether this human agency was the plaintiff, or a trespasser on the premises of the mill, it would be chargeable to plaintiff's negligence, and defeat a recovery. (h) The only reasonable hypothesis upon which the physical facts can be explained is that the plaintiff, finding too much water in the boiler, had turned the blow-off valve to let the water from the boiler, and, when the water got low in the boiler, had gone back to shut off the valve and found the hole full of hot water. If this is the truth, his own negligence was the proximate cause of his injury. \* \* \* Said verdict is contrary to the evidence, because it appears from plaintiff's testimony that at the time he went to the blow-off valve, where he slipped into the hole of hot water, he had his lantern with him, and that there was no trouble or defect with the lantern. It was a good lantern and cast a light, except in the steam, and he could see the steam before he got to it. If plaintiff could see the steam, this was sufficient to put him on notice of danger; and, by the exercise of ordinary care and diligence, he could have avoided the accident."

We have thus given in full the facts set out in the ground of the motion illustrating the controlling issues in the case. Based upon these facts, and the law applicable thereto, the plaintiff in error insists that it is entitled to have the verdict set aside and a new trial granted, (1) because the verdict is not only without evidence to support it, but is positively contrary to the undisputed physical facts in the case; (2) because plaintiff was unquestionably and indisputably guilty of such contributory negligence as would defeat his recovery; (3) because there is a fatal variance between certain material parts of his declaration and the proof. We will consider these grounds in the inverse order in which they are here stated.

The variance between the allegation and the proof, which is claimed to be fatal, is

seen by reference to paragraph 13 of the petition and to the evidence referring to the same subject. In this paragraph it is alleged that on the morning of his injury he "noticed that he was not getting much steam in one of the boilers. He raked the fire and threw in coal, did every thing he knew to generate the usual amount of steam in said boiler, but to no effect. Thereupon he determined to go to the rear of the boiler and furnace, loose the blow-off valve, and let the steam out of said boiler, in order that he might find out the trouble. This plaintiff did." In his testimony he says, "I did not turn the valve. I got my hands on it and found it was shut, and then I knew it was a burst." The statement made in the paragraph, taken alone, might be construed to mean that he did "loose the blow-off valve," and, so construed, it would present a variance, as against the statement in his testimony that he did not turn the valve, but got his hands on it and found that it was shut. And, if his right to recover was dependent materially upon the act thus pleaded and proved, it would constitute a fatal variance. We cannot say, however, that his right to recover depended solely on the fact whether he did or did not loose or turn the valve. We also think that it would be giving a too narrow construction to the plaintiff's allegation to say that he alleged unequivocally that he opened the valve. He did not allege in paragraph 13 positively and distinctly that he opened the valve. On the contrary, this paragraph, construed in connection with paragraph 17, would fairly give rise to the inference that he did not, mean so to state; for in the latter paragraph he says that he "walked to the rear of the boiler and furnace for the purpose of blowing the steam out of said boiler and furnace," and "stepped into said hole of hot water, and was thereby injured." These two paragraphs, construed together, leave the allegation on this point in doubt, and his evidence clears up this doubt by the positive statement that he did not turn or open the valve.

It is said that the plaintiff was guilty of such contributory negligence as would defeat a recovery, even conceding that the defendant was negligent in leaving the hole around the pipe near the blow-off valve from Saturday evening until Tuesday morning, the time he was injured, because, by ordinary care, he could have avoided the consequences to himself caused by this negligence. In support of this proposition, it is insisted that the plaintiff's own negligence was the effective and leading cause of the injury; the specific acts of negligence relied upon being that he must necessarily, as he alleged in paragraph 13 of his declaration, have turned the valve which allowed the hot water to escape from the boiler and thus reach the crack in the pipe below the valve, and thus leak out and fill up the hole, and that, as the valve could not be turned without some

physical agency, it must necessarily be accepted as a fact that either the plaintiff himself turned the valve, or negligently allowed or permitted some trespasser to turn it, thus permitting said hole to fill up with hot water, and that in either event his injury was the result of his own negligence. We are not prepared to hold as a matter of law, under the circumstances of this case, that, if the plaintiff did turn the valve, it was an act of culpable negligence. He had noticed that he was not getting much steam in the boiler from which this pipe led. It was his duty to find out where the trouble was. "If there was any trouble with the boilers, I was told to see what it was, if I could, and report it." And, if he did turn the valve in an honest effort to find out where the trouble was, we cannot hold as a matter of law, that such act amounted to contributory negligence. It must be borne in mind that the plaintiff did not know of the hole which had been left around the pipe; nor did he know of the break in the pipe below the valve. The turning of the valve and permitting the hot water to go down through the pipe involved no danger whatever, if the pipe had not been broken below the valve and if the hole had not existed around the pipe. Without knowledge of the dangerous conditions existing, he had the right to assume that they did not exist, and could not properly be chargeable with negligence in acting according to such assumption. The effective and producing cause of the plaintiff's injury was not the turning of this valve and permitting the hot water to flow down, but the negligence of the company in permitting the crack to remain in the pipe and the hole to be left open around the pipe. These two things concurring made the act of turning the valve, otherwise harmless, dangerous; and the plaintiff, if he did turn the valve, was ignorant of the danger resulting therefrom.

It is not the law that an act of an employé in the zealous discharge of his duties, which would be entirely harmless but for the pre-existing negligence of the master, is such an act of culpable negligence as would bar his right to recover. The law is not quick to condemn an act of a faithful servant resulting from a zealous, rather than a careless, performance of his duties; and if the plaintiff in this case did, as a matter of fact, turn this valve, thus permitting the water to flow down and out, if he might reasonably have thought that the turning of the valve would result in no danger, but would enable him to find out the cause of "the trouble with the boiler," the jury might very well have found that his act was one of diligence, and not negligence. If, in this case, the servant's act in turning the valve operated upon and rendered actively dangerous the physical conditions previously created by the master's antecedent breach of his obligation, and such act was one of negligence on the part of the

servant, he cannot recover. But if the act of the servant was not an act of negligence, and but for such dangerous conditions would have been harmless, the master is liable. The foregoing propositions on the subject of contributory negligence, we believe, are based upon sound reasoning, and are supported by authority.

A suit by an employé will not be barred on the ground that he was guilty of contributory negligence in respect to the act which was the real cause of his injury, unless it is shown that he knew, or ought to have known, of the conditions which rendered the act so done an imprudent one. 1 Labatt on Master & Servant, § 319. "Negligence can only be affirmed in respect to situations and conditions known to the party to whom it is imputed." *Brown v. Louisville R. Co.*, 111 Ala. 275, 19 South. 1001. "The mere fact that, if the servant had not done a certain act, he would not have been injured, is, of course, not a bar to his maintenance of an action, if that act is not a culpable one, considering the circumstances." 1 Labatt on Master and Servant, § 323. The employer is not allowed to escape responsibility where the intervening act of the employé, although it may have contributed to the cause of the injury, was done without knowledge that it would be dangerous, and would not have been dangerous but for the pre-existing physical conditions of danger due to the employé's negligence. Therefore, if we concede that the plaintiff in this case did in fact turn open the valve so as to permit the hot water to escape and fill up the hole around the pipe, such an act could not prevent his recovery, where it is clear that he was ignorant of the existence either of a crack in the pipe or of the hole, which physical facts and conditions were due to the antecedent negligence of the defendant. Discarding all complex and subtle discussion of the question of causation, intervening or proximate, of the injury, it is perfectly plain that the injury in this case could not have taken place without the breach of duty by the master in digging the hole around the pipe, and in allowing it to remain, without warning to the servant of its existence, and with the knowledge that the servant would be exposed, in the discharge of his duty, to the danger that might result. This was the *causa sine qua non* of the injury in this case. We have dwelt at some length on this subject because of the position of the learned counsel for the plaintiff in error that there was no reasonable solution of the evidence, other than the assumption that the plaintiff did in fact turn open the valve on the pipe, and that this was an act of contributory negligence which should prevent his recovery.

It is next insisted that, if the plaintiff did not himself turn on this valve and permit the water to escape into the hole, he must have allowed some trespasser to come on the premises and do so, and that this would have

been an act of negligence on his part which would defeat recovery. We are inclined to think that this suggestion is too improbable for serious consideration. But, even if it were true, it would not as a matter of law prevent a recovery. Impossibilities are impossible, and the law neither requires nor expects their performance. The presence of a trespasser might have been entirely consistent with the plaintiff's discharge of duty. He could not be present at every point of the premises or prevent every possible trespass.

It is also insisted that the plaintiff was furnished by the defendant with a lantern for the purpose of making "night the same as day to him upon the defendant's premises"; that this lantern was in good condition, and that its light was sufficient to put him on notice and cause him to investigate before stepping into the hole of hot water; that it did permit him to see the steam arising from around the pipe; and that the rising steam ought to have given him warning of the danger. We think the light of the lantern is somewhat magnified by the distinguished counsel when he claims that it "made night the same as day." It was poetic license that authorized Portia to say to Nerissa, "How far that little candle throws his beams!" The jury, probably being men of practical experience, might have remembered the light of a lantern was extremely limited as to area, and intensified the darkness outside of such area, and, although it did cast a light on the steam around the pipe, it did not cast a light through the steam so as to disclose the hole, or clearly show from whence the steam came. Light cannot penetrate vapor so as to discover physical objects located within and enveloped by it. Therefore the steam, although it might have given notice of some trouble with the pipe, did not necessarily give notice of the existing trouble, to wit, the hole of hot water. The steam was more probably coming from the crack in the pipe than the hole in the ground.

In the next place, it is insisted with a great deal of earnestness by the very able counsel for the plaintiff in error that the verdict is without evidence to support it, because it is positively contrary to the undisputed physical facts of the case; that these physical facts prove that it was impossible for the plaintiff to have been injured in the manner in which he says he was injured. The plaintiff testified that he was injured by the caving in of the dirt around the hole and his feet falling into the hot water. He does not say how the water got into the hole, though he does say that the valve was shut when he put his hand on it. It is true that the water could not have gotten down into the pipe below the valve if the valve had been shut securely and was itself in a perfectly sound condition. We are not called upon to suggest any theory explaining the presence of the water in the hole. This was a question for the jury. Difficult and per-

plexing questions of fact are committed by the wisdom of the law to the solution of the jury. The great Chief Justice, who but this very week left us to solve the last great mystery, declared that "juries have no higher function than to solve mysteries." *Central Railroad v. Rouse*, 77 Ga. 407, 3 S. E. 308. And this wise statement has been approved by Justice Cobb in *Southern Ry. Co. v. Webb*, 116 Ga. 164, 42 S. E. 395, 59 L. R. A. 109. With the very limited practical knowledge we possess on such questions, we might, however, suggest several ways in which this hot water might have gotten into that hole. The valve might have been partially open all night. The crack in the pipe was very small. The water might have been constantly flowing slowly from the boiler, its intense heat lasting some time, because, although the night was very cold, the hole of water was in proximity to the heat from the boiler and furnace, or the valve itself might have had a slight crack through which the hot water gradually flowed. It may have been true that the plaintiff did turn the valve himself, but this hypothesis is not invulnerable, in view of the fact that he stated that his feet fell at once into the water, hardly giving sufficient time, between the turning of the valve and falling into the hole for the water to run through the very small crack in the pipe and fill up the hole. But we do not think it was incumbent upon the plaintiff to clearly explain how the water got into the hole. He could have recovered under the facts short of that proof. The great practical, controlling facts were that the water was in the hole, in a scalding condition, and both the crack and the hole had been left there by the master without warning to the servant, although the master knew that in the discharge of his duties the servant would be about the place of danger at night with only the light of the lantern to save him from probable injury.

It seems to us in this case that the master did not measure up to the full performance of his duty as imposed upon him by law. It is an elementary principle that masters owe to their servants the duty of providing them a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment. This is a positive duty which the master owes, and the servant has a right to assume that it will be fully performed. 20 Am. & Eng. Enc. of Law (2d Ed.) 55, 56. If there are any holes or excavations on the premises, about or over which the servant must pass in the course of his work, the master must take reasonable precaution to protect the servant from injury by erecting proper barriers, or otherwise; and, if he neglects to do so, he is liable in case the servant is injured by reason thereof. *Indiana Pipe Co. v. Neusbaun*, 21 Ind. App. 361, 52 N. E. 471; *Frye v. Bath Gas Co.*, 94 Me. 17, 46 Atl. 804. If there are dangers incident to an employment unknown to the

servant, of which the master knows or ought to know, he must give the servant warning in respect thereto. Civ. Code 1895, § 2611. When the servant injured did not know and had not equal means of knowing of the danger, and by the exercise of ordinary care could not have known thereof, he can recover. Civ. Code 1895, § 2612. By the undisputed facts in this case it is clearly shown that the master knew of the existence of the danger, permitting it to remain for three days, did not inform the servant of its presence, and knew that the servant, in the discharge of his duties, would be exposed to the danger, and that the servant did not know of the danger, and, by the exercise of ordinary care, could not have found it out, as he was the night watchman, and was not on the premises during the day.

There may be mysteries in this case. There may be some doubt as to how the hot water got from the boiler, past the valve, and into the hole; but there is one fact that is clear, and that is that the employé, when hurt, was in the line of his duty, and was trying to find out "the trouble," in order that he might save his master's property from threatened injury. Possibly the jury in solving the perplexing mystery of the presence of the hot water in the hole gave the benefit of any doubt which may have been on their minds to the vigilant employé. The law on the subject of negligence and contributory negligence was fully given in charge by the learned trial judge. The verdict of the jury was consistent with reasonable inferences deducible from the evidence, was not inconsistent with the physical facts, and was approved by the court. This court will not disturb the judgment refusing to grant a new trial.

Judgment affirmed.

(1 Ga. App. 398)

J. F. BAILEY CO. v. WEST LUMBER CO.  
(No. 19.)

(Court of Appeals of Georgia. March 2, 1907.)

1. APPEAL—REVIEW—QUESTIONS OF FACT.

The evidence in the justice's court, set out in the petition for certiorari (which was adopted by the magistrate), authorized the verdict in that court, and that verdict, having been approved by the judge of the superior court, will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4322-4326.]

2. SALES—CONTRACT—EXECUTION—EVIDENCE.

The correspondence of the parties, especially when taken with the fact that plaintiff treated the letters as a contract and attempted to carry out the agreement by filling defendant's order, is sufficient to establish a contract between the parties.

3. PRINCIPAL AND AGENT—PROOF OF AGENCY.

The agency of a person who is recognized by both parties as agent in regard to a particular transaction is sufficiently proved where the relation is wholly uncontradicted by the adverse party. A suit brought to enforce rights based upon unauthorized acts of an agent, or other person acting in behalf of a principal, may imply ratification of the acts of such per-

son, and dispense with the necessity of any further proof of ratification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 420-429, 655.]

4. CONTRACT—PROPOSAL—ACCEPTANCE.

"If a proposal includes any qualifying conditions, the acceptance of it is an assent to those conditions, and gives the proposer the right to understand that the acceptance was in all things according to the terms of the offer." 7 Am. & Eng. Enc. Law, 181. A party to a contract, in the absence of fraud, cannot avoid it by reason of misunderstanding it, unless it appear that his misunderstanding was not the result of his own fault or negligence.

5. SALES—ACTION—DEMAND.

Plaintiff's suit relieved defendant from the necessity of a demand for the lumber according to the terms of the contract.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; Pendleton, Judge.

Action by the J. F. Bailey Company against the West Lumber Company. Judgment for defendant on counterclaim. From an order overruling a certiorari, plaintiff brings error. Affirmed.

Etheridge, Boykin & Etheridge, for plaintiff in error. Walter McElreath, for defendant in error.

RUSSELL, J. The error alleged in this case is the overruling of a certiorari. J. F. Bailey Company filed suit against West Lumber Company, in a justice's court, on an account for \$22.25, "for demurrage and loss on selling price of lumber shipped July 7, 1904." The defendant in error, West Lumber Company, filed a plea in recoupment for the sum of \$82.50, for failure to deliver goods alleged to have been purchased of plaintiff in error, and asked judgment for the difference between the contract price and the market value at the place of delivery. In this plea the defendant contended that plaintiff had contracted to deliver a certain carload of lumber, to wit, No. 1 common boards, at \$9.50 per 1,000. It was further alleged that the market price of No. 1 common boards in Atlanta, at the date of the shipment, was \$15 per 1,000, and that the car load which plaintiff agreed to sell would have been not less than 15,000 feet. The defendant in the plea asked, therefore, for the difference of \$5.50 per 1,000 feet between the price at which it claimed to have bought and the market price at the place of delivery, to wit, the city of Atlanta, on 15,000 feet of lumber. Before the case went to trial plaintiff in error attempted to dismiss its action, but upon defendant's objection the magistrate put the case to trial, and the defendant (now defendant in error) proceeded to introduce evidence to prove plaintiff's liability, and recovered a verdict for \$82.50, the amount of damages it claimed. The plaintiff in error excepted to this verdict and the judgment thereon, and carried them to the superior court by certiorari. Upon consideration the judge of the superior court overruled the cer-

tiorari and refused a new trial; and this judgment is, by the bill of exceptions, assigned to be the error which this court is asked to review.

In the petition for certiorari a new trial is asked: (1) Because, as alleged, the evidence showed that there was never a clear understanding between the parties in such a way as to constitute a valid contract. (2) The parties did not agree to the same thing and in the same sense unconditionally, unequivocally, and without variance of any sort. (3) Because the letters upon which West Lumber Company relied as the basis of their contract are signed by John J. Earle, and the evidence does not show that John J. Earle was an authorized agent of the Bailey Company. (4) Because there was no proof to show that the act of Earle was ever ratified by defendant, Bailey Company, or that they ever had any notice of his act and the circumstances under which Earle acted for them. (5) There was no proof of any demand ever being made upon J. F. Bailey Company for delivery of No. 1 common boards. The statement of these assignments of error shows that the case depends largely upon the construction of the evidence by the jury in the first place, and the review of that construction by the court in the second instance. We shall consider the first two grounds together; and, while there appears to have been, so far as the direct evidence is concerned, a claim of misunderstanding between the parties, the jury could well infer from the uncontradicted circumstances of the case that a contract was entered into on the part of the plaintiff to furnish car of No. 1 boards at the price mentioned in plaintiff's proposal. The correspondence introduced before the jury would have made a contract before the alleged misunderstanding came into existence. There was an invitation for a proposal, and an acceptance; and this was followed by shipment of the articles referred to in the very initiation of the correspondence. The first letter, May 28, 1904, addressed to West Lumber Company and signed by Earle, states: "We have three cars 13/16x8 and up No. 1, Common Boards D2S, en route to your city. If you can use same, we would be pleased to have your best offer by return mail." Second. The letter dated May 31, 1904, addressed to J. F. Bailey Company, and signed by West Lumber Company, says: "Yours of 28th inst. to hand and noted. We will take one car of this lumber at \$9.50 per thousand, f. o. b. Atlanta, cash in ten days, less two per cent., provided the lumber is sound and square edge; otherwise at half price." Third. The letter of June 3, 1904, addressed to West Lumber Company and signed J. F. Bailey Company, per Earle, and stating: "We have your favor of 31st inst., and do not quite understand your order. However, we are entering same. We note you say price

\$9.50, less 2 per cent., provided the lumber is sound and square edge; otherwise at half price," etc. The plaintiff treated these letters as constituting a contract between the parties. It shipped certain lumber in what it asserted was a compliance with the contract. The jury was authorized to find there was no misunderstanding except such as was created by the plaintiff. There was no dispute as to the market value of boards at Atlanta. The only question was whether the Bailey Company was to furnish that kind of lumber or a different kind; and from the correspondence it would seem that the jury was at least authorized to sustain the contention of the defendant. The plaintiff in error insists that the contract must relate back to the letter written by Earle, and that it is not shown in the evidence that John J. Earle was an authorized agent of J. F. Bailey Company upon whose letters West Lumber Company rely to establish their contract, and further contends, if the letters signed by J. J. Earle are presumed to have been written by him as an authorized agent of Bailey Company, that there is nothing showing that the letters are genuine. In *Freeman v. Brewster*, 93 Ga. 649 (6), 21 S. E. 165, the court held that "a letter is not admissible in evidence without proof of its being genuine, and this proof cannot be supplied solely by what appears on the face of the letter itself, to wit, the contents, the letterhead," etc. We think the evidence, without regard to the contents or the printed letterhead, proved the genuineness of the letters so as to make them admissible; and certainly the action of the Bailey Company in attempting to perform the contract, which in any view of the case had its inception in the letters and was made by them, disposes of all question as to the authority of Earle to write and sign the letters constituting the contract. If it had not authorized him before, it adopted his action and ratified it certainly by suing on the contract. Thereby it admitted the genuineness of the letters (whatever might be the variance between the parties as to the construction to be placed upon them), and it could not be heard to say that there was no contract between the parties, or that Earle acted without authority. "The agency of a person, who is recognized as such in regard to a particular transaction, is sufficiently proved where the relation is wholly uncontradicted and unanswered by the adverse party." *Liverpool Insurance Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1008. "Implied ratification arises when the alleged principal claims and seeks to enforce by suit rights based upon the unauthorized act of an agent or other person acting in behalf of the principal." 1 Am. & Eng. Enc. Law, 1209. After the plaintiff filed its suit and after the defendant had filed its plea of recoupment, the plaintiff attempted to with-

draw its action and to dismiss the suit. There was no error in the court's refusal to allow this to be done. Nothing is better settled than that, where a defendant (after he has been haled into court) himself asks for affirmative relief, he is entitled to proceed with his counter action.

The other grounds of error assigned are fully covered by the headnotes thereon, and do not require further elaboration. There was no error in overruling the certiorari.

Judgment affirmed.

(1 Ga. App. 420)

**READ PHOSPHATE CO. et al. v. S. WEICHSELBAUM CO.** (No. 120.)

(Court of Appeals of Georgia. March 11, 1907.)

**1. SHERIFFS—DISTRIBUTION OF MONEY—ANSWER TO RULE.**

An officer called to respond by a rule nisi is, if the rule be made absolute, liable either to have an execution issued against him or to be attached for contempt. Consequently it is error to strike from the answer of such officer any meritorious matter of defense which will tend to prevent the issuance of the rule absolute.

**2. SAME—CONCLUSIVENESS.**

Until traversed, the answer of a sheriff is to be accepted as true, and is conclusive as to all matters therein contained, and evidence will not be heard to dispute it. When such answer is traversed, any issues of fact arising upon the traverse to the answer must be submitted to a jury, except where there is an express agreement to submit such issues to the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sheriffs and Constables, § 250.]

**3. CHATTEL MORTGAGES—VALIDITY—UNCERTAINTY.**

A mortgage which describes the mortgaged property as "all crops of cotton, corn, or other agricultural products grown or cultivated by said R. B. B. in Laurens county, during or for the year 1905," is not void for uncertainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 93-95.]

**4. EVIDENCE—PAROL EVIDENCE—MORTGAGED CHATTELS.**

A mortgage in which the property mortgaged is described as "all my crops corn, cotton, etc., now up and growing, on about 240 acres of land, all the above property is in Jackson district, county and state aforesaid," may be explained by parol evidence so as to point out and identify such property, and is good as between the parties to the mortgage.

(Syllabus by the Court.)

Error from City Court of Dublin; Burch, Judge.

Rule by the S. Weichselbaum Company against Peacock, sheriff, for distribution of funds. The Read Phosphate Company and others, claiming an interest in the funds, were made defendants to the rule. Judgment for movant, and the other defendants bring error. Reversed.

James A. Thomas, for plaintiffs in error. W. C. Davis, P. L. Wade, and Harvey Hill, for defendant in error.

**RUSSELL, J.** S. Weichselbaum Company brought a rule against Peacock, sheriff, to distribute money in his hands arising from

the sale of property of R. B. Blackshear. In the rule the movant set out two mortgage *fi. fas.* and a distress warrant, and claimed that they were the highest and best liens upon the fund in the hands of the sheriff. The sheriff in his answer, admitted that the two mortgage *fi. fas.* and a distress warrant for \$250 in favor of Mary A. Smith against R. B. Blackshear, and properly transferred by Mary A. Smith to S. Weichselbaum Company were in his hands, and that the net sum of \$745.93 was in hand for distribution, but he denied that movant's mortgages, as alleged, were of the highest dignity. The sheriff further answered that he had in his hands "a mortgage *fi. fa.*, foreclosed October 9, 1905, from a mortgage deed dated — day of May, 1905, and recorded May 11, 1905, on crops of R. B. Blackshear, in favor of the Read Phosphate Co. vs. R. B. Blackshear, for the sum of \$351.50 principal, interest \$3.75, attorney's fees \$35, and costs of court," which was placed in his hands October 19, 1905, with written notice to hold up said fund, and that said Read Phosphate Company claim their mortgage *fi. fas.* to be of the highest dignity and entitled to said fund. He also set out other liens placed in his hands, which claim the fund. Upon motion of movant's attorney, the court directed that the denial by the sheriff in his answer of the allegation in the rule that the S. Weichselbaum mortgages were of "highest dignity" should be stricken from the answer, which was done, over objection of counsel for respondent. In response to a motion by movant, the court also struck from the sheriff's answer the date of the record of the mortgage of Read Phosphate Company, the words "and recorded May 11, 1905," also the words "that Read Phosphate Co. claim their mortgage to be of the highest dignity and entitled to said fund." All parties having *fi. fas.* in the hands of the sheriff were made parties defendant to the rule. It was admitted that the property sold was the property of R. B. Blackshear, raised by him on his farm in Jackson district, Laurens county, Ga., in the year 1905; that the consideration of the mortgages of Weichselbaum Company was supplies to make said crop, and the consideration of Read Phosphate Company's mortgage was commercial fertilizers to make the same crop. The issue was narrowed down to the question as to which constituted the superior lien upon the fund in the hands of the sheriff, the mortgages of Weichselbaum or the mortgage of the Read Phosphate Company, and this issue was determined in favor of the mortgages held by Weichselbaum. There are four material assignments of error in the bill of exceptions which either include or control all the lesser complainants: (1) That the court erred in striking the allegations of the sheriff's answer as to the matters which have been referred to above; (2) that the trial judge

erred in holding that the mortgage of the Read Phosphate Company was no mortgage, for want of sufficient description; (3) that the judge erred in holding the two mortgages of Weichselbaum Company were good and sufficient as to description; (4) that the trial judge erred in admitting evidence without any traverse to the answer being filed.

We think there can be no question that the court erred in striking the sheriff's answer as to the portions complained of. The court is always warranted in striking (upon proper objection thereto) bare conclusions of the pleader, but the portions of the sheriff's answer which were stricken in this case were not conclusions of the sheriff, but statements of facts which had influenced him in not paying over the money upon demand. He was the subject of a harsh remedy. The rule called upon him to show cause why he had not applied the fund in his hands to the satisfaction of certain *fi. fas.* which had brought the fund into his hands. He was subject to penalties drastic and severe, unless he offered a good reason for his nonpayment. On the other hand, the answer of the sheriff, not traversed, is to be taken as true, and the right of every party at interest was to be affected by it as the truth, until it was traversed. *Hutchins v. Hullman*, 34 Ga. 347. And, as said by Judge Bleckley in *Davis v. Reid*, 57 Ga. 190, if it be not true, let it be traversed, and let the sheriff have an opportunity of supporting it by proof, if he can. Certainly he had the right to deny, in his answer, the specific allegation made by Weichselbaum & Company that their mortgages were of the "highest dignity." If he did not deny this, what defense could he offer, or what reason give why he had not paid over the money? And it seems to us equally clear that as a servant of the court, called to answer for an alleged dereliction of duty, he would have the perfect right to say he had not paid the fund, because of another mortgage *fi. fa.*, and to describe it, and at least, as evidence of his good faith, to say that the holders of this other mortgage *fi. fa.* "claimed their mortgage to be of the highest dignity and entitled to said fund." It has been expressly held that, if there are defects in the answer, they are to be pointed out by special demurrer, so as to permit of amendment. *Davis v. Reid*, 57 Ga. 190. Every party to a rule, moreover, is affected by the sheriff's answer, because of the fact that it is to be taken as true until traversed; and to needlessly or improperly strike the answer is not only to deprive the sheriff of his rights, but also, perhaps, to deprive some party to the cause of a substantial benefit accruing to him by operation of law.

We think it clear that the second assignment of error is well taken. The description in the mortgage of the Read Phosphate Company was sufficient to point out the property against which the lien was created.

In the third assignment of error it is insisted that the judge erred in holding that the two mortgages of Weichselbaum Company were good and sufficient as to description. The description of the property in both mortgages was the same, to wit: "All my crops corn, cotton, etc., now up and growing, on about 240 acres of land, all the above property is in Jackson district, county and state aforesaid." We think the objection of the plaintiff in error was well taken. The description was entirely inadequate as to the property, though the uncertainty of description could be relieved in any contest between mortgagee and mortgagor by parol evidence; but, as will appear from the ruling on the fourth assignment of error, evidence was not admissible unless a traverse had been filed to the answer.

Complaint is made that the trial judge admitted the evidence submitted by defendant in error without any traverse or pleading of any character. It appears from the bill of exceptions that movant offered the record book of mortgages for the purpose of showing that Read Phosphate Company's mortgage was recorded, but only one witness' name, to wit, W. J. Joyner, appeared on said record. Attorney for respondents (though agreeing that the record book might be used instead of a certified copy, if the evidence were otherwise admitted) objected to the introduction of the evidence upon the ground that no traverse of the sheriff's answer, nor any written pleading of any character, had been filed or offered to be filed by movant attacking said mortgage for matters dehors the record as made up by the rule and answer. The court overruled the objection and admitted the evidence. Movant then offered Mark Smith as a witness to show that the name of L. B. Ogburn, commercial notary public, was not signed to the paper when it was recorded. Respondents objected to this evidence upon the same grounds, that no traverse to the sheriff's answer or any written pleading or paper of any kind had been filed attacking said mortgage dehors the record. The court overruled the objection and allowed the witness to testify. Movants, over the same objection interposed by respondent, also offered R. B. Blackshear, who testified that his recollection was that he did not acknowledge his signature to this paper before Ogburn, but did to a mortgage he gave Read Phosphate Company, but not this paper. Movants having closed, respondents introduced L. B. Ogburn, who testified that he signed the mortgage as commercial notary public, that Blackshear acknowledged his signature before him, and this was done before the same was recorded.

We are bound by a long line of decisions to hold that the introduction of testimony, in the absence of a traverse to the answer of the sheriff to a rule, is erroneous. There is no issue for a jury, or for a court sitting as a jury, to which the evidence can be address-

ed. The sheriff's answer, verified by his oath, is to be taken as true, unless traversed as provided by the Code and a verdict found by the jury against the truth thereof. *Pound v. Carr*, 40 Ga. 84. In the *Pound Case* the judge refused to submit the matter to a jury and examined witnesses. In this case it does not affirmatively appear that the parties consented that the judge should hear the issues of fact (should the answer be traversed) instead of a jury. We do not know whether it was the agreement for the judge to take the place of the jury or not. If there was no such consent, the judge could not have heard evidence touching the answer at all, but, even if the consent extended to the judge's determining the issues of fact instead of a jury, still no evidence was admissible until the answer was traversed. Except for the difference that in the *Pound Case* the judge refused a jury, and in this case acted without one, there is no difference between the present case and that case. See, also, Civ. Code 1895, § 4775; *Haynes v. Perry*, 76 Ga. 33; *Cason v. Mulling*, 50 Ga. 599; *Lightfoot v. Freeman*, 54 Ga. 216; *Heard v. Callaway*, 51 Ga. 317; *Davis v. Strickland*, 62 Ga. 174; *Wilkin v. American Freehold Co.*, 106 Ga. 182, 32 S. E. 135; *Lindsey v. Cock*, 40 Ga. 7. In the case of *Lightfoot v. Freeman*, supra, the sheriff, as in this case, was unable to determine what he should do in the premises, and therefore returned the papers by his answer, to be adjudicated by the court. In that case "he was desirous of performing his whole duty in the matter and acted in the utmost good faith and would have sold the land, but for the reason that he was wholly unable to determine what was his duty," and in this case the sheriff appears to have acted in the utmost good faith, and only asked the direction of the court as to which of the contending mortgage *fi. fas.* he should pay the money. He was acting at his peril in paying it to either without this direction, and, having answered, it was error to strike out good grounds of defense from the answer, and error to admit evidence without a traverse.

Judgment reversed.

(1 Ga. App. 425)

**HARRIS v. HILL & BRIDGES.** (No. 189.)  
(Court of Appeals of Georgia. March 11, 1907.)

EXEMPTIONS — SCHEDULE — DESCRIPTION OF PROPERTY.

In order to be superior to the title of a bona fide purchaser without actual notice, a statutory or short homestead under Civ. Code 1895, § 2866, must contain a description of the property sought to be exempted sufficiently definite to impart constructive notice.

(Syllabus by the Court.)

Error from City Court of Sylvester; Park, Judge.

Action by one Harris against Hill & Bridges. Judgment for defendants, and plaintiff brings error. Affirmed.

*Passmore & Tison*, for plaintiff in error.  
*J. H. Tipton*, for defendants in error.

**POWELL, J.** Though many questions appear in the record, one is controlling. The plaintiff brought suit against the defendants for the recovery of a described cow and calf, claiming the same by virtue of what is known as a "statutory" or "short" homestead. In the schedule offered in support of the plaintiff's title there is listed "one cow and calf"; no other description being given. In settlement of a pending litigation the plaintiff had sold the cow and calf in dispute to another person, who, in turn, sold it to the defendants. The defendants bought without any notice whatever of the exempt character of the property, unless the record of the schedule containing the description above mentioned be regarded as sufficient for the giving of constructive notice. The court awarded the property to the defendants, and the plaintiff excepts.

The proceedings necessary to the setting apart of the statutory or short homestead, under Civ. Code 1895, § 2866, are very simple and summary, and yet for the protection of those who may have occasion to deal with the exempt property certain statutory requirements have been made. The debtor must prepare a schedule of the property he desires to be exempted, and must cause the same to be recorded. This schedule and record are necessary to put the public on notice, not only that an exemption has been claimed, but also of the identity of the property which is thus to be withdrawn from the category of the debtor's ordinary belongings. The description appearing in the schedule, "one cow and calf," while not entirely void, and while capable of being amplified and made certain by amendment, is too vague and indefinite to be regarded as constructive notice of the exempt character of property answering to that general description, which has been bought by an innocent purchaser who had no other notice. That bona fide purchasers, without actual or constructive notice, are protected against the title of the beneficiaries of a homestead. See *Weaver v. Saffold*, 101 Ga. 150, 28 S. E. 118; *Willingham v. Slade*, 112 Ga. 418, 37 S. E. 787 (2); *Walden v. Brantley Co.*, 116 Ga. 298, 42 S. E. 503.

Judgment affirmed.

(1 Ga. App. 413)

**HARRELL v. MAYOR & COUNCIL OF MACON.** (No. 69.)

(Court of Appeals of Georgia. March 11, 1907.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—ASSUMPTION OF RISK.

There is no rule of law in this state that where a defect or dangerous excavation exists in a highway, and is known to one who elects to use such highway, such election, even if justified by the dictates of ordinary prudence,



must as a matter of law entail the consequences of a want of ordinary care and prudence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1679, 1754-1757.]

## 2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a ditch or gully has been left open for several months on the side of a public alley in a city, the alley being used generally as a thoroughfare and being a part of the street, it is not such contributory negligence per se, on the part of a person living near the alley, having knowledge of such ditch or gully, to walk on the alley to her home at night, as she had done on previous occasions, instead of taking another way to her home, as will justify a judgment of nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1679, 1754-1757.]

## 3. SAME.

It is for the jury to determine, from all the facts and circumstances, whether the location of the ditch, and the hazard to result from an attempt to walk on the alley at night, was so great that the plaintiff, with knowledge of the defect, could not, as a reasonably prudent person, in the exercise of ordinary care, have elected to use said highway instead of taking another route to her home.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1679, 1754-1757.]

(Syllabus by the Court.)

Error from City Court of Macon; Hodges, Judge.

Action by one Harrell against the mayor and council of Macon. Judgment for defendant, and plaintiff brings error. Reversed.

M. R. Freeman, A. L. Miller, and J. C. Morcock, for plaintiff in error. Minter Wimberly, for defendant in error.

HILL, C. J. The plaintiff in error sued to recover the amount of the damage alleged to have been sustained from personal injuries suffered by her as the result of a fall into a ditch in a street of the city of Macon. At the close of the testimony introduced in behalf of the plaintiff a motion for nonsuit was made and sustained, and a judgment entered dismissing the case. This judgment is before us for review. A motion to nonsuit presents for decision the single question whether or not the evidence introduced in behalf of the plaintiff, assuming it to be true, proves his case as laid (Reeves v. Jackson, 113 Ga. 182, 38 S. E. 314; Kelly v. Strouse, 116 Ga. 873 (4 b, c), 43 S. E. 280, or, in somewhat different phraseology, whether under the facts as alleged and proved by the plaintiff, and all reasonable inferences fairly deducible therefrom, the jury, under the law, can find a verdict in his favor. This makes it necessary to consider the case as made by the facts proved by the plaintiff and appropriate to the allegations of the petition.

The plaintiff, a woman 62 years of age, was hurt by falling into a ditch or gully on the side of a public alley which was used generally as a thoroughfare, in the city of Macon. She lived on Elm street, and, some months prior to the accident, the city authorities

had worked the street in front of her residence, leaving next to her fence a narrow sidewalk, and making a new sidewalk between this old narrow sidewalk and the street. A row of brick steps ran from the old sidewalk in front of the plaintiff's house down to the level of the new sidewalk. These brick steps were not in good repair. From the surface of the street to the new sidewalk was 21 inches and the step up from the new sidewalk to the brick steps was 12 to 14 inches. There were two ways from the plaintiff's house to the street—across the old sidewalk down to the new sidewalk, stepping down the brick steps and then to the street, or down the old sidewalk to the alley, and then down the alley in a gentle slope to the street. On account of the condition of the brick steps, the latter way was most generally used. On both sides of the alley were ditches and gullies. On one side the ditch or gully was about 12 inches deep, and on the other side the ditch or gully was two feet deep, two feet wide, and extended for some distance. This was the ditch into which plaintiff fell. There was an electric light near the corner of the street and alley, and, when burning, these ditches or gullies were plainly visible. Plaintiff knew the situation of the ditch or gully into which she fell. It had been in the same condition for four or five months, and she went up and down the alley several times a day. The night of the accident the plaintiff left her residence, went down the old sidewalk next to her fence, to the alley, and then on to the street, as she usually did, on account of the condition of the brick steps across the new sidewalk. The electric light was burning brightly. In returning from church, about 9 o'clock, the light was still burning, and, when she reached the alley, just as she turned up the same, the light went out, leaving her in total darkness. She waited a minute for the light to return, but, it not doing so, she took four or five steps carefully up the alley, and, knowing she was in the neighborhood of the gully, stopped and stooped down to feel for it. As she stooped down, the ground caved under her feet, and she fell into the gully. The foregoing facts were in accord with the allegations of the petition; and the question for decision is: Did the court err in granting a nonsuit?

It is the duty of the city to keep its streets and sidewalks in a safe condition for travel in the ordinary modes, by night as well as by day, and, if it fails to do so, it is liable for damages for injuries sustained in consequence of such failure. Mayor of Atlanta v. Perdue, 53 Ga. 607; City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 313. The whole of the street used by the public must be kept in a reasonably safe condition. City of Atlanta v. Miam, 95 Ga. 135, 22 S. E. 43; Jones Neg. Mun. Corp. § 77. "The municipality should not allow obstructions or excavations to adjoin the traveled way which will render

its use unsafe and dangerous. The public is entitled to the use of the whole street from side to side and from end to end." Jones, Neg. Mun. Corp. § 78; Tied. Mun. Corp. § 300. "Cities are liable for negligently permitting unguarded excavations near the line of the road or street." *Ill. Roads & Str.* § 613. These principles are cited with approval by our Supreme Court in *City Council of Augusta v. Tharpe*, 113 Ga. 155, 156, 38 S. E. 389. In the instant case the evidence shows that the plaintiff was hurt by falling into a gully or ditch in a public alley, between the sidewalk and the street, and therefore being a portion of the street, and commonly used as a thoroughfare. Whether the gully or ditch, in the place where it was, and of the width and depth that it was, was such an excavation as to render the thoroughfare unsafe for travel by day or night, presented questions of fact for the exclusive determination of the jury, under proper instructions from the court. 15 Am. & Eng. Enc. of Law (2d Ed.) 440, and notes. Whether the city had actual notice of the alleged unsafe condition of the street, or whether such alleged unsafe condition had existed for such a length of time that, by reasonable diligence in the performance of its duty, it ought to have known of such condition, were questions of fact. *Mayor of Atlanta v. Perdue*, 53 Ga. 607, *City Council of Augusta v. Tharpe*, 113 Ga. 155 (2), 38 S. E. 389.

The gully in question having existed for three or four months, we think the jury might well have concluded that the city did have legal notice of its existence. We do not imagine, however, that our learned Brother based his judgment of nonsuit on the insufficiency of the proof in these particulars. We infer from the argument and brief submitted in behalf of the city that the court adopted the theory that knowledge of the defect in the highway by the plaintiff precluded a recovery for an injury caused by such defect; in other words, that, as the plaintiff well knew the condition of the alley and the location of the ditch thereon, when she made use of the alley she assumed the risk incident to such use, or that she was not in the exercise of ordinary care to avoid the result of the negligence of the city in using the alley at night and after the light had gone out. That the mere knowledge of a dangerous defect in a sidewalk is sufficient to preclude recovery, regardless of circumstances, is not the law. But a person having knowledge of a defect or dangerous condition of a street is bound to use care, according to the circumstances, to avoid injury. On this point we might well content ourselves with the authority of the Supreme Court in *Samples v. Atlanta*, 95 Ga. 119, 22 S. E. 136, where Mr. Justice Lumpkin, in giving the rule laid down by text-writers and many decisions, deduces therefrom the following as the correct doctrine: "The law is plain and clear, and in a nutshell is as follows:

If the danger arising from a defect in a bridge, or other portion of the highway within the limits of a city, is obviously of such character that no person, in the exercise of ordinary prudence, would attempt to pass over the same, or, in other words, if such an attempt would, of itself, plainly and unequivocally amount to a want of ordinary care and diligence, the court may so instruct the jury as matter of law. But in other cases the mere knowledge of the existing defect will not prevent a recovery on the part of one who is injured because of the defect, if the use of the bridge or highway in which the defect exists is consistent with ordinary care, and it further appears that the plaintiff did in fact exercise such care. All cases of this kind should be submitted to the jury, who, in determining what would be ordinary care in the particular instance, should take into consideration and carefully weigh all the facts and circumstances."

Between the two extremes of plain, obvious danger, and slight or trivial danger, incident to the use of many public highways, there may be every conceivable degree and kind of danger, and in those cases lying between the two extremes the question of contributory negligence in the use of the street with knowledge of the danger is one for the determination of the jury. *Osborne v. London & Northwestern Ry. Co.*, L. R. 21 Q. B. Div. 220, was a case where the facts were similar to those in the one now under consideration. The plaintiff was injured by falling on the steps leading to the defendant's railway station. He knew that the steps were dangerous, but went down carefully, holding the handrail; and it was held that these facts did not show such contributory negligence as to make the maxim "*volenti non fit injuria*" applicable, and therefore he was entitled to recover. The plaintiff in this case knew of the existence of the ditch, and, when the electric light went out, she carefully went four or five steps up the alley, and, knowing the proximity of the gully, she went down on her hands for the purpose of feeling her way so as to avoid it. Can the court say as matter of law that in doing so she was not in the exercise of ordinary care to avoid the danger? Or can the court say as matter of law that ordinary care would have compelled her, when the light went out, to retrace her steps and take another way to her home? She testified that this other way was more dangerous and inconvenient than the way by the alley, and, for this reason, pedestrians used the way she took. Can it be doubted that these questions were for the determination of the jury? Negligence is peculiarly and specially a question for the jury. In the case of *City of Columbus v. Ogletree*, 96 Ga. 178, 22 S. E. 709, the Supreme Court uses the following emphatic language: "If anything is settled in the law of this state, it is that, as a

general rule, what will or will not constitute negligence is a question peculiarly for determination by the jury."

The case of *Mosheuevel v. District of Columbia*, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170, is closely analogous to the present one. The plaintiff, a woman, was hurt by stumbling over a water box in the sidewalk. It was about four inches square, projecting irregularly above the level of the sidewalk, and was without covering of any kind. It was visible from the door of the plaintiff's home, and had existed, with her knowledge, in the same condition for some months before the accident. She had on a previous occasion stumbled over it; and, because she knew it, she took a long stride to get over it. She usually went around it. She testified that on the day she got hurt she had the box in view from the time she left her door, had it in mind all the time, and remembered its dangerous character, but that on this occasion she attempted to step over it, instead of going to one side, did not take a sufficiently long step, and put her foot into the hole and was thrown and hurt. The Supreme Court held that under these facts the court erred in directing a verdict for the defendant; because, under the undisputed proof, it was a question for the jury, and not for the court, to determine whether in attempting to step over the box, instead of going around it, she was guilty of such contributory negligence as would prevent her from recovering. In that case the court discusses at length the question of contributory negligence in the use of streets with knowledge of the existence of dangerous defects therein, and declares that "there is no rule of law that where a defect exists in a highway, and is known to one who elects to use such highway, such election, even if justified by the dictates of ordinary prudence, must as a matter of law entail the consequences of a want of ordinary care and prudence." Whether the use of the highway was negligence must in each case be evolved from the facts and circumstances of the particular case, taking into consideration the extent and character of the defect, and the degree of care exercised by the plaintiff in the use of the street with knowledge of the dangerous defect. To hold that the use of a street with knowledge of a dangerous defect would as a matter of law amount to an assumption of the risk in the event of injury, although, in choosing to make use of the street, and in the manner of the use, the greatest degree of judgment and care was exercised, "would be to relieve municipalities of all duty and consequent responsibility concerning defects in highways, provided only they choose to give notice of the existence of such defects." 191 U. S. 247, 24 Sup. Ct.

57, 48 L. Ed. 170. Of course, under the law in this state, the plaintiff could recover, even if guilty of contributory negligence, if the united acts of negligence on her part and on the part of the defendant caused the injury (the damage to be reduced according to the degree of negligence attributed to her), provided, by ordinary care, she could not have avoided the consequences to herself caused by defendant's negligence.

The able attorney for the city of Macon insists that the plaintiff failed to show any negligence on the part of the city, but that, assuming that such negligence was shown, it was also shown that the plaintiff, by the exercise of ordinary care, could have avoided the consequences to herself caused by such negligence, and therefore she is not entitled to recover. He asserts that "she voluntarily left an open street and went up an alley which she knew had an open drain or ditch on the side, where she would have to use extreme care, or she would fall into it; that in the dark, just as the light went out, her own common sense ought to have taught her that it was safer to step 14 inches up on safe brick steps in front of her house than to take the risk and negligently go up the alley in the dark, into what was a dangerous place." In reply it was doubtless urged that in the dark to go the way where she would have been compelled to step up 21 inches from the street to the sidewalk, and then up brick steps out of repair, 12 or 14 inches, was more dangerous than to go up the alley with caution and care to avoid falling into the ditch. These contentions presented clear-cut issues for the jury. The law could not make a selection. "Whether it is obligatory upon the plaintiff to pass over the walk known by her to be unsafe, or to pass around it upon the street, or to take the walk on the opposite side of the street, was a question which it was not the province of the court to determine as a matter of law. It is a question of fact for the jury, whether in passing over a walk known to be dangerous, instead of taking some other route, the plaintiff is, or is not, in the exercise of ordinary care." *City of Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 523, 23 Am. St. Rep. 598; 191 U. S. 263, 24 Sup. Ct. 57, 48 L. Ed. 170. The use of a sidewalk with knowledge of its dangerous condition may be evidence of negligence, but it is not negligence as a matter of law.

It is not our purpose in this review of the case to express any opinion on the merits. All we decide is that the plaintiff had sufficiently proved her case to entitle her to have it submitted to the decision of the jury.

She was deprived of this right by the judgment of nonsuit; and, for this reason, the judgment is reversed.

(1 Ga. App. 235)

**CHAPMAN v. TALIAFERRO.** (No. 96.)  
(Court of Appeals of Georgia. Feb. 16, 1907.)

**1. JUDGMENT—REVIVAL—SCIRE FACIAS TO REVIVE.**

A judgment obtained by revival of a dormant judgment by scire facias in the name of a plaintiff as transferee, instead of in the name of the original plaintiff, suing for the use of the transferee, as required by Civ. Code 1895, § 5384, cannot be treated as a void judgment, unless it appears that the court rendering such judgment did not have jurisdiction.

**2. SAME—COLLATERAL ATTACK—IRREGULARITIES.**

There can be no judicial inspection behind a judgment to discover defects that could have been cured by amendment. Such irregularities (if not cured by judgment) can only be taken advantage of by a proper proceeding to set aside the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 941.]

**3. SAME.**

In an issue formed on a motion to distribute money between judgments one plaintiff in *fi. fa.* cannot attack the judgment of another plaintiff in *fi. fa.* on the ground of irregularities previous to the judgment. The defects, to be subject to objection, must be such as are not amendable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 941.]

**4. SAME.**

Consequently, where the revived dormant judgment, dating from its revival, is older than another judgment, which carries with it no special lien on the fund, all the questions involved in the revival by scire facias are *res adjudicata*. The court cannot inquire or consider whether any other than the plaintiff in the judgment before him has been plaintiff in the original judgment revived by scire facias, and can only award the fund in dispute to the older lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1641, 1642.]

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; Flite, Judge.

One Chapman brought a rule against the officer who had made a sale of certain property requiring him to pay over the money on his *fi. fa.* and one Taliaferro intervened and was made a party to the rule, and asked that the money be applied to her *fi. fa.* Taliaferro's prayer was refused by the justice of the peace, but granted by the superior court, and Chapman brings error. Affirmed.

Payne & Payne, for plaintiff in error. J. H. Anderson, for defendant in error.

**RUSSELL, J.** The question involved in this case is the priority of lien between two judgments against S. D. Taliaferro, the husband of the defendant in error, one of which is held by the plaintiff in error as guardian, and the other by Mrs. M. E. Taliaferro, the defendant in error, as transferee. The contest between the contending lienholders started in a justice's court. A horse levied upon as the property of the defendant, under the Chapman *fi. fa.*, was claimed by the wife of defendant, the present defendant in error. Her claim was not sustained, either in the

justice's court or in the superior court. The horse was found subject to Chapman's judgment, and was finally sold under the levy of his *fi. fa.* Chapman brought a rule against the officer who sold the horse, requiring him to pay the money over on his *fi. fa.*, and the defendant in error intervened and was made a party to the rule, and asked that the money be applied to an execution which she held as transferee. Her prayer was refused by the justice, but granted by the judge of the superior court. Mrs. Taliaferro, the defendant in error, as transferee, had the oldest execution, but it was attacked by Chapman as void. The facts as to this *fi. fa.* are conceded to be as follows: A judgment was obtained by an original plaintiff, not disclosed by the record, against S. T. Taliaferro, which had been transferred in writing to Mrs. Whatley, the mother-in-law of the defendant. This judgment became dormant. Mrs. Whatley sought to revive it, the scire facias being in her own name as transferee. The judgment was duly revived, and the revival was placed on the record in Gordon county, where it was first obtained, and on the general execution docket in Catoosa county, where S. D. Taliaferro lived. All of this had been done before the debt was created, out of which Chapman's judgment grew. Chapman attacked this judgment, on the ground that it ought to have been in the name of the original plaintiff, for the use of the assignee, as provided in Civ. Code 1895, § 5384. The justice's court sustained this contention and awarded the money to the younger judgment. Mrs. Whatley in the meantime had transferred it to her daughter, the wife of the defendant, who carried the case by certiorari to the superior court, which court sustained the certiorari and awarded the money to Mrs. Taliaferro; and to this judgment plaintiff in error excepts. The question in the case, then, is whether the *fi. fa.* and the judgment on which it was issued were void by reason of the fact that the dormant judgment was revived, not in the name of the original plaintiff, for the use of the transferee, as is required by section 5384 of the Code, or whether its revival and proceeding in the name of the transferee is merely such an irregularity as would protect the judgment from collateral attack.

There is no question that the requirement of section 5384 is plain, and that it is intended, where a judgment has been assigned and has become dormant, that the scire facias to revive it shall proceed in the name, not of the transferee, as in this case, but in the name of the original plaintiff, for the use of the transferee. Section 5380 declares that scire facias to revive a dormant judgment is not an original action, but a continuation of the suit upon which the judgment was obtained, and is based upon a record. Where a dormant judgment has been revived, it is a lien on the defendant's property from the date of revival only. *Foster v. Reid*, 57 Ga.

609; *Dunn v. Brogden*, 68 Ga. 63. There can be no question, then, that in the case the dormant judgment, dating from its revival, March 6, 1901, is an older lien than the judgment in favor of the plaintiff in error, which was rendered June 27, 1904; and, unless the older judgment is void, the judgment of the superior court in awarding the funds in the hands of the constable to the defendant in error was right. The line of demarcation between a void judgment and a judgment voidable is not always plainly apparent. It has perhaps not been very definitely established in this state. *Stanford v. Bradford*, 45 Ga. 97. "A judgment that is void may be attacked in any court, and by anybody. In all other cases judgments cannot be impeached collaterally, but must be set aside by the court rendering them." Civ. Code 1895, § 5373. "Creditors or bona fide purchasers may attack a judgment for any defect appearing on the face of the record or pleadings, \* \* \* whenever and wherever it interferes with their rights." Civ. Code, 1895, § 5371. These sections must be construed together, to enable us to know when and how a judgment can be attacked as being void. We shall not attempt to summarize what is included in the words "void for any other cause," following the statement of the well-known principle that the judgment of a court having no jurisdiction of the person and subject-matter is a mere nullity, as laid down in section 5369, but it is fundamental that the judgment of a court of competent jurisdiction cannot be collaterally attacked in any other court for irregularity, but shall be held a valid judgment until reversed or set aside. Civ. Code 1895, § 5368. The question, then, is: Was the *fi. fa.* revived by *scire facias* void, because the transferee proceeded by a *scire facias* in her own name, instead of in the name of the original plaintiff, for her use, or was this such an irregularity as is protected from attack?

One of the tests which can be applied to determine whether a judgment is void is whether it can be set aside by motion in arrest of judgment. If the judgment can be arrested by motion, it is always void. But a third person, not a party to the record, cannot move to set aside a judgment not against him. This right appertains only to a party to the case. Civ. Code 1895, § 5362; *Merchants' Bank v. Haiman*, 80 Ga. 624, 5 S. E. 795. Chapman, then, could not have made a motion in arrest as to the judgment transferred to Mrs. Taliaferro, because he was no party to it, and therefore this test cannot be applied in this case; but, if he had been a party, the motion in arrest could be sustained only for defects appearing on the face of the pleadings, which could not be cured by amendment nor aided by verdict. The pleadings must be so defective that no legal judgment can be rendered thereon. *Merritt v. Bagwell*, 70 Ga. 578. If, then, Chapman had during the term moved to ar-

rest the judgment, and had been a party thereto, he would not have succeeded, because the *scire facias* was amendable by substituting the name of the original plaintiff, suing for the use of the transferee. Civ. Code 1895, §§ 5105-5108. It is conceded that the superior court of Gordon county had jurisdiction, and hence the judgment was not voided on that account.

The rule for determining whether this revived judgment is or is not void, it would seem, should be analogous to the decision in *Dunn v. Brogden*, 68 Ga. 63, which says that "so long as the judgment of revival is unreversed, the same having been rendered by the court having jurisdiction, the fact that the original judgment was dormant, whether true or false, is *res adjudicata*, and is not open to question on a motion to distribute money arising from the sale of defendant's property." It is true that the subject of attack in the case cited was whether the judgment was more than 10 years old (and the same question was passed on in *Wiley v. Kelsey*, 9 Ga. 117, *Kelsey v. Wiley*, 10 Ga. 371, and *Wiley v. Kelsey*, 13 Ga. 223); whereas, in this case the objection made is that the *scire facias* proceeded contrary to section 5384 of the Code, and judgment was revived in behalf of the wrong plaintiff. But the principle is the same. By the provisions of section 3761 of the Code, and the ruling in *Selbels v. Hodges*, 65 Ga. 245, it is absolutely necessary that a dormant judgment shall be revived in three years from its dormancy, just as much so as it is required by section 5384 that the plaintiff in *scire facias* (where the judgment has been transferred) shall be the original plaintiff for the use of the transferee. After judgment the failure to comply with either of these requirements in a given case does not render the judgment void, but it is to be treated as an irregularity which can be reached and taken advantage of only in a proceeding brought for that express purpose. The plaintiff in error relies on section 5371, and insists that creditors may attack a judgment for any defect appearing on the face of the record where it interferes with their right. In *Stanford v. Bradford*, 45 Ga. 98, Judge McCay, construing section 5371 (then section 3596), says: "Does this mean that a creditor or bona fide purchaser may attack a judgment, etc., for a mere irregularity? That, in one sense of the word, is a defect, it is true; but this section is to be taken with section 3536, which provides that judgments shall not be attacked collaterally for a mere irregularity. It was not the intent of the codifiers to change the old law. And in construing the Code this intention ought not to be assumed. The rule on this subject has long been well settled. For want of jurisdiction a judgment may be attacked collaterally. This may also be done by a stranger if the judgment be so defective as that it is null and void. The distinction between a mere irregularity and a defect

which renders the judgment void is not very definitely established. The best marked distinction we take to be this: A mere irregularity is amendable; under our law, is cured by a judgment; and anything which, if objected to, could have been amended, does not render the judgment void. *McNamara on Nullities and Irregularities*, 6. "To set aside a judgment rendered by a court having jurisdiction to adjudicate a question, a direct proceeding must be had." *Dunagan v. Stadler*, 101 Ga. 479, 29 S. E. 440. To the same effect are the rulings in *Dill v. Jones*, 3 Ga. 79; *Steers v. Morgan*, 66 Ga. 552, 555; *Moss v. Stokeley*, 95 Ga. 675, 678, 22 S. E. 692; *Artope v. Macon R. Co.*, 110 Ga. 346, 348, 35 S. E. 657. From the above it appears that the decision of the justice's court, in awarding the fund to the plaintiff in error, was wrong; and the judgment of the superior court, sustaining the certiorari, was right.

Judgment affirmed.

(1 Ga. App. 560)

**ANDREWS v. JOHN CHURCH CO. (No. 250.)**

(Court of Appeals of Georgia. April 4, 1907.)

**1. WRIT OF ERROR—DISMISSAL—DEFECTS IN PROCEEDINGS FOR REVIEW.**

A writ of error will not be dismissed by this court for mere informality or lack of formal statements, where the alleged errors sought to be corrected can be clearly gathered from the bill of exceptions alone, or from an examination of the bill of exceptions and the record transmitted therewith.

**2. EVIDENCE—PAROL EVIDENCE—CONTRADICTION OF WRITTEN CONTRACT.**

A demurrer to a plea of a defendant in an action on a written contract promising to pay a stated sum of money, which plea set up a parol contract made before the execution of the written contract, by the terms of which payments on said contract were to be made in specifics, and not in money, was properly sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030, 2048.]

**3. ASSIGNMENTS—RIGHTS AND LIABILITIES OF PARTIES—SUFFICIENCY OF ASSIGNMENT.**

The title of the holder of a conditional contract of sale, transferred or indorsed in writing, cannot be inquired into unless it appears that the inquiry would in some way protect the defendant or let in a meritorious defense; but an entry on the contract in these words, "For value received, we hereby guarantee the payment of the within conditional purchase contract, and waive presentation, demand, protest, notice of nonpayment, and notice of protest," is not a transfer nor an indorsement. These words conveyed no title either in the paper or the property described therein, did not make the plaintiff a holder of the instrument in question, and gave the plaintiff no right of action against the maker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 78, 232.]

**4. SAME.**

Consequently it was error to admit such contract in evidence, and to direct a verdict for the plaintiff.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by the John Church Company against one Andrews on a contract of sale of a piano. Judgment for plaintiff and defendant brings error. Reversed.

T. C. Battle, for plaintiff in error. W. A. Fuller, for defendant in error.

RUSSELL, J. 1. The defendant in error made a motion to dismiss the writ of error, upon the ground that the assignment of error is too general to be considered by the court, and upon the further ground that the bill of exceptions does not plainly specify the decisions complained of and the errors alleged. The whole question on a motion to dismiss is whether the errors complained of are so presented as to be clearly understood by this court in determining the rights of the parties. We do not think there is any merit in the motion to dismiss. It is true that the bill of exceptions does not set forth a brief of the evidence *eo nomine*, and, for that reason, we cannot know or consider as evidence that which is not presented; but as to all the rulings of the court which are material to be considered the bill of exceptions is both clear and full, and the plaintiff in error, after a very minute recital of her various contentions and objections as defendant in the court below, with a distinct statement of the ruling of the court as to each, "assigns as error the rulings of the court heretofore specifically set out, refusing to allow him to introduce evidence heretofore set out, and upon the close of the case directing a verdict and entering up judgment, both special and general." The bill of exceptions is really unnecessarily full. It purports to give verbatim the greater number of the questions asked by defendant's counsel, his objections and contentions, and to quote (as certified to be true) the exact language used by the judge in his various rulings. Certainly we are not able to say, having an exact reproduction or photograph of what occurred at the trial before us, and these different matters assigned as error, that there is not enough in the record to enable us to determine the errors complained of. It is true that there is no formal statement that exception was taken to the rulings of the court at the time of the trial or of the ruling. But this is purely formal. Under Civ. Code 1895, § 5569, the real question which determines whether a bill of exceptions is or is not able to resist a motion to dismiss is whether or not there is such an assignment of error as will enable this court to know what are the specific grounds of complaint, and whether there is enough in the bill of exceptions alone, or in the bill of exceptions and the record taken together, to enable this court to pass upon the questions at issue. There is no difficulty in this case in determining either what errors are com-

plained of, or whether the complaints are justified by law. Especially is this true as to the error in admitting in evidence the instrument upon which the action is based, and the written entry thereon, over defendant's specific objection that such entry was neither an indorsement nor a transfer, and showed no title in the plaintiff. The motion to dismiss is therefore overruled.

2-4. The John Church Company brought suit against Mrs. Andrews on a contract of sale of a piano, which was as follows: "This contract is given subject to the approval of McArthur & Sons Co. No agent is authorized to make any contract or verbal promise differing in any wise from that written and printed herein, or to collect money thereon, unless he presents proper authority from McArthur & Sons Co. \$350.00. Atlanta, Ga., Aug. 20, 1903. Received of McArthur & Sons Co., under conditional contract for the sale thereof, as hereinafter stated, one Harvard Piano, Style G, No. 13507, on which I have this day paid ten dollars, and in addition hereby promise to pay McArthur & Sons Co., or order, the sum of three hundred and forty dollars, with interest from maturity at 6 per cent. per annum, in instalments of eight dollars per month \* \* \* payable on the 15th day of each month, until the above named sum, with interest, shall have been paid in full; said payments to be forwarded by postal money order, draft or registered letter, at my expense, to McArthur & Sons Co., waiving all valuation and appraisal laws of Ga. This contract is given for the conditional purchase of Harvard Style, No. 13507, the conditions of which are that the said piano shall remain the property of McArthur & Sons Co. or its assigns, until this contract is paid in full; and at any time after default of payment of any of the instalments, or in said case piano is removed from the residence I now occupy, before the payment of this contract, without the written consent of McArthur & Sons Co., the said McArthur & Sons Co. may resume possession of and remove the said piano without being required to refund anything which may have been paid previously on it, and the said payment shall be retained by McArthur & Sons Co., or its assigns, as rent and liquidated damages. By mutual agreement between the bargainor and the bargainee, the sale of said instrument in case same is replevied is hereby waived. Loss in case of fire or other accident to be borne by the undersigned. And it is agreed, if this conditional contract is placed in the hands of an attorney at law for collection, or has to be sued on, that I will pay ten per cent. attorney's fees in addition to the principal and interest, which fees shall be added to and become part of the judgment. And it is further agreed that upon failure to make the payments as they become due,

as stated above, the total amount of this conditional contract shall become due and payable. [Signed] Mrs. Sarah E. Andrews."

The plaintiff alleged that the bill of sale had been transferred to it for value received. It further alleged that \$111 had been paid, and that nine installments of \$8 each were then due, and it elected, under the terms of the contract, to declare the full amount of the balance to be due—that is, \$239—besides interest, and asked a general and special judgment. The defendant pleaded that the contract was not the property of the John Church Company, and that it cannot legally sue on said contract. She further pleaded that she had paid \$123 and made all payments promptly, under the terms of the trade as made by her with the parties from whom she purchased the piano; that she was to pay said \$350, not in money, but in board of employes of McArthur & Sons Company; that she purchased the piano upon that understanding; and that said terms of purchase were ratified by McArthur & Sons Company. On demurrer the court struck all of defendant's pleas except the one which set up that the contract was not the property of the John Church Company, and, after the introduction of the contract and the so-called transfer, directed a verdict for the plaintiff. The question presented for our determination is whether the court erred in restricting the case to this one issue, and, finally, in directing a verdict for the plaintiff.

The defendant's answer did not deny the execution of the instrument which was the foundation of the suit; and, as the court could not legally allow the terms of the written instrument to be varied by the introduction of parol evidence in regard to the payment of the installments by board instead of money, the plea of the defendant, which set up a parol contract totally at variance with that sued upon, which was in writing, was properly stricken. It appears that the court thereafter throughout the trial dealt with the case upon the assumption that the written contract of sale had been transferred and that all rights thereunder had been assigned to the bearer by McArthur & Sons Co., and that, for that reason, the John Church Company had the right, in its own name, to maintain an action upon it. If the trial judge had been right in supposing that the paper was really transferred, his subsequent rulings and his final disposition of the case would have been right; for all of the evidence offered by the defendant on the trial and rejected by the court tended to question the title of the plaintiff, the holder of the paper upon which suit was brought; and, while a defendant can always inquire into the title of a holder of a contract on which he is being sued, if it be to his interest, still that title cannot be inquired into unless it appears that the inquiry would in some way protect the defendant or let in a meritorious defense. If there had been a transfer of the instrument in ques-

tion, the title of the holder could not properly have been inquired into; for, the payee having parted with all its title and interest in the contract by a written indorsement and physical delivery of the paper, a transfer or an indorsement would have carried with it the idea of negotiation, and the negotiated instrument, when payment therefor has been made to the holder, becomes *functus officio*. The original payee, having received value for his indorsement to the holder, has been satisfied, and his rights are at an end; and by payment to the holder she would be fully protected against any legitimate consequences or liabilities assumed by her in entering into the contract. If there had been a transfer (as the plaintiff admitted the execution of the contract and does not contend that she has not been allowed credit for all payments made thereon), the trial judge would have been right in holding that the defendant was not hurt by the judgment, and that all of the evidence offered on the subject of title was immaterial. Had there been a transfer or an assignment in writing, as the learned judge supposed, this case would be practically identical with that of *Johnson v. Cobb*, 100 Ga. 139, 28 S. E. 72, and the ruling in that case would be applicable in this. But we think the learned trial judge was in error in admitting the contract in evidence over defendant's objection, and in holding that the entry thereon was either such assignment or indorsement of the instrument in question as could evidence title in the plaintiff or entitle it to maintain an action thereon. The so-called indorsement is in these words: "For value received, we hereby guarantee the payment of the within conditional purchase contract, and waive presentation, demand, protest, notice of nonpayment and notice of protest." These words amount to nothing except to guarantee payment. They do not import any transfer of the title, either in the legal instrument, the contract, or the physical instrument therein described, and to which title is reserved by the vendor. Because they do not convey the title to the legal instrument the plaintiff was not entitled to its general judgment; and, for consequent failure of title in the musical instrument, the special judgment is out of tune. The objection of the defendant to the evidence, as certified in the bill of exceptions—that the contract offered in evidence did not show title in the plaintiff, for the reason that the entry thereon was neither a transfer nor an indorsement—was well taken, and should have been sustained.

We confess that during the oral argument of this case this court fell into the same error as did the learned trial judge, but after a more thorough investigation and mature consideration we have no hesitancy in holding that the written entry of the words quoted above on the contract submitted in evidence gave the plaintiff, the John Church Company, no right whatever to maintain this action. Counsel for defendant in error cites the case

of *Vanzant v. Arnold*, 31 Ga. 212, and says that "an indorsement worded almost exactly as that involved in the case at bar was held to be not merely a guaranty, but such an indorsement as would render the indorsers liable as such." We see no similarity whatever in the case cited and the present case, except that there was a guarantee in the *Vanzant* Case as well as a transfer of title. As there was a transfer, the guaranty was immaterial. The words of the transfer in the *Vanzant* Case were clear and explicit: "For value received we assign the within notes to Arnold, Johnson & Hamilton and to H. E. Diblee & Company, waiving demand and notice, and guarantee the payment of the same." While there was a guaranty, the case turned on the fact that there was a written assignment which operated to transfer title, and the guaranty of payment was considered by the Supreme Court merely as defining the liability of the indorsement, as expressed in the word "assign." This is evident from the language of the decision on this subject, as appears on page 212: "We think the defendants are indorsers. Their written engagement on the back of the note has the legal effect of an indorsement in Georgia of notes not payable or intended for negotiation in banks. That they stipulate therein to guarantee the payment of the notes does not the less make them indorsers under the act of 1826, \* \* \* for by it they have the right to define their liability; and thus may be guarantors, and yet indorsers, within the meaning and provisions of that act."

There is no question that a promissory note not containing any words of negotiability is so far negotiable by indorsement of the payee in blank as to pass the title to a bona fide holder and enable him to sue the maker in his own name. *Shelley v. Baker*, 125 Ga. 663, 54 S. E. 653. But this is not a case of indorsement in blank; because the very words used import a guaranty, and exclude the presumption of indorsement which arises where one signs his name across a contract. The cases of *Habersham v. Lehman*, 63 Ga. 383, *Heard v. De Loach*, 105 Ga. 500, 30 S. E. 940, and *National Bank v. Leonard*, 91 Ga. 805, 18 S. E. 32, as well as the *Shelley* Case, above cited, are none of them applicable in this case, because they all deal with indorsements in blank. The decision in *Geiser Co. v. Jones*, 90 Ga. 309, 17 S. E. 81, is conclusive of the fact that the entry on the contract in this case is a mere guaranty. And while the words quoted by counsel for defendant in error, "had the payee of these notes signed [such a] contract upon them with a third person, and \* \* \* afterwards negotiated them to such third person, [the payee] could, under our law, be sued and made answerable as indorser," appear in the opinion in that case, this point was not involved in the case, and the language quoted is in conflict with the rest of the decision, and is therefore clearly obiter dictum. On the contrary,



words similar to those used in the contract now under our consideration were there held to constitute the signers not indorsers, but guarantors. "On each note was the following, without date, signed by Jones & Toole: 'For a consideration not herein named, we guarantee the payment of this claim to the Geiser Manufacturing Company.'" The case was dismissed as to Jones & Toole, and the plaintiff excepted. In rendering the opinion, Chief Justice Bleckley says: "Whether the present case falls within this exception [Civ. Code 1895, § 5873] depends on the question whether Jones & Toole, declared against as indorsers, are such in fact, or whether the terms of their contract render them liable to the plaintiffs, not as indorsers, but as guarantors only. By its very nature a contract of indorsement cannot be entered into with the payee of a promissory note as indorsee, but a contract of guaranty can be made with him as well as with any subsequent holder. Nor does the mere indorsement of a contract upon a note render the signer of the contract an indorser, within the legal and proper meaning of the term. It is true that in a physical sense he is an indorser by the mere position of his name on the paper; but we apprehend that the Constitution intends by the term 'indorser' to refer to a person who has entered into a contract of indorsement as distinguished from contracts of a different class. \* \* \* A contract of indorsement is one of negotiation. Where there is no negotiation, either real or apparent—that is, either in substance or in form—there can be no such contract. \* \* \* Why should it not be held that the parties, one and all, contemplated the class of contract which the words they employed, naturally and fairly construed, import, to wit, a contract of guaranty? This is the better and safer construction. Jones & Toole, being guarantors, not indorsers, were exempt from suit in any county of the state, except in Troup where they resided." See, also, *Trust Co. v. National Bank*, 101 U. S. 68, 25 L. Ed. 876.

Judgment reversed.

(1 Ga. App. 250)

PERKINS et al. v. TERRELL, Governor.  
(No. 79.)

(Court of Appeals of Georgia. Feb. 20, 1907.)

1. BAIL—SURRENDER—WHAT CONSTITUTES.

"Bail may surrender their principal in vocation to the sheriff or in open court, in discharge of themselves from liability." Penal Code 1895, § 935. Producing or presenting a principal in court is not all that is required to discharge the obligation and relieve securities from their liability under a criminal bond. In order for a surrender of the principal in open court to be effective, the attention of the court must be called to the presence of the defendant principal, and the intention to surrender him must be definitely expressed and understood.

(a) The highest evidence of surrender is an exoneretur entered upon the minutes.

(b) "There is no evidence here at all of a surrender into custody. Being in court is one

thing, being in custody another." *Williams v. Jenkins*, 53 Ga. 167.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 331.]

2. SAME—FORFEITURE—SCIRE FACIAS.

A proceeding by scire facias to forfeit a criminal recognizance is a civil case, distinctly separate from the criminal indictment, and ancillary thereto for one purpose only—the securing of the defendant's presence. The rule nisi and scire facias may be disposed of by a judgment of dismissal, with judgment for costs only, without invalidating the appearance bond of the defendant or relieving his securities.

3. SAME.

If the defendant is called in court on the sounding of his case, the uttering and repeating of the ancient and customary words of formal forfeiture becomes a useless and perfunctory ceremonial. The real beginning of the proceeding to forfeit a recognizance being the issuance of the rule nisi and its signature by the judge, a dismissal of the rule nisi, or a discharge therefrom by the court in passing upon the answer, will not prevent a subsequent forfeiture of the bond, where the sureties have neither surrendered their principal nor paid the costs.

(Syllabus by the Court.)

Error from City Court of Washington; Hardeman, Judge.

Action by Terrell, Governor, against Perkins and others on a recognizance. Judgment for plaintiff, and defendants bring error. Affirmed.

F. W. Gilbert and W. A. Slaton, for plaintiffs in error. R. C. Norman, Sol., for defendant in error.

RUSSELL, J. Perkins was indicted by the grand jury of Wilkes county and was arrested on a bench warrant, and Hill and Crouch, as his securities, entered into a recognizance by which they bound themselves to be responsible for the appearance of their principal, Perkins, at the next superior court, and "from day to day and term to term," to answer to the indictment, and "not to depart thence without the leave of said court." The indictment was transferred to the city court of Washington, and the recognizance or appearance bond went with it as matter of law. At the October term, 1904, of said city court, the defendant, Perkins, failed to appear, his bond was formally forfeited, and a rule nisi, in usual form, issued and was signed by the judge. The rule nisi, after reciting the making of the bond, its terms, and its formal forfeiture, called upon Perkins, principal, and Hill and Crouch, securities, to show cause at the next term of court why this order should not be made final, and scire facias was ordered to issue. The securities were each served personally with copy of the scire facias. It cannot be determined from the record whether Perkins appeared at the next quarterly term, in January, 1905, or not. However, from the fact that no judgment absolute was taken at the January term, 1905, it may be assumed that he was then present in court, though no action was taken by the court on the rule nisi. At the April term, 1905, the court con-

sidered the rule nisi (and presumably the answer of the defendants thereto, though no answer was sent up), and on April 18th entered up the first one of the two judgments which have been brought to our consideration by the writ of error. At the October term, 1905, the defendant again failed to appear; and the court allowed the same bond upon which a rule nisi was granted October 18, 1904, and on which scire facias had been issued and judgment for costs had been rendered, to be again formally forfeited. Another rule in the same language as the first was granted and scire facias again ordered to issue. Thereupon the securities answered, by their attorneys, and pleaded a discharge from any and all liability as securities on the appearance bond of their principal, Perkins, and insisted that by reason of the judgment of April 18, 1905, heretofore referred to, their bond could not again be forfeited, the body of their principal having been produced to the court and the costs paid in accordance with its prior judgment. The issue thus formed (there being no traverse of the answer) was submitted to the court without a jury, his honor Judge S. H. Hardeeman presiding, who found against the defendant securities and entered up judgment against them, by rule absolute on the bond, for the full amount of the recognizance and costs.

The bill of exceptions excepts to the judgment on six grounds, and in each assigns error as follows: (1) That said judgment is contrary to law. (2) That said judgment is contrary to the evidence, against the weight of the evidence, and is without evidence to support it. (3) That it appearing, from the evidence and the admissions of counsel for plaintiff, that the bond sought to be forfeited in this proceeding had been once forfeited before, and that defendants John J. Hill and J. S. Crouch had produced the body of their principal, W. D. Perkins, in answer to a rule nisi, before final judgment, and had been relieved from further liability on said first rule nisi, the judgment of the city court of Washington discharging said securities from further liability on said first scire facias and rule nisi discharged said securities absolutely, and they are not liable on a second forfeiture of said bond. (4) That a second forfeiture of the same bond given for the appearance of the accused is illegal and void. (5) That the order of Judge William H. Toombs on the first forfeiture of said bond discharged said securities absolutely from further liability on said bond. (6) That it appearing from the record of said city court of Washington, properly introduced in evidence, that said securities had produced the body of their principal to the court in answer to a rule nisi and scire facias forfeiting their bond, the said securities were discharged by said act, and were not further liable on said bond. The consideration of the last four grounds will dispose of the

first two, which are formal only. And relieving assignments 3, 4, 5, and 6 of useless verbiage, they can be satisfactorily determined by grouping their subject-matter in an interrogative form, into two inquiries, and correctly answering these questions: (1) Were these securities relieved and discharged from further liability on the bond because they produced their principal at court in response to the scire facias, before the judgment rendered on the first nisi? (2) Were the securities discharged from liability by the former judgment of the court? The answer to both questions, in our opinion, depends almost wholly on the terms and meaning of the order or judgment for costs. Its terms are as follows: "It appearing to the court that the principal in the within recognizance has been produced, it is ordered and adjudged that the securities upon said recognizance be discharged from liability upon this rule nisi upon payment of the costs of rule nisi and scire facias. It is further ordered and adjudged that the officers of the city court of Washington do recover of the said W. D. Perkins, principal, and Jno. J. Hill and J. S. Crouch, securities, the sum of twelve and <sup>50</sup>/<sub>100</sub> dollars, costs of this rule nisi and scire facias. This 18th April, 1905. W. H. Toombs, Judge C. C. W." "Cost paid this 25 day of Nov. 1905. E. G. Binns, Clerk." Its meaning is made more clear by reference to the purpose of the rule nisi, as shown by the words employed therein (after the statement of the principal's absence and the formal forfeiture): "It is therefore ordered by the court that the said W. D. Perkins, principal, and Jno. J. Hill and J. S. Crouch, securities, forfeit their obligation, and that the said J. M. Terrell, Governor, or his successor, recover against the said W. D. Perkins principal, and Jno. J. Hill and J. S. Crouch, securities, the sum of one hundred dollars, the amount of their obligation so forfeited as aforesaid, unless at the next term of this court they show sufficient cause why this order should not be made final," etc.

It must be borne in mind that the forfeiture of a criminal bond (including rule nisi, scire facias, answer, and final judgment or rule absolute) is not a part of the criminal case, but a distinct civil proceeding ancillary to the criminal for only one purpose—to procure the presence of the accused. The rule nisi is a mere warning—an order to show cause why the defendant is absent. If good and sufficient cause is shown, the court may dismiss the rule without costs. If sufficient cause for the absence of the defendant principal is shown, but the showing could, by the exercise of proper diligence, have been presented sooner, and the cause thereby have been continued without the annoyance, delay, and expense which has attached by reason of lack of a more timely showing, the court may dismiss the rule nisi, but adjudge the costs against the defendants, as penalty for

their dilatoriness and so as not to deprive the officers of the just reward of their services. Neither depends upon or infers a surrender of the principal, though, if the principal has been surrendered, the action of the court would not be different. And the principal is not required to be in the custody of the sheriff, if the court, at the time of passing the judgment, is satisfied the principal is within reach of the court, in the custody of his bondsmen. Either course is in the discretion of the court, unless the defendant is again absent, when, unless the scire facias be continued, upon showing as in other causes, judgment absolute will be rendered for the amount of the bond and costs.

We can only make our answer to the first question by the record. The rule nisi summoned principal and securities to offer their excuse, if they had any, for the absence of the principal. The securities present the principal, produce him, so as to prevent a judgment absolute for the full amount of the obligation. The presence or production absolutely prevents any further present proceeding as to the principal sum mentioned in the obligation, for the court can now, if he wishes, try the defendant. But naturally says the law, "Why were you absent, and why were the court and officers put to trouble and labor by your former absence?" This is all that is left to the civil proceeding by rule nisi and scire facias. If the principal had an imperative excuse for his absence, the court will excuse him by dismissing the rule without the costs. If his excuse presents no good reason for his absence, the most the court can do, so far as that separate civil suit or scire facias is concerned, is to have judgment entered against the principal and his bondsmen for costs. The purpose of the rule nisi being to warn the securities that unless the defendant appear the bond will be finally forfeited, forfeiture is prevented either by the appearance of the principal or by showing good excuse why he was absent; but the bond is not annulled or its status changed. To do this, by section 935 of the Penal Code of 1895, the principal must be surrendered. The word used in the judgment for costs is the defendant was "produced." The order in question is not an exoneration, and therefore not an evidence of a surrender. It in nowise gives defendant "leave to depart." "It appearing to the court that the principal has been produced" cannot be construed as evidence of a surrender into custody. To produce or show a person or thing is not synonymous with "surrender." "Produce," according to Webster's International Dictionary, means "to bring forward; to lead forth; to offer to view or notice; to exhibit; to show"—while "surrender" the same authority defines: "To yield to the power of another; to give or deliver up possession of (anything) upon compulsion or demand; as, to surrender one's person to an enemy or an officer; \* \* \* to yield; to render or de-

liver up; to give up; as, a principal surrendered by his bail." In *Williams v. Jenkins*, 53 Ga. 167, the court held that an entry of the Solicitor General reciting payment of costs and that the defendant appeared in court was no discharge of the bond or satisfaction of the estreatment. In that case Judge McCay says: "There is no evidence here at all of a surrender into custody. Being in court is one thing, being in custody is another." The securities in their answer do not aver that they surrendered Perkins, or relinquished that custody the law vested in them as sureties, or that it was their desire or intention to surrender him. They merely aver that they are discharged from liability because they produced him in response to the rule nisi of the court, when they had already obligated themselves to do this by their bond. So that there is no evidence of a surrender, because there is no exoneration shown. *Griffin v. Moore*, 2 Ga. 331; *Dennard v. State*, 2 Ga. 137. We are compelled, therefore, to answer the first question in the negative and take up the second interrogatory.

Did the judgment operate to discharge the sureties? We hardly think that the familiar doctrine insisted upon by counsel for plaintiff in error and embodied in Civ. Code 1895, § 2972, has any application in this case. The judgments of courts are not upon the same plane as the acts of individuals, in such sense as that the surety on a bail bond can be said to be injured and his risk increased by a judgment. If he did not understand it, he could except to it. Counsel for plaintiff in error, in his brief, says: "Under the facts of this case, was the risk of the sureties increased by the action of the court? These sureties were not men versed in the law. They did not have the legal ability necessary to draw the distinction between releasing them from further liability on that scire facias, and releasing them from further liability on the bond, which they believed to be satisfied by the judgment. They understood themselves to be released from further liability, and sought to keep the principal within their reach no longer. Except for that judgment they probably could and would have kept him within reach of the court, and have saved themselves by producing him when called on to do so." In reply to this we can only say (even if we could go outside of the record to construe the judgment) that a discharge from a rule nisi and a discharge from liability on a criminal recognizance are so different that knowledge of the difference has to be assumed on the same principle that ignorance of the law is no excuse or protection. So far from being an exoneration on the bond, the judgment of Judge Toombs expressly confines the release to the rule nisi. The judgment contains no hidden force within it that can so expand it as to make it embrace more than it expresses. It has no effect beyond its plain terms and meaning.

*Expressio unius est exclusio alterius.* The securities are excepted from a discharge by the unmistakable terms of the judgment. Furthermore, the dismissal of the rule nisi was predicated on payment of the costs, and it appears from the record that the prerequisite was not complied with until November 25, 1905, more than a month after the issuance of the second rule nisi. This would have defeated a discharge and have allowed the rendition of judgment absolute on the first rule, if not on the second. Pen. Code 1895, § 935; *Ward v. Colquitt*, 62 Ga. 267. So that the judgment for costs on the rule nisi, April 18, 1905, did not discharge or relieve the securities on the bond.

Another question is presented by the briefs to which we will direct our attention. It is the inquiry whether a bond can be formally forfeited and rule nisi be issued more than once. As stated in briefs of counsel for both parties, the question has never been expressly decided. But, bearing in mind the fact that the formal words of forfeiture by which the defendant is orally called in court by the sheriff, who, repeating after the state's counsel, likewise warns the securities by name to produce the body of the principal as they are bound to do, etc., is merely an ancient formality, now virtually of no service, and that the forfeiture really begins with the judge's signature to the rule nisi, and considering further that the function of this rule, as before stated, is merely to notify the bondsmen, it is clear to our minds that there is no reason why numerous rules nisi and scire facias may not issue without affecting its validity, or its binding force as regards the sureties. The bond does not become *functus officii* until there has been entered on the minutes a rearrest of the defendant under order of the judge at his discretion (*Smith v. Kitchens*, 51 Ga. 160, 21 Am. Rep. 232), or unless there has been a surrender of the principal, or a judgment absolute for the amount of the obligation, or there has been a rearrest of the defendant by an order entered in pursuance of a motion to strengthen the bond by additional security. The scire facias is a civil suit. No one would insist that to bring a suit on a note, and, for any one of various reasons, to dismiss it, would avoid the note and prevent a subsequent action. The rule nisi and scire facias constitute the beginning of a suit on the criminal bond, and can be dismissed without prejudicing or preventing a subsequent forfeiture.

Counsel for plaintiff in error insists that the law applicable to sureties under ordinary circumstances applies to sureties on a recognizance, and any act of the law, or its machinery, the court or its officers, which increases the risk of the sureties, will relieve them. Under Civ. Code 1895, § 2972, acts of "the creditor"—the opposite party—are those that relieve. Certain acts of the Solicitor

General representing the state—the opposite party—can relieve sureties, but the court in rendering a judgment is in no sense the opposite party. If his acts are erroneous, they can be taken advantage of only in the manner provided by law for review. Certainly the authorities cited do not support the contention of plaintiff in error. In *Lamb v. State*, 73 Ga. 587, the case in which the principal was bound to appear and answer had been continued, and the bond did not (as in the present case) obligate the securities to produce the principal from "term to term." Likewise in *Colquitt v. Smith*, 65 Ga. 341, the bond, not being from term to term, was not forfeitable, because *functus officii*—it had served its day. In *Roberts v. Gordon*, 86 Ga. 886, 12 S. E. 648, the principal had been tried, convicted, and sentenced, and the court was obliged to hold that after sentence he ought to have been, and hence was presumed to be, in the custody of the sheriff. *Bethune v. Dozier*, 10 Ga. 235, was not a case of forfeiture of a criminal bond. The most that can appear from that case to be applicable even as argument in this is the principle that, "the undertaking of a surety being *stricti juris*, he cannot \* \* \* be bound further than the very terms of his contract; and, if the principal and obligee change the terms of it without his consent, the surety is discharged." While the state, in the name of the Governor, is the obligee, the judge is not even officially a party thereto, and, as we have stated above, a judgment of the court cannot be treated as in the class with the acts of individuals by which, the risk of a surety being increased, he is released. The actions of a court are subject-matter of review.

We conclude, therefore, that the judgment of the city court of Washington was right. None of the exceptions are well taken, and therefore the judgment is affirmed.

(1 Ga. App. 189)

# SEABOARD AIR LINE RY. v. BOSTOCK. (No. 63.)

(Court of Appeals of Georgia. Feb. 13, 1907.)

## 1. MASTER AND SERVANT—ACTION FOR INJURIES—DECLARATION—SUFFICIENCY.

The declaration as amended is good as against a general demurrer.

## 2. TRIAL—INSTRUCTIONS—LAW APPLICABLE TO PARTICULAR THEORIES.

The principle of law contained in Civ. Code 1895, § 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover," having been clearly and distinctly raised by the answer and the evidence, it was reversible error for the court not to have given this law in charge to the jury, even without any request to do so. *Atlanta Ry. Co. v. Gardner*, 49 S. E. 818, 122 Ga. 92, 93 (7).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 478, 630.]

### 3. WRIT OF ERROR—OBJECTIONS BELOW—MOTION FOR NEW TRIAL—GROUNDS—AUTHENTICATION OF STATEMENT.

Where one of the grounds in the motion for new trial is the failure of the court to charge the above principle of law, and the question is made before this court that there is no sufficient verification of this ground, the court will examine the record and bill of exceptions to ascertain if such is the fact; and where it appears from the record that said ground of the motion was presented to the trial court, considered, and overruled, and it further appears that the entire charge delivered to the jury had been approved by the judge, and was at that time a part of the record, and, from an examination thereof, it is manifest that the court did not give in charge the foregoing principle, such facts, taken together, will be considered by this court as a sufficient verification of said ground of the motion. *Colson v. Meyers*, 5 S. E. 504, 80 Ga. 499 (3).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1156.]

### 4. TRIAL—INSTRUCTIONS—LAW APPLICABLE TO PARTICULAR THEORIES.

The error of the court set out in the second headnote requiring a new trial, a decision on the other assignments of error is not necessary.

(Syllabus by the Court.)

Error from City Court of Savannah; Norwood, Judge.

Action by one Bostock against the Seaboard Air Line Railway for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff alleged that he was employed by the defendant company as a switchman, and while so engaged it became his duty to place against the wheel of a box car a chock, being a piece of scantling four by four inches square, and four or five feet long; that the railroad track ran east and west, and the chock was placed on the south rail of the track, 10 or 12 inches of the end of the chock being between the rails, and the longer part pointing south and being held in its position by being pressed against the car wheel; that he adopted the proper and usual method of chocking the wheel to prevent the car from rolling west and to cause it to remain stationary; that the object in chocking the wheel was to enable other servants of the company to couple a train to this box car; that it was the duty of the engineer of the train to have so backed it as to avoid coming in contact with the box car with unusual force and violence, but he backed the train against the box car with such great and unusual force and violence that the wheel of the moving train ran upon the chock and threw the projecting end of it around, so that it struck the plaintiff on the right leg near the knee, throwing him to the ground and producing a wound that has resulted in permanent injury to him (describing it, and alleging the damages sustained); that he did not know, and could not by ordinary care have known, that the engineer was about to strike the stationary car and the projecting scantling with great and unusual force and violence, but had reason to believe that he

would have caused the train to back slowly and with due care. By its answer the defendant alleged that the injuries complained of were not caused by any negligence on its part, but were caused by the plaintiff's negligence, or arose from one of the risks of the business in which he was engaged; that by the exercise of ordinary care he could have avoided the injuries, and he did not exercise such care. There was a verdict for the plaintiff; and the defendant excepted to the overruling of its general demurrer to the petition, and of its motion for a new trial. The other material facts sufficiently appear in the headnotes.

J. Randolph Anderson, for plaintiff in error. Garrard & Meldrim, for defendant in error.

HILL, C. J. Judgment reversed.

(1 Ga. App. 213)

### CHAPMAN v. CONWELL (No. 81.)

(Court of Appeals of Georgia. Feb. 14. Rehearing Denied March 2, 1907.)

#### 1. JUSTICES OF THE PEACE—MISTRIAL.

A justice of the peace has the right to declare a mistrial, where the jury cannot agree on a verdict. Even if this right did not exist as an inherent right in the court, its exercise would not result in preventing the further prosecution of the case which had been withdrawn from the consideration of the jury by the declaration of a mistrial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 385.]

#### 2. SAME—FORM OF ACTION.

A. sued B. in a justice's court "in an action of debt due on an account." The evidence showed that B.'s liability was based on an agreement made with A. to pay for the property represented by the account, in the event of its destruction by fire while A.'s house was occupied by B.'s servant. A. fully performed his part of the contract, and nothing remained to be done by B., except to pay for the property which was destroyed by fire while the house was occupied by his servant. Held, that such an action was properly brought, although there was an express contract between the parties on the subject-matter from which the debt arose. The contract in question was evidence of the debt. *Johnson v. Quin*, 52 Ga. 485; *Hill v. Balkcom*, 5 S. E. 200, 79 Ga. 444; *Tumlin v. Bass Furnace Co.*, 20 S. E. 44, 93 Ga. 599.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 228.]

#### 3. FRAUDS, STATUTE OF—ORIGINAL UNDERTAKING.

The contract in this case was an original undertaking, and not within the statute of frauds.

#### 4. SAME—EVIDENCE—SUFFICIENCY.

The value of the personal property destroyed by fire, for which the defendant had expressly agreed to pay, was substantially shown by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; Holden, Judge.

Action by G. E. Conwell against M. E. Chapman. Judgment for plaintiff. From an order dismissing a writ of certiorari, defendant brings error. Affirmed.

Z. B. Rogers, for plaintiff in error. O. Roberts, for defendant in error.

HILL, C. J. Conwell brought suit against Chapman in the justice's court for a "debt due on an account." A copy of the account attached to the summons was as follows: "M. E. Chapman to G. E. Conwell, debtor. Jan. 2d, 1904. To 2 horse-loads of crab-grass hay, 3000 lbs, at \$15.00, \$22.50; 6 one-horse loads pea vine hay, 21½ tons, \$33.75; 1500 bundles fodder at \$2 per 100, \$30.00.—\$86.25. Georgia, Elbert County. Personally comes G. E. Conwell, who on oath says that the above account is just, true, due and unpaid. G. E. Conwell." "Sworn to and subscribed before me, this 14th day of —, 1904. T. J. Cleveland, J. P." The defendant answered the suit by a general denial of the indebtedness, and by stating that, if he did owe any part or all of said account, "the charges are excessive, and that plaintiff has included in his account items that should not be." Before filing his answer, the defendant filed two special pleas: First, a plea to the jurisdiction; second, a plea in abatement. Both of said special pleas averred that at a previous trial of said case in the justice's court the presiding justice had declared a mistrial and dismissed the jury which had said case under consideration, said mistrial having been declared by the justice without the knowledge or consent of the defendant; and it was averred that the justice had no authority under the law to declare a mistrial, and that said suit should be dismissed. The justice overruled both of said special pleas, and the case proceeded to trial before a jury, which found a verdict for the plaintiff, in the sum of \$62.50; and judgment was entered accordingly. The defendant filed his petition to the superior court for the writ of certiorari, which was sanctioned, and the writ issued. On the hearing of the certiorari in the superior court, it was overruled and a new trial refused, and the case comes to this court for review.

An understanding of the errors insisted on in this court makes necessary a consideration of the evidence adduced on the trial in the justice's court. This evidence may be substantially stated as follows: The defendant had employed a negro woman, for whom he wanted to get a house to live in until his own was ready for her occupation. He asked the plaintiff to let him put her in his house, and the plaintiff agreed to do so, provided the defendant would be responsible for the destruction by fire of certain agricultural products which he had stored in said house, being the same for which suit is brought. The defendant made the promise and agreement, and put his servant in the house. The house burnt down, and the said personal property was destroyed by the fire. After the fire the plaintiff went to the defendant and demanded that he perform his agreement and pay for the products so destroyed. This the de-

fendant agreed to do, stating that "he would be as good as his word, and would pay for the stuff." This promise, however, seems to have been "made to the ear and broken to the hope," for the defendant did not pay; and hence the suit. The assignments of error insisted upon before this court are: (1) That the pleas in abatement and to the jurisdiction should have been sustained by the justice, and the case dismissed. (2) If the plaintiff in the justice court had any rights upon which he could recover, they were based upon an express contract and not upon an open account, and the suit should have been based upon the contract. (3) That the evidence showed that the cause of action sued on was a parol promise to answer for the debt, default, or miscarriage of another. (4) That the verdict was without evidence to support it, as it failed to show any value of the agricultural products, which had been destroyed by the fire.

1. We think a justice of the peace has a right to declare a mistrial. Even if such right is not expressly given by statute, it must exist as an inherent right of all courts where jury trials obtain. If, however, the justice should exercise such right without authority, we cannot agree with our learned Brother who represents the plaintiff in error that the result would be to destroy the right of action or abate the suit.

2. The second ground of error is not without difficulty. But, under the liberal rules of pleading applicable to suits in justice's courts, we think this suit can be upheld. The bill of particulars attached to the summons called upon the defendant to pay for the value of certain agricultural products. It is true he had not received any of the goods sued for, but he had expressly agreed to pay for them in the event of their destruction by fire while his servant was occupying the plaintiff's house, where the goods were stored. This was a contract between the parties which the plaintiff had fully performed on his part, to wit, he had turned his house over to the servant of the defendant, with an express agreement with the defendant that he would pay for the personal property if the same was destroyed by fire while the servant occupied the house. The event happened which fixed the liability of the defendant, and there was nothing left to be performed but payment by the defendant of the loss incurred. Under these facts an action on the account will lie to recover the value of the property destroyed, and the contract is evidence of the debt. *Dobbins v. Pyrolusite Co.*, 75 Ga. 450; *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200; *Hancock v. Ross*, 18 Ga. 364.

3. The facts in this case show that the agreement to pay, made by the defendant, was an original undertaking, and not within the statute of frauds.

4. The value of the agricultural products destroyed by the fire was substantially shown by the evidence. The bill of particulars sets

forth the value of each kind of product destroyed, and the plaintiff testified that the account was correct, as set out by said bill of particulars.

For the reasons given, we hold that the judgment of the superior court, overruling the certiorari and refusing to remand the case for a new trial, was correct.

Judgment affirmed.

(1 Ga. App. 534)

**MASON v. STATE. (No. 262.)**

(Court of Appeals of Georgia. March 23, 1907.)

**1. INTOXICATING LIQUORS—STATUTES—REPEAL BY IMPLICATION.**

Act 1877, p. 189, making unlawful the sale of intoxicating liquors within three miles of the Masonic Academy in the town of Swainsboro, was not repealed by section 26 of the charter of the city of Swainsboro, approved December 6, 1900.

**2. INFORMATION—SUFFICIENCY—PLACE OF OFFENSE.**

The words, "in Swainsboro, Georgia," used in a criminal accusation, are apt words to convey the meaning that the acts alleged occurred within the territorial limits of the municipal corporation bearing that name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 234.]

**3. INTOXICATING LIQUORS—OFFENSES—SALES AT PROHIBITED PLACES.**

The mere fact that the school formerly taught in the Masonic Academy, which was designated as the center of a three-mile area in which a local prohibition act became effective, is no longer taught in the original building, but in a new house a short distance away, does not invalidate the conviction, under that act, of one who is guilty of selling intoxicating liquor within three miles of both the original and the subsequent location of the school.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 178.]

**4. CRIMINAL LAW—EVIDENCE—BEST EVIDENCE.**

Oral testimony tending to prove that a given act occurred within three miles of a certain Masonic Academy is not subject to the objection that the charter of the academy is the highest evidence.

**5. INTOXICATING LIQUORS—DEFINED—MEDICINAL PREPARATIONS—PATENT MEDICINES.**

The expression "intoxicating liquors," as used in statutes, in the absence of other words tending to limit the meaning, may be defined as including any liquid intended for use as a beverage or capable of being so used containing alcohol, obtained either by fermentation or distillation, or both, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk.

(a) Medicinal, toilet, and culinary preparations, recognized as such by standard authority (such as the United States Dispensatory) and not reasonably capable of use as intoxicating beverages—e. g., tincture of gentian, paregoric, bay rum, cologne, essence of lemon, wood alcohol—are not ordinarily to be regarded as being within the meaning of the expression "intoxicating liquors," though such articles are liquid, contain alcohol, and may produce intoxication.

(b) Patent medicines, cordials, bitters, tonics, and other articles not recognized by standard authority as being within the class just mentioned are to be regarded as being intoxicating liquors if they are capable of being used as a beverage and contain such a percentage of al-

cohol as that, if drunk to excess, they will produce intoxication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 142-146.]

**6. CRIMINAL LAW—TRIAL—INSTRUCTIONS—DUTY TO SUBMIT DEFENSES.**

While the evidence was amply sufficient to support the verdict, yet, since the defendant made the specific contention that the particular patent medicine which he was accused of selling was not capable of being used as a beverage, and introduced proof tending to show this fact, and the trial judge, in his instructions to the jury, entirely ignored this defense, the exception upon this ground must be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1986.]

(Syllabus by the Court.)

Error from City Court of Swainsboro; Mitchell, Judge.

One Mason was convicted of an unlawful sale of liquor, and he brings error. Reversed.

Saffold & Larsen, for plaintiff in error.  
Henry R. Daniel, Sol., for the State.

POWELL, J. In 1877 a local act was passed making it penal to sell "spirituuous or intoxicating liquors, schnapps, or bitters," within three miles of the Masonic Academy in the town of Swainsboro, Emanuel county, Acts 1877, p. 189. The defendant was convicted under an accusation charging that he "did sell in Swainsboro, Georgia, within and in less than one mile of the Masonic Academy, for valuable consideration, a certain quantity of intoxicating liquor, commonly known as 'Rutona.'" Upon the trial the State proved, by several witnesses, that they had bought Rutona of the defendant at his drug store in Swainsboro; that they had drunk it, and that its effects were similar to those of whisky; that it was intoxicating. It is described as tasting like whisky with something bitter in it. One witness says: "I do not know what Rutona is made of. I don't know a single ingredient in it, but there must be some alcohol in it from the effects it has. I never drank much of it, but on one or two occasions, when I had drunk too much whisky, and whisky was out, and I was feeling sick, I drank this. After a man has been on a drunk and he is nervous, he will drink most anything that is intoxicating, if he can't get whisky. I drank this Rutona, and I know it will get up steam in a little while. It will quiet the nerves and put the blood to circulating, and make you feel good again." The defendant introduced, among other witnesses, the president and the secretary of the Columbia Drug Company, the corporation by which Rutona is manufactured. The president testified that he was a chemist by profession, and that the percentage of alcohol in Rutona is 22 per cent. in maceration, but that by the time it is through evaporating there is not over 18 to 20 per cent. left. Formerly the percentage of alcohol was higher, but, by experiment, the amount had been reduced, and the above was the mini-

mum amount which would preserve the alkaloïds and keep the active ingredients in solution; that quinine is the active principle of Rutona; that it is a medicine, is not manufactured or sold as a beverage, is not an intoxicating liquor; that, if a person were to take enough of the medicine to be affected by the alcohol, "he would be in a bad fix, he would not have any head left." The secretary of the Columbia Drug Company also testified that the percentage of alcohol in Rutona was 22 per cent. The medicine is obtained by allowing the alcohol to percolate through Peruvian cinchona bark and other crude drugs. Only so much alcohol is used as is absolutely necessary to hold the drugs in solution. It is intensely bitter, does not contain one-fourth as much alcohol as cheap whisky, is incapable of being used as a beverage. If a man were to drink enough of it to cause him to be affected by the alcohol, he would be positively stupefied. It contains less alcohol than a great many of the household remedies now on the market. Another witness testified, for the defendant, that he had bought a bottle of Rutona and had used it according to directions, and that it did him good; but this witness evinced his impartiality by testifying on cross-examination: "Good old rye whisky will do me good too, any tonic will do me good, and I expect it [referring to Rutona] would make you drunk." The defendant stated that he had sold Rutona along with other patent medicines in his store, not as a beverage, and with no intention of violating the law. Two bottles of the Rutona were introduced in evidence and submitted to the consideration of the jury, but, as none of this was transmitted to this court with the record, we are unable to give any more accurate description of it than we have been able to summarize from the evidence as above. The building known as the Masonic Academy in Swainsboro is no longer used for school purposes, though the Masonic lodge is still located there. The school has been moved to a new building just a short distance away. The drug store of the defendant, where the sales took place, was within a few hundred yards of both the old and the new location of the school.

1. By demurrer the point was raised that the act of 1877 is no longer in effect; that it has been repealed by the charter of the city of Swainsboro, approved December 6, 1900. The 26th section of that charter (Acts 1900, p. 435) is as follows: "That the city council shall have complete control of the manufacturing, wholesaling, and retailing of spirituous or malt liquors or any intoxicants in the city; provided, the license for retailing such shall not be less than one thousand dollars per annum; to prohibit the storage or keeping of wine, beer, malt, alcoholic or intoxicating liquors of any kind for illegal purposes, or prohibit the same from being brought into said city, and to punish within the limits prescribed by this charter any per-

son or persons violating the same." The repealing of statutes by implication is not favored. We construe this clause of the charter as giving the city authorities control of the retailing only of such liquors as may now or hereafter be lawfully sold in Swainsboro, if there are now, for any reason, or shall hereafter be, by the repeal of the statute of 1877 or otherwise, any liquors which may be lawfully sold there.

2. Another demurrer to the accusation makes the point that in the act of 1877 the language used in describing the Masonic Academy is "in the town of Swainsboro, in Emanuel county," while the accusation merely uses the words "in Swainsboro, Georgia." There is nothing in the point. *Sessions v. State*, 115 Ga. 18, 41 S. E. 259; *Mayor of Smithville v. Dispensary Commissioners*, 125 Ga. 559, 54 S. E. 539; *Murphy v. Waycross*, 90 Ga. 36, 15 S. E. 817.

3. The plaintiff in error contends that, since the school formerly taught in the Masonic Academy has been moved into another house near by, the act of 1877 is no longer of force. It is unnecessary for us to decide whether the act in question could be repealed even by the destruction of the building named therein and the total discontinuance of both the Masonic lodge and the school located therein at the time of the passage of the act, or whether the center of the three-mile territory to be affected has shifted by the removal of the school, since the acts for which the defendant was tried occurred within three miles of both the new and the old location of the school. We cannot hold that the slight difference in the present, from the former, location of the school, operated to repeal the statute. Compare *Allen v. Lytle*, 114 Ga. 275, 40 S. E. 238.

4. The holding in the fourth headnote seems obvious.

5. The definition of intoxicating liquors, contained in the fifth headnote, rests upon the authority of *Black on Intoxicating Liquors*, §§ 2, 3; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Colwell v. State*, 112 Ga. 75, 37 S. E. 129.

6. We think that the verdict would have been authorized, although not absolutely demanded, not only by the state's testimony, but also by the evidence submitted by the defendant himself. Under the testimony of the manufacturers, Rutona contains 18 to 22 per cent. alcohol. Although one of the witnesses states that there is not one-fourth as much alcohol in this preparation as there is in cheap whisky, common knowledge contradicts him. Proof-spirit, or, as it is commonly called, hundred-proof, liquor, the United States government's basis for revenue tax, is defined by the *Standard Dictionary* to be "an alcoholic liquor that contains half its volume of alcohol." Very little whisky is hundred proof. Most of it, especially the cheaper grades, runs from seventy, and even lower, to ninety, proof; that is to say,



contains 35 to 45 per cent. alcohol. Commercial alcohol itself is only 188 proof. Beers and wines usually contain only 4 to 10 per cent. of alcohol. So that a preparation containing 22 per cent. of alcohol would be intoxicating even if taken in reasonably small quantities. The mere fact that a mixture may have medicinal virtues does not take it from under the ban of the law against the sale of intoxicants. Whisky itself is a stimulant, and has some good qualities as a medicine. The theory of prohibitory statutes is that it is better to forego the legitimate uses of these alcoholic mixtures than to risk the dangers of their abuses. However, in an alcoholic preparation, the alcohol may be so denatured as to render the mixture totally incapable of being used as a beverage; and such preparations are not within the purview of laws against the sale of intoxicating liquors. There was evidence from which the jury might have found that the preparation in question belongs to this class, and upon this contention the defendant mainly rested his defense. The trial court ignored this question and in effect charged to the contrary. The defendant was entitled to have this defense submitted for whatever it was worth, in the light of all the testimony. For this alone we grant a new trial.

Judgment reversed.

(1 Ga. App. 150)

**HARDAWAY v. STATE.** (No. 176.)

(Court of Appeals of Georgia. Feb. 5, 1907.)

**GAME—SHOOTING ON POSTED LAND—INDICTMENT.**

An indictment under the act of 1903 (Acts 1903, p. 44) amending the Pen. Code 1895, § 221 (which provides "for the posting of lands and for the punishment of persons hunting thereon"), alleging that the accused did on the 1st day of "December, 1905, \* \* \* hunt with firearms upon the land of [A], said lands being then and there posted by having two cards on said land \* \* \* forbidding all persons to hunt on said lands, and the said [A] having registered his name in the register for posting lands in the clerk's office in said county as required by law," is defective, and sets forth no offense under the statute, and should have been quashed on demurrer. Under the requirements of the above act, the indictment should allege that the notice had been posted by the landowner in two or more places on each tract of land; that the landowner had registered his name in "the register for posting lands," after first having stated, etc., that said two notices had been posted; and that at the time of registering he gave a description of the lands, by giving the district in which the lands were located, the number of the lots, or other description sufficient to put the public on notice of the lands referred to.

(Syllabus by the Court.)

Error from Superior Court, Greene County; Lewis, Judge.

Tom Hardaway was convicted of hunting on posted lands, and brings error. Reversed.

James B. & Noel P. Park, for plaintiff in error. Joseph E. Pottle, Sol. Gen., and James Davison, for the State.

HILL, C. J. Tom Hardaway was indicted in the superior court of Greene county for a misdemeanor, the indictment charging that he "did on the first day of December, 1905, in said county, hunt with firearms upon the land of C. J. Thornton, said lands being then and there posted by having two cards on said lands, and one of said cards being then and there posted at the courthouse door in said county, forbidding all persons hunting on said lands, and the said C. J. Thornton having registered his name in the register for posting lands in the clerk's office in said county as required by law." Said indictment was transferred to the county court of Greene county. The defendant demurred to the indictment on various grounds, and the demurrer was overruled; whereupon the defendant "waived formal arraignment, trial by jury, and pleaded not guilty." After hearing the evidence the court found the defendant guilty. The defendant presented his petition for certiorari, alleging "that said demurrer should have been sustained by the county judge, that certain evidence was erroneously admitted, that his conviction was illegal, contrary to law, and without evidence to support it." The petition was sanctioned and the writ of certiorari issued. On hearing the certiorari, the judge of the superior court overruled the same and affirmed the judgment of the court below. To this judgment of the court the defendant excepted, and assigns the same as error.

The first and second grounds of the demurrer can well be considered together. The second ground of the demurrer is that the indictment is defective, in that it does not put the defendant upon notice as to what lands of C. J. Thornton are meant, and that said lands are not sufficiently described, nor does said indictment allege what district they are in. By reference to the act of 1903 (Acts 1903, p. 44), amending section 221 of the Penal Code of 1895, it will be seen under what conditions the law makes hunting upon the lands of another a misdemeanor. Section 1 of this act declares that "It shall be the duty of the landowners to post a notice in two or more places on each tract of land \* \* \* forbidding all persons to hunt thereon." Section 2 of the act requires that the landowner, in addition to posting the notice aforesaid "in two or more places on each tract of land," shall register his or her name in a book to be known as "the register for posting lands," in the office of the clerk of the superior court, after having first stated, etc., that the two notices have already been posted upon said landowner's land as required by section 1 of this act. Section 4 (page 45) of this act provides that "at the time of the registering of the name of the landowner he shall also register a description of the lands that have been posted, giving the district in which said lands are located, and either the numbers of the lots or

other description of the lands sufficient to put the public on notice of the land referred to."

Construing all these sections of the act together, we think it clear that, before it becomes an offense to hunt on the lands of another, the following facts must exist: First. The landowner shall post a notice in two or more places on each tract of land forbidding all persons to hunt thereon. Second. Said landowner shall register his name in the register for posting lands, stating in the presence of the officers in charge of said book that the two notices have already been posted upon each tract of land. Third. At the time of the registering of the name of the landowner and the posting of the land, the landowner shall also register a description of the land that has been posted, giving the district in which said land is located, and either the numbers of the lots or other description of the land, sufficient to put the public on notice of the land referred to. What the act requires shall be done to constitute the offense should be alleged in the indictment and shown by the evidence. The omission of either one of these essential allegations is fatal to the indictment. We therefore hold that the court erred in not sustaining the demurrer on the first and second grounds, and that the judgment of the superior court in overruling the certiorari was error.

Judgment reversed.

(1 Ga. App. 573)

**HARALSON v. SPEER.** (No. 109.)

(Court of Appeals of Georgia. April 11, 1907.)

**1. LOGS AND LOGGING — LIENS — ENFORCEMENTS—ACTIONS—ALLEGATIONS.**

There was no error in refusing to quash the affidavit and *fi. fa.*, or to dismiss the levy, in this case. Nor was it error to overrule the demurrer to the plaintiff's petition as amended. Demand after the debt became due was alleged by amendment, and it was impossible to aver the completion of the contract.

**2. SAME.**

In the foreclosure of liens under Civ. Code 1895, § 2816, it is not essential that it be alleged or proved that the contract was fully completed by the party claiming the lien, if compliance with the contract was either waived or prevented by the defendant. In presenting the issue of lien or no lien, a proper averment that the promisor was prevented by the promisee from completing his contract as a sawmillman is a good substitute for a statement that the obligations of the contract have been fully met, and (if sustained by sufficient evidence satisfactory to the jury) is equivalent to completion, as a remedial element.

**3. SAME.**

Though full performance of the contract on the part of the plaintiff be essential to the establishment of the liens provided by section 2816 of the Civil Code of 1895, yet, where it appears that the defendant himself prevented the completion of a contract partly performed, and rendered full compliance therewith impossible, the defendant will not be allowed to take advantage of his own wrong, so as to defeat the lien for the services already rendered. It will in such a case be presumed that there was a novation of the original contract between the

parties, and that by subsequent agreement the parties have substituted a new contract in such terms as require, for its full performance, exactly that which the plaintiff has already performed, and no more.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 60-66.]

**4. SAME — ENFORCEMENT—EVIDENCE—SUFFICIENCY.**

The evidence, though conflicting, authorized the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of La Grange; Harwell, Judge.

Action by one Speer against one Haralson. Judgment for plaintiff, and defendant brings error. Affirmed.

A. H. Thompson, for plaintiff in error. W. T. Tuggle and Hatton Lovejoy, for defendant in error.

RUSSELL, J. Speer, a sawmillman, foreclosed his lien against Haralson, and levied on certain lumber sawed by him for the defendant. Haralson gave bond for the lumber, instead of a replevy bond. On the trial Haralson moved to quash the affidavit and *fi. fa.*, and to dismiss the levy, and by a demurrer set up, as reasons why the affidavit and *fi. fa.* should be quashed and the levy dismissed, (1) that the affidavit does not allege that the contract is complete, nor state any reason why the plaintiff did not complete it; (2) no demand and refusal to pay is alleged; (3) the affidavit does not allege the debt to be due, but distinctly denies it is due; (4) no legal reason is averred why demand was not made on the owner; (5) the affidavit does not state when or by whom demand was made. Thereupon the plaintiff amended his affidavit by alleging that he demanded the amount due of the defendant after it became due; and, further, that after he had cut the lumber upon which the lien was claimed, and while he was preparing to complete the sawing, the defendant hired his fireman and his stock cutter without his consent; that without these hands affiant was unable to carry on the sawing; and that he tried to get hands to take the place of his fireman and stock cutter, but was unable to do so. The trial judge overruled the demurrer, and the defendant excepted *pendente lite*. The case then proceeded to trial, and the jury rendered a verdict for the plaintiff. The defendant (now plaintiff in error) excepts to the overruling of his demurrer and to the refusal of his motion for a new trial. The demurrer raised all the issues of law which are pertinent in this case, and the grounds thereof are properly presented here for adjudication.

If the court was right in overruling these demurrers, the verdict cannot be disturbed, for there is evidence to support it. If the judge should have sustained the demurrers and motion to quash, the plaintiff could not foreclose his lien as a sawmillman then, and

never could in the future. It is true that the learned counsel for plaintiff in error insists in his brief that the verdict is contrary to evidence, against the weight of evidence, and without evidence to support it; but this contention rests, it will be found upon investigation, wholly upon counsel's view of the law, and upon the theory that the evidence showing why the sawing was not completed should not be considered. Summarizing the motion to quash the affidavit of foreclosure, the affidavit is attacked on three grounds: (1) That it does not show that the contract of sawing has been completed; or (2) that the amount claimed is due; or (3) that a demand has been made. The objection that no proper demand was legally set forth in the affidavit (and which, in different forms, was the burden of three grounds of the demurrer) was met by amendment detailing that the demand was made on the defendant by plaintiff in person, and after the debt became due. This met the motion to quash; and as to this ground the motion was properly overruled. On the trial there was proof of demand, though this was not necessary, as demand was not denied by the counter affidavit. *Langston v. Anderson*, 69 Ga. 65. The affidavit as amended also shows that it is distinctly alleged that the debt for the sawing, on which a lien is claimed, is due. So that the real controlling question is whether this owner of the sawmill, even if he was prevented by the owner of the timber (who hired his two indispensable employes, whose positions he could not fill with other help) from complying with his contract, shall be deprived, though himself free from fault, of just compensation for the labor already done, and of the lien attached to such service by law. It may be said that he could, by suit, recover judgment for the amount of his services; and he might also recover damages for the breach of the contract. But in many instances the special lien allowed by law is the only security or guarantee for the collection of the sum due, which might otherwise be merely included in a noncollectible judgment.

It is well settled that the lien laws are in derogation of the common law and are to be strictly construed. And generally before one can claim a lien for services, material or labor, it is incumbent on him to show that he has complied with and performed a contract declared on. This is the express statute with reference to such liens enforceable against real estate; and, in *Faircloth v. Webb*, 125 Ga. 231, 53 S. E. 592 (5), the same rule seems to be applied to liens sought to be enforced on personalty, the court holding that, "in order to establish his lien, it is incumbent upon the laborer to show that he complied with and performed the contract declared on." In *Tanxley v. Lampkin*, 113 Ga. 1007, 39 S. E. 473, it was held that a verdict for the defendant is demanded, where a laborer institutes a suit to foreclose

a lien which he claims against real estate, and where there is no testimony to show that he has completed his contract of labor. But the point now before us was not involved in either of those cases; and though it is generally essential to allege, and, when alleged, to prove, that a contract has been complied with and fully performed, this rule is subject to exceptions, where the complete performance is prevented by the opposite party to the contract. The principle involved in the maxim that the law will allow no one to take advantage of his own wrong is more binding than the requirement that the completion of the contract be alleged. To hold otherwise would be to require, in some cases, an impossibility. And the law never imposes this burden on any one.

According to the allegations of the affidavit (which for the purposes of demurrer are assumed to be true), it clearly appears that the sawing of the full amount of lumber, according to the terms of the contract, was prevented by Haralson himself; and, if the demurrer is well taken, Speer could not foreclose his lien for the full amount of the lumber, or even for that which had been sawed. Speer set forth in his affidavit, and the amendments thereto, that Haralson hired two of his hands at the sawmill; that other hands could not be secured, though he made every effort to do so; and that the mill was thereby forced to stop sawing. One man was his fireman, the other was the stock cutter. Without these the mill could not be run, and Speer could not replace them with others. Haralson having caused the mill to shut down, he cannot be heard to complain that Speer did not go on sawing. This would allow him to take advantage of his own wrong. As the fundamental principles of the law will not permit this, we have no difficulty in holding that, where one party is prevented from completing his contract by the other party to the contract, the first party retains his lien for the work already done. If this be sound principle, such a party has the right to allege the reasons why he has not completed the contract instead of averring its completion; and consequently this demurrer to the affidavit was properly overruled, and evidence on the subject properly admitted.

Proof of the completion of a contract in cases of lien may be dispensed with either where compliance with the contract is prevented by the action of the defendant or where the defendant waives compliance. We have examined at least two cases in our own state which are directly in point. In *Hart v. Hirsch*, 74 Ga. 799, the plaintiff sued out a laborer's lien. It was admitted that the contract had not been fully completed; but the plaintiff gave as a reason therefor that the defendant had refused to pay him the amount due monthly for wages, and, in violation of his contract, had removed the plaintiff's goods from his house. And in that case the court refused a request to charge the jury as

follows: "In order for the plaintiff to prevail in this case, it is necessary that he must show that he completed his contract of labor." The Supreme Court affirmed a judgment denying a new trial, expressly holding that no error was made in refusing to charge as requested. In *Lewis v. Owens*, 124 Ga. 223, 52 S. E. 333, it was held that a cropper was entitled to a laborer's lien, although he did not complete his crop, being prevented from doing so by the levy thereon of a distress warrant against his employer. If the fact that the contract has not been completed will not defeat the lien where a third party—a stranger to the contract—prevents its completion, still less will it be defeated when the employer in person takes steps to prevent his employé from complying. And the authorities in our own state are re-enforced by decisions from the courts of last resort in every section of the Union, sustaining the principle that a statutory lien is not lost by noncompliance with the contract where the lienor is prevented by the other party from completing his contract.

In *Bohem v. Seabury*, 141 Pa. 594, 21 Atl. 674, it is held that in foreclosing a mechanic's lien it is necessary to allege completion of the contract or that the owner had prevented the completion; thus recognizing the doctrine stated above, that prevention from complying is a good substitute for compliance and completion. In *Pardue v. Missouri R. Co.*, 52 Neb. 201, 71 N. W. 1022, 66 Am. St. Rep. 489, it is decided that, where a contractor has been wrongfully interrupted by the owner and prevented from completing the work, the contractor is entitled to his lien for the work done and material furnished. In *Smith v. Fleischman*, 48 N. Y. Supp. 234, 23 App. Div. 355, it was held that "a contractor's right to a lien cannot be defeated upon the ground that he failed to complete his contract within the specified time, when the failure was due to interference by the owner." In *Orr v. Fuller*, 172 Mass. 597, 52 N. E. 1091, it was held that "a contractor has a lien for the portion of work done on a house when the contract is broken by the owner after part performance." We think it settled, therefore, where one, who would have a lien at the completion of the contract, is prevented by the act of the other party from completing his contract, and is himself free from fault, such a one would still be entitled to his lien to such an extent as he had complied with the contract. It was held in *Hawkins v. Chambliss*, 120 Ga. 615, 48 S. E. 169, that there could be such a waiver of compliance with the contract as would preserve the lien as to the portion of the work done, although the contract was not completed.

We have, in part, based our ruling in this case upon the principle underlying the holding in the case last above cited—the presumption of a novation of the original contract. Based upon this principle, there is no conflict between our decision in this case and the long

line of decisions which make the completion of the contract one of the essential prerequisites to the existence of a lien. As they who make contracts, have by mutual consent the right to alter them, and as he who prevents a thing from being done shall not avail himself of the nonperformance which he himself occasioned, the breach of the contract by the one party may be assented to by the other at his option; and, if assented to, it becomes a mutual agreement, which presumes a new contract, the operation of which extends to that which has been performed by the lienor up to the time of the assent, and no further, and becomes an executed or completed contract. In this view of the case, *Haralson*, when he broke the contract, by preventing *Speer* from sawing, thereby proposed that the contract be reduced from one of sawing 100,000 feet of lumber to one for sawing 61,000. *Speer* had the option to agree to this change if he saw fit. By his suit he did agree, and the contract became complete, and he was therefore authorized to enforce his lien.

A remedy at law, as in medical science, is prescribed, designed, and administered so as to cure, or, at least, relieve, the ills from which the patient suffers. Sometimes the proper remedy is elementary in substance; sometimes a prescription requires compound; and generally, in law, the remedy is the mingling of several rights, compounded to make a panacea which shall relieve the party's wrongs and restore his rights to free and healthful action. In law, as in medicine, there is frequently more than one formula by which a remedy can be compounded and perfected. Sometimes the remedy is composed of certain remedial ingredients, and at other times new and different curatives are either added or omitted, to suit the case. Frequently, for the lack of one sanative, the law substitutes another, which will produce a like healing effect. Relief, both in law and medicine, is the object sought. The sawmillman needed a remedy to put his lien in healthy action. One of the ingredients of that remedy must be a proper affidavit, and the proper presentation of the issue of lien or no lien. According to the usual formula of the prescription, full compliance with the contract must be stated. That particular narcotic is not available, but the doctor finds a balm in *Gilead* in a proper averment that the promisor was prevented by the promisee from completing his contract as a sawmillman. With this change the prescription can be compounded, because a good substitute has been found for the statement that the obligations of the contractor have been fully met. The pleadings are complete. A substitute averment, if sustained, as in this case, by sufficient evidence which was satisfactory to the jury, is equivalent to completion, as a remedial element.

Judgment affirmed.

(7 S. C. 351)

STATE ex rel. SPENCER v. McCAW et al.  
(Supreme Court of South Carolina. July 11, 1907.)

**1. STATUTES—LOCAL ACTS—SCHOOL DISTRICTS—CHANGE OF BOUNDARIES.**

25 St. at Large, p. 731, amending 20 St. at Large, p. 246, creating the school district of Yorkville, by extending its boundaries, is not in violation of Const. art. 3, § 34, subd. 4, prohibiting the General Assembly from enacting local laws to incorporate educational societies; that section applying to institutions of learning, and not to school districts.

**2. SAME.**

25 St. at Large, p. 731, amending 20 St. at Large, p. 246, creating the school district of Yorkville, by extending its boundaries, is not in violation of Const. art. 3, § 34, subd. 5, prohibiting incorporating of school districts by special law, as such act does not incorporate a district, but only amends a previous statute of incorporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 107.]

**3. SAME.**

Const. art. 3, § 34, subd. 11, prohibiting special laws in all cases where a general law can be made applicable, must be construed in connection with article 11, § 5, providing that the General Assembly shall establish public schools and divide counties into suitable school districts; and, so construed, a special act extending the boundaries of a school district already created may be regarded as a special provision to a general law, and therefore not unconstitutional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 107.]

**4. SAME—CHANGE OF CORPORATE CHARTER.**

Const. art. 9, § 2, providing that no charter of incorporation shall be granted, changed, or amended by a special law, relates to private or quasi public corporations, and not to school districts.

Application by the state, on the relation of C. E. Spencer, for writ of mandamus against W. B. McCaw and others. Writ denied.

C. E. Spencer, in pro. per. W. B. McCaw, for respondents.

**GARY, A. J.** This is an application to the court in the exercise of its original jurisdiction, for an order of injunction restraining the respondent from ordering and holding an election in the school district of Yorkville. The said school district was incorporated by an act, entitled "An act to create the school district of Yorkville, in York county, and enable it to organize a system of free schools, and to levy a tax in support of the same, and to purchase and hold property," approved 22d December, 1888. 20 St. at Large, p. 246. This statute embraced an area of one mile, extending from the intersection of Congress and Liberty streets. On the 15th of February, 1907, an act was passed, entitled "An act to enlarge the area of the school district of Yorkville to two and one-half miles" (25 St. at Large, p. 731), which provides: "That after the approval of this act, the territory embraced within the area extending two and one-half miles, from the intersection of Congress and Liberty streets, in the town of

Yorkville, in said state, be declared a separate school district, and to be known as the 'School District of Yorkville,' and that it be invested with such corporate powers as may be necessary to carry out the purposes of its organization, as now declared by law heretofore creating the same, and acts supplementary or amendatory thereto."

The petitioner alleges that this act is unconstitutional on the following grounds, to wit: "(a) In that it is in violation of and is repugnant to article 3, § 34, subds. 4, 5, 11, of the Constitution of South Carolina. (1) The school district of Yorkville, whose charter is hereby amended, is not an educational institution under the control of the state. (2) It is a new school district, the creation of which is expressly prohibited. (3) A special law has been enacted where a general law could have been made applicable. (b) In that it is in violation of and repugnant to article 9, § 2, of the Constitution of South Carolina, in that the Yorkville school district, the corporation whose charter has been amended by said act of the General Assembly, is not one of the excepted corporations enumerated in article 9, § 2, of the Constitution, namely, 'such charitable, penal, educational or reformatory corporations, as may be under the control of the state,' but, on the contrary, is a corporation whose charter cannot be amended by special law, save only under the proviso to article 9, § 2, of the Constitution, which provides 'that the General Assembly may by a two-thirds vote of each house, on a concurrent resolution, allow a bill for a special charter to be introduced, and may pass the same as other bills'; but in this connection petitioner avers and charges that no such two-thirds vote of each house was taken on a concurrent resolution allowing the introduction and passage of the bill into the act herein assailed."

We proceed to consider, first, the grounds upon which it is contended the statute is obnoxious to certain provisions of article 3, § 34, of the Constitution, which is as follows: "The General Assembly of this state shall not enact local or special laws concerning any of the following subjects, or for any of the following purposes, to wit: (1) To change the names of persons or places. (2) To lay out, open, alter or work roads or highways. (3) To incorporate cities, towns or villages, or change, amend or extend the charter thereof. (4) To incorporate educational, religious, charitable, social, manufacturing or banking institutions not under control of the state, or amend the charters thereof. (5) To incorporate school districts. (6) To authorize the adoption or legitimation of children. (7) To provide for the protection of game. (8) To summon and empanel grand or petit jurors. (9) To provide for the age at which citizens shall be subject to road or other public duty. (10) To fix the amount or manner of compensation to be paid to any county officer, except that the laws may be

so made as to grade the compensation in proportion to the population and necessary service required. (11) In all other cases, where a general law can be made applicable, no special law shall be enacted. (12) The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operation: provided, that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws. (13) The provisions of this section shall not apply to charitable and educational corporations, where, under the terms of a gift, devise or will, special incorporation may be required."

1. The statute does not violate subdivision 4 of that section, for the reason that a school district is not an educational institution, and therefore that provision is inapplicable. It has reference to institutions of learning, such as colleges. Nor is it repugnant to subdivision 5 of that section, as the statute does not incorporate the school district, but is in effect only an amendment of a previous statute of incorporation. It will be observed that the General Assembly is not only prohibited from enacting local or special laws of incorporation, concerning any of the subjects enumerated in subdivisions 3 and 4, but likewise from amending or extending charters already in existence. In subdivision 5, however, there is only a prohibition against the incorporation of a school district, but there is no inhibition against amending or extending a charter granted prior to the adoption of the Constitution.

2. The next question is whether the statute was obnoxious to subdivision 11. This subdivision must be construed in connection with article 11, § 5, which provides that "the General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the counties into suitable school districts, as compact in form as practicable, having regard to natural boundaries, and not to exceed forty-nine, nor be less than nine square miles in area: \* \* \* provided, further, that nothing in this article contained shall be construed as a repeal of the laws, under which the several graded school districts of this state are organized. The present division of the counties into school districts and the provisions of law now governing the same shall remain until changed by the General Assembly." In granting general laws concerning school districts which shall be uniform in their operation, the General Assembly, in providing for the division of counties into suitable school districts as compact in form as possible, has the power in each instance to regard natural boundaries, and to determine the number of miles in area a school district shall contain, provided it shall not exceed 49 nor be less than 9 square miles. This could unquestionably be enacted as a special provi-

sion in a general law. A statute, therefore, which could be enacted as a special provision in a general law will not be declared unconstitutional merely because it is in form a separate act, but will be regarded as an amendment of the general law upon the subject. *Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. E. A. 687. In that case the court uses this language: "We think it safe to say that if it be competent for the Legislature, while enacting a general law, to enact special provisions therein, it is also competent to enact similar special provisions by way of amending a general law. The former power would necessarily include the latter."

3. The last objection urged against the constitutionality of the statute is that it is violative of article 9, § 2, which is as follows: "No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal or reformatory corporations as may be under the control of the state, or may be provided for in this Constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organizations of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created shall be subject to future repeal or alteration: provided, that the General Assembly may by a two-thirds vote of each house on a concurrent resolution, allow a bill for a special charter to be introduced, and when so introduced, may pass the same as other bills." We have already shown that the statute was not a special law, but in effect an amendment to a general law, as it merely contained a special provision that could have been enacted in a general law. Furthermore, section 1 of that article, which provides that "the term 'corporation,' as used in this article, includes all associations and joint-stock companies, having powers and privileges not possessed by individuals or partnerships, and excludes municipal corporations," has no reference to corporations such as a school district having the public and corporate purpose of education. The article relates to private or quasi public corporations. This objection must likewise be overruled.

The judgment of this court dismissing the petition has already been filed.

(77 S. C. 441)

**CITIZENS' & MAINE BANK v. WITCOVER.**

(Supreme Court of South Carolina. July 29, 1907.)

**APPEAL—APPEALABLE ORDER.**

No appeal lies from an order refusing to strike out an answer as sham.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 704.]

Appeal from Common Pleas Circuit Court of Marion County; Watts, Judge.

Action by the Citizens' & Maine Bank against one Witcover. From an order refusing to strike out the answer as sham, plaintiff appeals. Affirmed.

Montgomery & Lide, for appellant. Jas. W. Johnson, for respondent.

WOODS, J. This appeal is from an order refusing to strike out defendant's answer as sham and irrelevant. The complaint alleges the making by the defendant of two notes, for \$180 and \$500, dated April 21, 1906, payable to the order of J. G. Latimer, 60 days after date, the indorsement of the note by the plaintiff before maturity, the present ownership by the plaintiff, demand for payment, and failure to pay. Defendant answered as follows: "(1) He denies each and every allegation of the complaint not herein-after admitted. (2) He admits that he executed the notes described in the complaint, but denies that they were given for any valuable or other consideration; but, on the contrary, he alleges that they were given solely for the accommodation of one J. G. Latimer, and were without consideration, which fact plaintiff well knew at the time it took said notes; that defendant is informed and believes that when said notes became due the said J. G. Latimer substituted his own note, with O. M. Latimer as indorser, for said notes in said bank, and said bank accepted same in lieu of this defendant's notes, thus releasing him from all liability to said bank on account of said notes. (3) He admits the allegations contained in paragraphs 1 and 4 of plaintiff's first cause of action, and the allegations contained in 1 and 4 of plaintiff's second cause of action."

The motion to strike out was made on the pleadings; the affidavits of W. E. Vest, cashier of the plaintiff bank, denying the substitution of Latimer's notes for the notes in suit, and asserting the bank's ownership of the notes; the affidavit of W. J. Montgomery, Esq., setting forth separate admissions of liability by the defendant after the notes had come into his hands; and a number of letters of the defendant to the bank, written after the maturity of the notes, asking for indulgence, and making no allusion to any defense set up in the answer. The circuit judge thus states his conclusions of law and fact: "No contrary showing was made by the defendant, his counsel taking the position that by his answer he had denied a material allegation of the complaint, viz., that the plaintiff is the legal owner and holder of the notes sued on, and therefore the answer could not be disposed of on motion. In my opinion this position is unsound, because the defenses set up are in themselves admissions of title in the plaintiff. At the hearing before me, defendant's attorney abandoned the defense that the notes were accommodation paper. I am satisfied from the show-

ing made by the plaintiff that the answer made by the defendant is sham and irrelevant, and intended merely for delay; but as the answer raises one issuable fact, viz., whether or not the plaintiff took the notes indorsed by O. M. Latimer in substitution for the note of the defendant, I do not think I have the power to strike out the answer as sham and irrelevant on affidavits."

Section 173, Code Civ. Proc. 1902, provides: "Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may, in its discretion, impose." The exceptions raise the question whether the remedy provided is available when the sham of the answer is not to be seen on the face of the record, but can be made to appear beyond doubt by affidavits or other evidence. Inasmuch as the motion to strike out was denied, the order is not appealable, and we are precluded from consideration of the important and interesting question. *Harbert v. Railway Co.*, 74 S. C. 13, 53 S. E. 1001.

The judgment of this court is that the judgment of the circuit court be affirmed.

(77 S. C. 426)

#### GREEN v. CATAWBA POWER CO.

(Supreme Court of South Carolina. July 25, 1907.)

#### MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE TO WORK.

In an action for injuries to a servant, alleged to have been caused by failure of a master to provide a safe place to work, before the master can escape liability he must show that the servant had assumed the duty of adjusting the proper appliances which he furnished, and where this is not admitted, and the evidence admits of any other inference, the issue is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000, 1001.]

Appeal from Common Pleas Circuit Court of York County; Prince, Judge.

Action by Ben Green against the Catawba Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See 55 S. E. 125.

Wilson & Wilson and Russell G. Lucas, for appellant. Green & Hines and Mr. McDow, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff in consequence of the falling of a battle post, which he was assisting to raise and place in position, as a part of the bench of a bridge, by means of a jim pole. The acts of negligence specified in the complaint are: (1) That the defendant failed to brace properly the bottom of the jim pole, or otherwise fix it securely; (2) that it failed to warn plaintiff of the extra hazard by reason of the erection of the jim pole in an unsafe manner; (3) that it caused the block and tackle to be fastened by a chain to the bottom of the jim pole, instead of fastening it

to a secure object; and (4) that it failed properly to inspect the jim pole and superintend its erection. The defendant denied the allegations of negligence, and set up the defenses of contributory negligence and assumption of risk. At the close of the plaintiff's testimony the defendant made a motion for a nonsuit on the following grounds: "(1) That the evidence fails to show any negligence on the part of the defendant company, causing or being the proximate cause of the injury to the plaintiff. (2) Upon the ground that the evidence shows that, if the plaintiff's injury was due to negligence, it was the negligence of a fellow servant or fellow servants." The motion was refused. The jury rendered a verdict in favor of the plaintiff, and the defendant appealed.

The first and second exceptions are as follows: "(1) Because his honor erred in refusing the defendant's motion for a nonsuit on the ground that the evidence failed to show any negligence on the part of the defendant, causing or being the proximate cause of the injury to the plaintiff; the error consisting in his not finding that the injury to the plaintiff was caused by the falling of a battle post, which was being raised by a jim pole to which was attached ropes and blocks and tackle, and that the fall of such battle post was due to the failure of Roseman (the foreman), or other members of the gang at work, to secure, guy, or fasten the bottom of said jim pole, or to adjust said ropes, blocks, and tackle, and that the duty to so secure, guy, and fasten such jim pole, and to properly arrange, attach, and adjust the said ropes, blocks, and tackle, was a duty resting upon the servants of the defendant who were working with the same, and was a mere detail incident to the work, and was not a part of any duty that the defendant owed to the plaintiff, and that consequently there was no such breach of any duty owed plaintiff by the defendant, and no negligence was shown on the part of the defendant. (2) Because his honor erred in refusing defendant's motion for nonsuit on the ground that the testimony showed that the plaintiff sustained his injury through the negligence of his fellow servant; his error consisting in not finding that the testimony showed that Roseman was the fellow servant of the plaintiff at the time of the acts causing the injury to plaintiff." The third exception is substantially the same as the second. These exceptions will be considered together.

The first point which the appellant's attorneys make in their argument is as follows: "Defendant furnished a sufficient supply of safe and suitable appliances. The negligence, if any, was in the adjustment, setting up, and adaptation of the appliances to the work in hand. It is well settled that the adjustment and adaptation of implements to the work in hand, according to its various needs, is the duty of a servant, and not of the master, and negligence on defendant's

part cannot be predicated upon the failure to use due care in that regard." They cited numerous authorities which amply sustain said proposition, provided it appears, either from the express language of the contract entered into between the master and servant or by implication, that the servant agreed to adjust the appliances as the occasion required during the progress of the work, or no other inference could be drawn from the evidence. Unless this fact is admitted, the court cannot say, as matter of law, that the servant undertook to discharge this duty, and must submit the question to the jury. In 2 Labatt on Master & Servant, § 615, the rule is thus stated: "The limits of a master's liability for an injury caused by a scaffold or other appliance, constructed or adjusted as a part of the work, are determined upon the hypothesis that it is his duty, in the alternative, 'to furnish either a suitable platform or scaffold for doing the work that the plaintiff and his employes were required to do, or proper and suitable materials for the construction of such a platform.' Under the general principle stated in section 594, supra, the question whether the one or the other of these duties was chargeable to the master is primarily one for the jury, under proper instructions. \* \* \*

The starting point of one of these lines of investigation may be said to be in the question whether the construction or adjustment of the defective instrumentality was a function which the master was justified in leaving to the servants themselves. \* \* \*

The virtual effect of the authorities is that, whenever the defective scaffold or other appliance was essentially one of a temporary character, constructed or adjusted with a view to some particular piece of work, the master cannot be held negligent merely for the reason that he left such construction or adjustment to the servants themselves. Accordingly, whenever the instrumentality is one of this character, the burden of proof lies on the servant to overcome the presumption of nonculpability by adducing some positive evidence from which an obligation on the master's part to furnish such instrumentality in a completed state is reasonably inferable. On the other hand, it is also clear, both upon principle and authority, that the fact of an appliance being ordinarily prepared by the plaintiff's fellow servants is not necessarily a bar to the action. Since the duty to furnish safe appliances rests upon the master, he must discharge his duty in the premises. \* \* \*

The essential question to be determined, if we choose the alternative line of investigation, is whether the master as a matter of fact assumed to furnish the scaffold or other instrumentality in a completed form, or merely furnished the materials and left them to be used by the servants themselves. Clearly, if such assumption is established, the master will be liable as for negligence, even if the



circumstances were such that he would have been justified in leaving the servants to prepare the defective instrumentality themselves. The case is for the jury where the evidence is conflicting, or reasonably consistent either with the hypothesis that the defective appliance was constructed by the fellow servant of the injured person out of the materials furnished by the master or with the hypothesis that it was constructed under the direction of the defendant or his representative." In a note to that section, on page 1784, we find the following: "Donnelly v. Booth Bros. & H. I. Granite Co. (1897), 90 Me. 110, 37 Atl. 874 (negligence here was in the erection and support of a run for large stones and in the selection of the gear), citing *Arkerson v. Dennison* (1875), 117 Mass. 407, where the general rule was laid down as follows: 'When the preparation of the appliances is neither intrusted to nor assumed by them, the master may be held guilty of negligence if defective appliances are furnished, even though the workmen themselves are employed in the preparation of them. In such case, negligence appearing, it is a question of fact for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen or was the negligence of the master.'" In the case of *Charping v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186, the facts were that the plaintiff was standing on a scaffold, which is a temporary structure, working for defendant as a carpenter. The cross-beam of the scaffold broke, and the plaintiff was thrown to the ground and injured. The basis of the action for damages was the alleged failure of the defendant to provide the plaintiff, his employé, a safe place to work. The court said, at page 476 of 70 S. C., page 188 of 50 S. E.: "There is no doubt that the master is liable when injury comes to a servant from being put in a place or furnished with appliances which the master, by the use of reasonable diligence, ought to have known to be unsafe, as well as when he had actual knowledge of the defects."

There was testimony sustaining the following allegations of the complaint: That on the 8th of February, 1904, the defendant was engaged in the construction of a public road and bridge over the creek therein mentioned; that on the said day the plaintiff was employed by defendant as a common laborer, and as such was engaged with a grading gang, which was constructing a roadway, approaching a point where the bridge was being constructed; that James Roseman, the foreman in charge of defendant's works, was engaged in erecting the benches for the bridge; that James Roseman, while superintending the erection of one of the benches, summoned the plaintiff from the work of grading the road and ordered him to assist in the erection of the bench, known as a "bottle post," which plaintiff at once proceed-

ed to do, as his duty to defendant required. If Roseman, the foreman, alone had been intrusted with the duty of adjusting the jim pole, as became necessary in the erection of the bridge, and through a defective adjustment the place where he worked was rendered unsafe, in consequence of which he was injured, he would not have been entitled to damages. *Keys v. Granite Co.*, 72 S. C. 97, 51 S. E. 549. The same principle would apply where other servants also agree to arrange the appliances so as to form a completed machine, although it might render the place where they worked unsafe by reason of the negligent manner in which the appliances were adjusted. The reason is that the injury would be attributable to the misconduct of the fellow servant. But, before the master can escape liability for failing to provide a safe place to work, he must show that the servant had taken upon himself the duty of adjusting the appliances (in which case the principle for which the appellant's attorneys contend would apply). This may be shown by express agreement or by implication, and, unless admitted, presents a question of fact to be determined by the jury. In the present case it does not appear from the testimony that the plaintiff even had any knowledge that he was supposed to have undertaken to adjust the appliances, and it cannot be said, as a matter of law, that he entered into such an agreement.

The fourth exception assigns error in refusing the motion for a nonsuit on the ground that the testimony showed that the plaintiff assumed the risk in consequence of which he was injured. Rule 18 (33 S. E. viii) of the circuit court is as follows: "A motion for a nonsuit must be reduced to writing by the moving counsel, or by the stenographer, under the direction of the court, stating the grounds of the motion." The intention of the rule is that the grounds be stated specifically. It will be seen by reference to the grounds of the motion for nonsuit that this ground was not relied upon. But, waiving this objection, the testimony alone of James Roseman, a witness for the appellant, is sufficient to show that this exception should be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 434)

ANDERSON v. SOUTH CAROLINA & G.  
R. CO.

(Supreme Court of South Carolina. July 27, 1907.)

#### 1. CARRIERS—INJURY TO PASSENGER—ASSAULT BY FELLOW PASSENGER.

In an action for injuries to a passenger from the violence of a fellow passenger, an instruction that, if the injury complained of was so unexpected that defendant's employés could not have seen and prevented it by the highest degree of care, plaintiff could not recover, was proper.

## 2. SAME—INSTRUCTIONS.

An instruction that, when a passenger is injured on a train without fault on his part while being transported by a carrier, a presumption arises from this fact alone that there was negligence on the part of the carrier, which presumption the carrier is bound to rebut, or it will be liable in damages without further proof, is erroneous, in that no such presumption can arise from mere injury, unless caused by some instrumentality in the charge of the carrier, and notice of the threatened violence or impending danger must be brought home to the carrier before negligence can be imputed.

Appeal from Common Pleas Circuit Court of Aiken County.

Action by B. J. Anderson against the South Carolina & Georgia Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hendersons, for appellant. Croft & Salley and Sawyer & Owens, for appellee.

JONES, J. Plaintiff recovered a judgment of \$1,250 against defendant for alleged negligence in failing to supply sufficient coaches to accommodate the passengers on its train from Augusta, Ga., to Langley, S. C., on the afternoon of June 28, 1902, in permitting white and colored passengers to ride in the same coach, in not having a sufficient force of employes upon the train, and in failing to protect plaintiff—a passenger—from violence on the part of a fellow passenger, as the result of which negligence plaintiff received a pistol shot wound in the leg, inflicted, without fault on his part, by one of the negro passengers in the coach immediately in front of the car in which plaintiff was riding. This appeal questions the correctness of the charge to the jury.

The defendant requested the court to charge that if the injury complained of was caused by another passenger, and was so sudden and unexpected that the defendant's employes could not have foreseen and prevented it by the exercise of due care, then the defendant would not be liable. The court charged the request, except that the words "the highest degree of care" were substituted for the words "of due care." This modification of the request and the general charge that a railroad company must exercise the highest degree of care in the protection of passengers from injury or violence form the basis of the first and second exceptions. The charge as given correctly stated the law as to the degree of care to be exercised by carriers of passengers. *Steele v. Southern Railway*, 55 S. C. 393, 33 S. E. 509, 74 Am. St. Rep. 756; *Latour v. Southern Railway*, 71 S. C. 543, 51 S. E. 265; *Franklin v. Railway Co.*, 4 S. C. 332, 54 S. E. 578.

The third exception complains of error in charging "that the obligation of a common carrier for safe transportation is one arising from contract imposing duties growing out of the relation between the parties, involving trust and confidence, requiring extraordinary care, and whenever a passenger is injured on

a train, without fault on his part, while being transported by a carrier, a presumption arises from this fact alone that there was negligence in the management of the road, which presumption the carrier is bound to rebut, or it will be liable in damages without further proof"—the error being that no presumption of negligence can arise from the mere injury of a passenger unless it is shown that the injury was caused by some instrumentality in the charge of or under the control of the carrier, and that some notice of the threatened violence or impending danger must be brought home to the carrier before negligence can be imputed. This exception is well taken. According to the rule in this state, there is no presumption of negligence on the part of the carrier from the bare fact that a passenger has been injured while on the carrier's train, but that such presumption does arise on proof of such injury as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation. *Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; *Jarrell v. Railroad Co.*, 58 S. C. 494, 38 S. E. 910; *Doolittle v. Railroad Co.*, 62 S. C. 139, 40 S. E. 133; *Stembridge v. Railroad Co.*, 65 S. C. 447, 43 S. E. 968; *Hunter v. Railroad Co.*, 72 S. C. 340, 51 S. E. 860. The charge was harmful, as in this case the injury was not caused by any agency or instrumentality of the defendant, but by the direct act of a fellow passenger. In such case "knowledge of the existence of the danger or of the facts and circumstances from which the danger may be reasonably anticipated is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it." 1 *Petter on Carriers*, § 96, quoted with approval in *Franklin v. Railway Co.*, 74 S. C. 335, 54 S. E. 578. Numerous cases in other jurisdictions support this rule, but we cite only *Tall v. Baltimore S. P. Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120, wherein the subject is well considered.

It is not deemed necessary to consider the remaining exceptions to the charge.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(77 S. C. 437)

MORAGNE v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. July 27, 1907.)

## RAILROADS—PRIVATE CROSSING—REPAIR.

Where a road leads from the public road across a railroad to a house, and is used only by the owner and by the tenant of a neighbor, it is a private way, and the railroad is not required to keep the crossing over such private way in repair, under Civ. Code 1902, § 2183, providing that a railroad crossing a highway shall protect its rails, so as to procure a safe passage across the road.

Appeal from Common Pleas Circuit Court of Abbeville County; Purdy, Judge.

Action by J. P. Moragne against the Charleston & Western Carolina Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. N. Graydon, for appellant. Wm. P. Greene, for respondent.

POPE, C. J. Plaintiff, T. P. Moragne, brought this action against the defendant railway company to recover damages for injury to a mule alleged to have been caused by a defective crossing on its road. Defendant denied its liability on the ground that the road was a private way, and not such a crossing as it was required by law to keep up. The facts are as follows: Some time after the road was built defendant established the crossing in question. The road leads from plaintiff's home across the railroad to the public road and certain farm lands, and is used by plaintiff's family, the family of the tenant of one Porter, and, according to the testimony of the plaintiff, "every one who had business in there, coming or going to my house," or going to Mr. Porter's place. The crossing had been bad for several years, but defendant, although frequently requested to do so, had neglected to fix it and refused to allow plaintiff to do so. On February 22, 1906, plaintiff was crossing with a load of fertilizer, and his mule's foot was caught between a projecting spike and the rail, thus throwing it forward and crippling it, according to his testimony, permanently. The case was heard at the March, 1907, term of court for Abbeville county, and resulted in the direction of a verdict by the presiding judge, Hon. R. O. Purdy, for the defendant; the ground being that it was a private crossing. Plaintiff appeals.

The question of roads has more than once been discussed in this state, and the law on the subject is well settled. *State v. Hardin*, 11 S. C. 366; *State v. Tyler*, 54 S. C. 204, 32 S. E. 422; *Kirby v. Railway*, 63 S. C. 500, 41 S. E. 765. According to these decisions there are three kinds of roads, viz., highways, composing two classes, public roads, and private paths, or neighborhood roads, and private ways. The first two classes named are public in contradistinction from the last which is private. *State v. Harden*, supra. The three classes are very clearly distinguished in the case of *Kirby v. Railway*, supra; the distinction between private paths or neighborhood roads and private ways, the two classes germane to this discussion, being that the former runs from one public road to another public road, or from a public road to some other public place, or from one public place to another, while the latter does not connect any public road or public places at all. Again, to acquire a right to the former, use for 20 years is all that is necessary, while in the latter case adverse use

must be shown. From the distinctions as made by the court, however, we do not think that only those are neighborhood roads which run from one public road to another public road, or from a public road to a public place, or from one public place to another. Conceivably a road might be an outlet of a community numbering hundreds of people, and yet connect only at one end with a public road or other public place. Will it be contended that such a road is less a public way than one that leads off to a church or mill? Certainly not. On the other hand, not every road connecting with a public road is a neighborhood road, as, for instance, roads leading up to residences, such as avenues and outlets to roads. These are clearly private. The distinction must rest on the facts of the various cases. The road now under consideration falls under the class last alluded to, being only a way up to plaintiff's house and for his convenience, and for the use of the tenant of Mr. Porter, and running across their property. The evidence most favorable to plaintiff was that it was an outlet for himself and tenants of Mr. Porter, and such people as desired to visit their homes. If this were all that was required to be shown in order to establish the fact of a public road, whenever occasion demanded it, any avenue or road leading up from the public road to a private house could easily be shown to be a neighborhood road. We think the circuit judge was correct in holding that the only inference from the testimony here produced was that the road was a private way.

The appellant contends, however, that section 2183 of the Civil Code of 1902 gives him a right to recover, even though it be a private way. That section provides: "A railroad corporation whose road is crossed by a highway or other way on a level therewith shall, at its own expense, so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road; and if, in the opinion of the county board of commissioners, or if such highway or other way be within the corporate limits of any city, town or village, then the proper municipal authorities thereof, any subsequent alteration of the highway or other way, or any additional safeguards, are required at the crossing, they may order the corporation to establish the same." This contention, we think, cannot be sustained. Aside from any implication of the act, the only reasonable construction would be that it applied only to public roads. Carried to the conclusion contended for by the appellant, a railroad company would be required to provide for every crossing or path across its roadbed, whether public or private. Even at ways where the statutory signals are not required the company would have to provide for crossing. Such a construction cannot be legitimate. The railroad company is owner in

fee of its right of way, and its right to control it is analogous to the right of individuals to control individual property. As in the case of property owned by a person, so must the right of a railway give place to a public right when the welfare of the public demands it. When, however, private advantage is sought to be gained, there is no power of condemnation. One of the very foundation elements of all civilization is the right to hold property and exercise control over it. Even governments themselves cannot legitimately rob one person of his property and give it to another. Recognizing this principle, the framers of our Constitution provided therein that private property should not be taken for private use without the consent of the owner. Clearly, therefore, this being a private way, the use would be private. The Legislature, then, has no power to place the burden on railways of keeping up such crossings. *Mays v. Seaboard Railway*, 75 S. C. 455, 56 S. E. 30. But, aside from this consideration, the clear implication of the act is that it is to apply only to such roads as are under the authority of the county commissioners or under the control of the municipal authorities. Such roads alone would come under their observation. Not being responsible for private ways, it is hardly reasonable to suppose, even if the user thereof did not object, that the commissioners would interest themselves to the extent of examining private crossings. In the case now under consideration, it does not appear that the commissioners were even cognizant of the crossing. It was established merely as an accommodation, and was used with the road's consent. There was absolutely no evidence of adverse possession.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(128 Ga. 631)

#### COLUMBUS R. CO. v. WOOLFOLK.

(Supreme Court of Georgia. July 11, 1907.)

##### 1. ANIMALS—KILLING DOG—LIABILITY.

The owner of a dog may maintain an action against one who wantonly and maliciously kills or injures his dog.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 115; vol. 41, Railroads, § 1399.]

##### 2. EVIDENCE—VALUE OF DOG.

"The value of a dog [so killed or injured] may be proved, as that of any other property, by evidence that he was of a particular breed and had certain qualities and by witnesses who knew the market value of such animal if any market value be shown."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 293.]

##### 3. MASTER AND SERVANT—TORTS OF SERVANT.

A master is liable for the willful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1230.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; *W. A. Little, Judge.*

Action by C. M. Woolfolk against the Columbus Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Woolfolk brought suit to recover the value of a dog alleged to have been willfully and wantonly killed by the running of a street car on defendant's line of road. It is alleged that plaintiff's dog came on the track about 150 feet in front of said car, and in full view of the motorman in charge thereof, and that said motorman immediately, and "with intent to kill said dog, increased the speed of said car, and did willfully, wantonly, maliciously, and unlawfully run down said dog," and killed him. The defendant demurred to the petition generally as setting forth no cause of action against it, and because "said petition does not allege that said act of wantonness and malice was done under the command or with the consent of the defendant." It demurred specially to the paragraph which alleged the value of the dog to be \$200. The court overruled both general and special demurrers, and the defendant excepted.

Garrard & Garrard and W. Cecil Neill, for plaintiff in error. Slade & Swift, for defendant in error.

BEOCK, J. (after stating the facts). 1. "By the common law a dog is property, for an injury to which an action will lie. *Wright v. Ramscot*, 1 Saund. 84; 2 Bl. Comm. 293." *Uhlein v. Cromack*, 109 Mass. 273; *St. Louis Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; 2 Am. & Eng. Enc. Law (2d Ed.) 347; 4 Bl. Comm. 236. As was said by the court in the case of *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323 the property of the owner in a dog "seems to be better defined at common law than it is by the construction which this court has put upon our statutes." The decision in *Jemison v. Railroad Co.*, 75 Ga. 444, 58 Am. Rep. 476 holding that a suit cannot be maintained against a railroad company for the "unintentional, though negligent," killing of a dog, was affirmed in the case of *Strong v. Ga. Electric Co.*, 118 Ga. 515, 45 S. E. 366. In the latter case five justices held that inasmuch as the rule in the *Jemison Case* "has stood as good law since December 1, 1885, and the General Assembly has passed no act changing the same, \* \* \* the rule should not now be changed by overruling that case." *Fish, P. J.*, and *Cobb, J.*, concurred in the opinion in the *Strong Case* solely on the ground that it was controlled by the *Jemison Case*. *Cobb, J.*, in his concurring opinion, said: "The trend of modern decisions seems to be in favor of treating the dog as property to the same extent that other domestic animals are treated"—and cites as authority the very elaborate monograph note in 40 L. R. A. 503, to the case of *Graham v. Smith*, *supra*; also the note in

37 L. R. A. 659, to the case of *St. Louis Ry. Co. v. Stanfield*, 68 Ark. 643, 40 S. W. 126. In the *Jemison Case*, supra, while holding that an owner cannot recover for the "negligent" destruction of his dog, the court expressly ruled that such owner "may maintain an action of trespass vi et armis for the wanton and malicious killing of his dog." Inasmuch as the killing of the plaintiff's dog in the present case is alleged to have been the result of the "willful, wanton, and malicious" conduct of the defendant company's employé, we might safely rest our affirmation of the judgment of the court below upon the authority of the *Jemison Case*.

But it is contended by counsel for the plaintiff in error that "the ruling of the court in that case (that an action would lie for the wanton and malicious killing of a dog) is purely obiter dicta," and that it is not consistent with the other laws of the state. It is true that the question of the liability of the defendant for the wanton and malicious killing of plaintiff's dog was not before the court in the *Jemison Case*; but we are unable to assent to the other proposition that such a rule is inconsistent with the other decisions of this court, or with any of the statutes of the state. The case, cited by plaintiff in error, of *Moss v. Augusta*, 93 Ga. 797, 20 S. E. 653, the same being an action against the city for the wanton killing of plaintiff's dog by an officer of the city, was decided upon the ground that "a city is not liable for the illegal and tortious acts of its police officers." And the case of *Patton v. State*, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732, holding that the willful and malicious killing of a dog is not an indictable trespass under Pen. Code, § 729, was based upon the ground that "that section relates to the injury or destruction of inanimate property, and does not apply to injuring or killing animals of any kind." In the case of *Wilcox v. State*, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709, it was expressly held that a dog is a "domestic animal." Under Civ. Code 1895, § 3822, the owner is made liable for certain acts of his dog, "thus recognizing that the dog has an owner, and consequently that the thing owned is property." *People v. Maloney*, 1 Parker, Cr. R. (N. Y.) 593. Under the Constitution of the state (Civ. Code 1895, § 5883) dogs are treated as property, and the General Assembly is authorized to impose a tax upon them; and Pen. Code 1895, § 164, makes the dog a subject of simple larceny, and an indictment for simple larceny, even of a thing specified by statute, must allege both the ownership of the property stolen and its value. *Davis v. State*, 40 Ga. 229; *Thomas v. State*, 96 Ga. 311, 22 S. E. 956. It must, therefore, be concluded that the criminal branch of the law recognizes the dog as private property, and also as a "thing of value."

In the *Strong Case*, supra, Cobb, J., in his concurring opinion, quotes the language of a decision rendered by the then presiding

judge of the Atlanta circuit, holding that a dog was property subject to levy and sale. That question, however, has never come before this court, and is no part of the opinion in the *Strong Case*; but the reasoning of the learned circuit judge there, quoted is so cogent that we refer to it here as throwing a flood of light upon the question of the true status of the dog in this state. In the case of *Graham v. Smith*, supra, it was held that "the owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion." In the well-considered opinion it is expressly declared that a dog is property. It should also be remembered that in a trover case the plaintiff has the option of taking a verdict for the property or a money verdict. It seems to us, therefore, that the principles enunciated in the *Graham Case* control the case at bar; for it would be a strange inconsistency in the law to permit the plaintiff in a trover case to take a money verdict for the value of a dog wrongfully converted, and yet deny him the right to recover the value of a dog wantonly and maliciously killed. True, it has been held in this state that "a dog is not property, except in a qualified sense." *Jemison's Case*, supra. But even under the common law, where it was likewise declared that the property in a dog was "base property," and where he was not the subject of larceny, such property was nevertheless held to be sufficient to maintain a civil action for its loss. It would appear, therefore, that the rule in the *Jemison Case*, which declares that the owner cannot recover for the "unintentional, though negligent, destruction" of his dog, is extremely technical, and has no sound basis to rest upon. And while this court has followed the ruling in the *Jemison Case*, so far as to hold that there can be no recovery for the "unintentional, though negligent," killing of a dog, we feel no desire to extend that rule. The *Jemison Case* expressly recognizes that the owner may maintain an action for the "wanton and malicious killing of his dog"; and, as the allegations of the plaintiff's petition bring this case squarely within the rule last announced, we hold that the petition was good as against a general demurrer.

2. The fifth paragraph of the petition alleges that "said dog was of the value of \$200." Defendant demurred specially to this paragraph, on the ground that "the measure of damages would not be based upon the value of the dog, as a dog has no market value in contemplation of law." It is true that it was said in the *Jemison Case* that "dogs seem to have no market value, and the rule of damages in the case of live stock killed by the running of trains could not be applied to them. In case of their wanton and malicious killing or injury, a different rule for ascertaining damages obtains. The act is one which may be compensated by

general or exemplary damages." But this was merely obiter, and is not supported by the latest and best authorities. "Large amounts of money are now invested in dogs, and they are largely the subject of trade and traffic." *Mullaly v. People*, 86 N. Y. 365. "It is common knowledge that many dogs have an actual commercial and market value." *Strong's Case*, supra. The better rule, therefore, for ascertaining the measure of damages, seems to be: "The value of a dog may be proved, as that of any other property, by evidence that he was of a particular breed, and had certain qualities, and by witnesses who knew the market value of such animal, if any market value be shown. \* \* \* This was so at common law, yet it was held at common law that the absence of any value was the reason that prevented a prosecution for larceny of a dog." Note in 40 L. R. A. 518, and see numerous cases cited.

3. The principle announced in the third headnote has been frequently ruled by this court, and disposes of all the other assignments of error. *Central Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

Judgment affirmed. All the Justices concur.

(128 Ga. 600)

**CENTRAL OF GEORGIA RY. CO. v.  
HUNTER.**

(Supreme Court of Georgia. July 10, 1907.)

**1. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.**

A petition in a suit against a railroad company alleged that the defendant was the owner of the building which it used for depot purposes, and thereby invited persons having business to transact with the defendant to visit the same, and that the plaintiff went to the building for the purpose of transacting business with the defendant, and while there was injured by a defect in the floor of the building, which the defendant had negligently allowed to exist. An amendment was allowed, which alleged that the defendant permitted the express company to carry on its business in the building, and that the post office of the town was also situated therein, and that one person occupied all of the positions of railroad agent, express agent, and postmaster, and that plaintiff visited the building to transact business with such person as agent of the express company. *Held*, that the amendment did not set forth a new cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686, 687.]

**2. RAILROADS—INJURIES TO PERSONS AT STATION.**

The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 868-872.]

(Syllabus by the Court.)

Error from Superior Court, Taylor County; E. J. Reagan, Judge.

Action by Martha Hunter against the Central of Georgia Railway Company. Judgment

for plaintiff. Defendant brings error. Affirmed.

Mrs. Martha Hunter brought suit against the Central of Georgia Railway Company, alleging: That the defendant was a corporation operating a line of railroads in the county of Taylor and had damaged her in the sum of \$10,000. The plaintiff visited the depot of the defendant at the station of Howard, in the county named, "for the purpose of transacting business with the defendant." While she was leaving the depot she stepped upon a plank in the floor of the depot, and the plank gave way, causing her to fall into the hole. The depot was a place designed for public use, and was used by the public. It was designed for the use of those who transacted business with the defendant, and was so used. The plank on which she stepped was loose, and was so placed that any one stepping upon it would cause it to tilt and be precipitated into a hole thereunder. The insecure condition of the place was known to the defendant, or by the exercise of ordinary care could have been known. The negligence alleged is in allowing the depot to become insecure and unsafe in the manner above referred to, and in failing to repair the same after notice of the fact that the same was out of repair. The petition in detail alleged the character of the injuries sustained, which were serious and permanent. The plaintiff offered an amendment to the petition, alleging, in substance, that the express company was permitted by the defendant to carry on its business in the depot, that she went to the depot for the purpose of transacting business with the agent of the express company, who was also the agent of the defendant, and that the post office of the town was also situated in the depot building, and the agent of the defendant was also the postmaster. The purpose for which the plaintiff entered the depot is alleged to have been to pay the agent of the express company for a package which had been forwarded by him for her. The defendant objected to the amendment, upon the ground that it added a new and distinct cause of action, changing the legal status of the parties and the character and nature of the liability of the defendant, and that the averments of the amendment were in no way germane to the cause as laid in the original petition. The court allowed the amendment, and the defendant excepted *pendente lite*. The defendant filed an answer, in which it admitted that its depot, or a part thereof, was intended and designed for the use of those who had business to transact with it, but denied that it was designed for public use, or was used by the public, except in the manner above referred to. When the case came on for a trial, at the conclusion of the plaintiff's testimony, the defendant made a motion for a nonsuit, which was overruled, and the defendant excepted *pendente lite*. The trial resulted in a verdict in favor of the

plaintiff. The defendant made a motion for a new trial, which being overruled, it excepted.

Charlton E. Battle, for plaintiff in error. Smith, Berner, Smith & Hastings and R. S. Foy, for defendant in error.

COBB, P. J. (after stating the facts). 1. The original petition unquestionably set forth a cause of action. It was alleged that the defendant railroad company was the owner of a building used as a depot, and invited people having business with the company to come to the building and transact such business. The plaintiff, in response to this invitation, repaired to the building to transact business with the company, and was injured while there by a defect in the floor of the building, which the defendant negligently permitted to exist. The cause of action as originally alleged grew out of the ownership by the railroad company of the building, and its continuing it in a use which necessarily implied an invitation to all who had business with it to resort there for such purpose. The exact character of the business is not alleged. The character of the business that the owner or occupier of lands carries on therein is, in a case of the character now under consideration, material only in determining whether it is of a nature which implies an invitation to others to resort to such place. The use by a railroad company of a building by them for a freight and passenger depot carries with it an implied invitation to any one who may have business with it in its capacity as a carrier of freight or a carrier of passengers. "When the owner or occupier of land, by invitation, express or implied, induces or leads others to come upon its premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches, and, under such an express or implied invitation, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Atlanta Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759 (2), 12 Am. St. Rep. 244; Civ. Code 1895, § 3824. The liability of a railroad company as the owner or occupier of land, engaged in business, is the same as that of any person in like circumstances. *Central Railroad v. Gleason*, 72 Ga. 742.

It is now to be determined whether the amendment was a departure from the cause of action alleged in the original petition; that is, to use the language of our law, did the amendment set forth a new and distinct cause of action? What were the new facts alleged? That the railroad company, in its building, permitted the express company to carry on its business, and also permitted the United States government to carry on its postal business, and that the postmaster, the agent of the express company, and the agent of the defendant were one and the same per-

son, and that the plaintiff went to the depot for the purpose of transacting business with the express company. The company transacted its own business therein, and invited the people to come to the building for that purpose. The amendment simply alleged that it permitted the express company to also transact business therein, and therefore invited people to visit the building for the purpose of transacting business with that company, and, having allowed the government to use a portion of the building for a post office, an invitation to the public to repair to the building for any lawful matter connected with the post office department resulted. There was no change in the allegation as to the ownership of the building. In the amendment, however, the invitation was broader than it was in the original petition. In the original petition it embraced only one class, those who had business to transact with the company. In the amendment it embraced those who had business to transact with the express company as well as with the postmaster. The cause of action results from an injury to one who had been invited to the building by the defendant. The original petition alleged the acceptance of the invitation to visit the building for the purpose of transacting business with the defendant. The amendment alleged the acceptance of the invitation to the same building to transact business with a company which the defendant permitted to carry on business therein. The duty to keep the building in a safe condition was the same in each instance; that is, it was the duty owing to all who were invited there to transact business with the defendant, or with any one whom the defendant permitted to carry on its business therein. In *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, it is said: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant." This language was quoted with approval in *King v. Central Ry. Co.*, 107 Ga. 760, 33 S. E. 839. One who owns a building and occupies a portion thereof for the transaction of his own business, and permits others to occupy parts of the same for the transaction of their business, impliedly invites all persons having any business with any of the occupants to come to the building, and, as a consequence of the invitation held out, is under a duty to render the building reasonably safe for all who visit it in response thereto. The cause of action in the original petition rested upon the ownership of the building and devoting it to uses which impliedly gave an

invitation to others to approach and use the same. The amendment simply alleged that the invitation was broader in its scope than that alleged in the original petition. We do not think that the amendment constituted a departure from the cause of action as originally laid.

There is nothing in our present ruling to conflict with the ruling in *Central Ry. Co. v. Williams*, 105 Ga. 70, 31 S. E. 134. In that case the original petition alleged that the plaintiff was an employé and servant of the defendant, and that he was injured on account of a defective platform on which he was engaged in work; and the amendment sought to convert the action into one against the railroad company as the owner of the premises and as the landlord of the plaintiff's employer. Under the original petition the duty grew out of the relationship of master and servant. Under the amended petition the duty grew out of the obligation of the landlord to the tenant and the tenant's servants to keep the premises in repair. It is said, though, that in the present case the relation of landlord and tenant existed between the railroad company and the express company, and that therefore the *Williams* Case is, in principle, controlling, if not precisely in point. The difference between the cases is that in the present case the invitation was the same, and the duty was the same, whether the plaintiff went to the depot to transact business with the railroad company or with the express company. The liability arose out of the same state of facts—the ownership of the building and the invitation to others to visit the same. In the *Williams* Case, under the original petition, the liability charged grew out of one relationship, and the liability charged in the amendment grew out of an entirely separate and distinct relation. Speaking for myself, I doubt very much the soundness of the decision in the *Williams* Case, when it is considered in the light of the broad and salutary ruling made in the case of *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318. For similar reasons, there is no conflict between the present ruling and the case of *Helms v. S. F. & W. Ry. Co.*, 114 Ga. 678, 40 S. E. 710. Even if there were, that case is in conflict with the case of *Central Railroad v. Whitehead*, 74 Ga. 441. See the remarks of Mr. Justice Lumpkin, in *Georgia Railroad Co. v. Haas*, 127 Ga. 197, 58 S. E. 313. There was no error in allowing the amendment.

2. Those assignments of error in the motion for a new trial relating to the charges which were excepted to, and the requests to charge which the court refused, are disposed of by what has been said in the preceding division of this opinion. The evidence shows that the depot building contains several rooms devoted to different purposes. There was a door leading to the post office, which could be used by persons having business to transact with the postmaster, or with the express agent, or

with the railroad agent. There was also a door which led into the waiting room, and this room was connected by another door with that portion of the building in which the agent of the railroad company and the agent of the express company transacted the business of his different positions. It appears that the plaintiff entered the building by the door leading to the portion set apart for the post office, where the agent of the railroad and express companies attended to his business, and, having completed her business, she did not return in this way, but walked through the agent's office, through the door to the waiting room, and from there out of the door to the platform, where she received the injuries complained of. While it appears from the evidence that it was usual and customary for persons having business with the agent or with the postmaster to enter and depart from the building through the door the plaintiff entered, the manner in which the business was carried on in the building in the various rooms and the doors connecting the same was such that an inference could be drawn that one entering the building upon any business connected with the persons therein was at liberty to use any of the doors as means of ingress and egress. It distinctly appears that the door leading from the agent's office into the waiting room, and the door leading from the waiting room to the platform, were open, and there is nothing to indicate that it was against the rules of the company for one having business with the agent in any of his three capacities to leave the building by this route. The defendant owed to the plaintiff a duty to have its building, and the means of ingress and egress, and the platform, in a reasonably safe condition at all places that were held out by it, according to the way it conducted its business, as a place to transact business therein, or as a way to approach and depart therefrom. On every material issue the evidence authorized the finding in favor of the plaintiff. We see no sufficient reason for reversing the judgment.

Judgment affirmed. All the Justices concur.

(128 Ga. 653)

#### McLAUGHLIN v. McLAUGHLIN.

(Supreme Court of Georgia. July 11, 1907.)

#### 1. INJUNCTION — PETITION — VERIFICATION — DIVORCE — PETITION — AMENDMENT.

An equitable petition praying for an injunction should be verified. Civ. Code 1895, §§ 4965-4967; *Boykin v. Epstein*, 13 S. E. 15, 87 Ga. 25. Where a suit for divorce was filed by a husband against his wife, and she filed an answer in which she also, by way of cross-petition, prayed for alimony and injunction, this should have been verified; and in so far as it prayed for extraordinary equitable relief it was subject to be stricken for want of verification. But where the judge issued an order nisi upon it, and it was then amended, setting up additional grounds and an additional prayer for injunction, and an affidavit was attached to the amendment stating that "the facts stated



in the above and foregoing amended plea are true," there was no error in overruling a demurrer to the cross-petition as a whole for want of verification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 262.]

## 2. DIVORCE—ALIMONY—ATTORNEY'S FEES.

Under the evidence, there was no abuse of discretion in awarding temporary alimony and attorney's fees.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by A. T. McLaughlin against N. E. McLaughlin. From a judgment awarding temporary alimony and attorney's fees, plaintiff brings error. Affirmed.

Hendrix, Smith & Christian, for plaintiff in error. Alexander & Gary, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(128 Ga. 689)

## TEMPLE BAPTIST CHURCH v. GEORGIA TERMINAL CO.

(Supreme Court of Georgia. July 11, 1907.)

### 1. WRIT OF ERROR—HEARING—TIME FOR—CONSTITUTIONAL PROVISIONS.

The Constitution imperatively requires that all cases brought to the Supreme Court shall be heard at the first term, unless continued for providential cause, and that all cases shall be decided at a time not later than the end of the term following that at which they are heard. In order to comply with this constitutional requirement according to its true intent and spirit, it is necessary that the docket of each term should be made up in such manner as to fix with definiteness, as nearly as may be, the volume of the business for the term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3199.]

### 2. SAME.

In the absence of a constitutional provision or a valid statute regulating the method of docketing cases, the term at which they shall be heard is to be determined by the Supreme Court, keeping in view the constitutional requirement referred to in the preceding note.

### 3. SAME.

The Supreme Court, from its very origin, has exercised the power to close the docket of the term at some time during the term and before final adjournment, so far as relates to the entering of cases thereon.

### 4. SAME.

The statutes regulating the practice in the Supreme Court, when construed in pari materia and in the light of the history of the practice of closing the docket, contain nothing which, properly construed, denies this power, but, on the contrary, impliedly recognize the existence of the same.

### 5. SAME.

The bill of exceptions and record in the present case having been filed in the office of the clerk of the Supreme Court after the date that the docket of the term had been closed by order of the court, the case must be placed on the docket of the next term.

(Syllabus by the Court.)

Action by the Temple Baptist Church against the Georgia Terminal Company for an injunction and other relief. Judgment for

defendant, and plaintiff brings error. Motion by plaintiff in error to docket the cause at the then term. Motion overruled.

The Temple Baptist Church filed a petition in equity against the Georgia Terminal Company, praying for an injunction and other relief. After the hearing the judge refused to grant the injunction, and the plaintiff excepted. The record and the bill of exceptions were filed in the office of the clerk of the Supreme Court on July 6, 1907. The Supreme Court had, on June 12, 1907, passed the following order: "It is ordered that the civil docket for the present term be this day closed, and that the criminal docket for said term be closed on Monday, July 1, 1907." On the same date that the record and the bill of exceptions above referred to were filed in the office of the clerk of the Supreme Court, the plaintiff filed a motion in which it was asked that the case be entered upon the docket of the present term for a hearing. The grounds of this motion were as follows:

"The act of 1870, now incorporated in Civ. Code 1895, § 5558, provides that on the receipt of any fast writ by the clerk he shall place it immediately upon the docket of the circuit to which it belongs, and at the request of either party the court shall hear the case without delay and without respect to the order of the circuits; the spirit and purpose of the act being to insure a speedy hearing of such writ. It is contended that the court has no authority to pass an order to prevent or restrict the hearing of such writs; but, on the contrary, it is made the duty of the court to provide for a hearing without delay. The only power given to the court by statute in regard to the making of rules is the authority to make the hearing more speedy and systematic than the statute provides. The statute enlarges the power of the court for this purpose, but it does not authorize the court to restrict or limit such hearings. It is contemplated by the act that, so long as the court is in session, it shall hear such writs and continue to hear the same until adjournment. The present term of the court will continue for a sufficient time to hear and determine the case, and the parties thereto are willing to make all waivers necessary to secure a hearing. The case involves a vast outlay of money in a public improvement incident to the exercise of the right of eminent domain, affecting the rights of the public at large, as well as the rights of private parties, to a public street in the city of Atlanta. The nature of the case is such that it should be heard at once. The petition was filed to enjoin the closing of a public street by the defendant under an illegal order of the authorities of the city of Atlanta. At the hearing on June 8, 1907, the judge held that the plaintiff was estopped, and for this reason refused the injunction. This was four days before the passage of the order by the court closing the docket for entering fast writs of

error for the present term. When the judgment refusing the injunction was rendered, the plaintiff gave notice of its intention to apply for a writ of error; and an order was granted by the judge, superseding this judgment, to allow the filing of the bill of exceptions. When the bill of exceptions was filed the judge granted an additional supersedeas, suspending the judgment until August 6, 1907. This was done to allow a hearing of the case at the present term. The whole proceeding is in the utmost good faith, and it is the desire of the plaintiff to have its rights determined at once. If the case is not heard at the present term, the defendant will, as soon as the supersedeas has lapsed, proceed to excavate the street; and before a hearing of the case at the next term the excavation will be accomplished and a reversal of the judgment will be of no advantage, and it will be impossible to restore the street. The damage cannot be estimated in money, and the only protection that can benefit the plaintiff is to stop the excavation, and, under the present conditions, this can only be done by a hearing at the present term." The petition was signed by counsel and verified by affidavit.

Berner, Smith & Hastings, for movant.

COBB, P. J. (after stating the facts). The act establishing the Supreme Court of Georgia divided the state into five supreme judicial districts, and a term of court was held twice in each year in every district. The court sat at two places in each district, except the fifth, where all of its sessions were held at the seat of the government in the city of Milledgeville. In order to carry a case to the Supreme Court it was necessary for the losing party to tender the bill of exceptions to the judge within four days after the trial. When the bill of exceptions was tendered, if true, the judge was required to certify the same. Within 10 days thereafter notice was required to be served upon the opposite party or his counsel, and when such bill of exceptions and evidence of service was filed in the office of the clerk of the trial court it was the duty of that officer to certify and send up to the Supreme Court a complete transcript of the entire record in the case within 10 days after he received the original notice with a return of service thereon. Cobb's Dig. p. 451, §§ 8, 9 (1 Ga. viii, ix). Provision was made by the rules of the court for writs of error, citation, assignments of error on the bill of exceptions, etc. Rule 19 et seq., 1 Ga. xiv et seq. The rules of court provided: "All cases returned to this court shall be entered on the bench docket and numbered, on or before the court meets on the first day of the term to which they are respectively returned, and the cases first received by the clerk shall be first entered." Rule 7, 1 Ga. xii. It will be noted that it was by a rule of the court, and not by a statute, that the Supreme Court first determined when the docket should be

closed for the entry of cases for the term. The docket was closed on the first day of the term, and records and bills of exceptions thereafter received were docketed to the next term of the court. In 1855 an act was passed requiring the clerk of the Supreme Court to arrange the cases on the docket by circuits, and to give notice, by publication in a newspaper at the place where the court was to be held, of the order in which the circuits were arranged; it being also in this act provided that, if a case reached the office of the clerk in time to be entered upon the docket before all the cases from that circuit were heard, the same should be construed as being docketed in time for that term, and that error might be assigned and issue joined at any time before such case was called. Acts 1855-56, p. 198. The several separate judicial districts of the state were abolished by the Constitution of 1865, and the entire state was, in effect, declared to be one supreme judicial district, and the court was required to sit at the seat of the government at such time in each year as the General Assembly should prescribe. Code 1883, § 4961. In pursuance of this change made by the Constitution in the act organizing the Supreme Court, the General Assembly, in 1866, passed an act providing that the sessions of the Supreme Court should be held at Milledgeville on the first Mondays of June and December in each and every year, and that such sessions should be continued until the business before the court should be disposed of. It also provided that all bills of exceptions should be filed in the office of the clerk of the Supreme Court at least 20 days before the commencement of the term at which the same was to be heard, and bills of exceptions filed within less than 10 days should be docketed for the next succeeding term. Acts 1866, p. 46.

The practice prescribed by this act, of making the case returnable to the term which began not less than 20 days from the time that the record or bill of exceptions was filed in the office of the clerk of the Supreme Court, continued until 1890, when the decision in the case of *Logan v. W. & A. R. Co.*, 86 Ga. 493, 12 S. E. 586, was rendered. In that case Mr. Chief Justice Bleckley, after reviewing the various statutes in reference to bringing cases to the Supreme Court, laid down the rule that the return term fixed by law for all ordinary bills of exceptions is the first term which begins after the expiration of 30 days from the filing of such bills of exceptions in the office of the clerk of the trial court. Under this rule the term to which a case was returnable was not fixed by the date on which the record and bill of exceptions reached the office of the clerk of the Supreme Court, but by the date on which the bill of exceptions was filed in the office of the clerk of the trial court. This was a decision by a unanimous court, and was followed in the case of *Bank of Culloden v. Bank of Forsyth*, 119 Ga. 351, 46 S. E. 424, which

was also by a unanimous court. By an act approved October 28, 1870, it was provided that if a case had been transmitted in time to reach the clerk of the Supreme Court 20 days before the first day of the term, and should fail to so reach the clerk, either party, on the first day of the term, if the record had then arrived, might move the court to have it entered and heard in its order at that term, and if the court was satisfied that it was so transmitted in time, and if not so transmitted that it was by reason of some act of the defendant in error to produce delay, the motion should be granted. Acts 1870, p. 48. On October 28, 1870, the very same day that the act last referred to was approved, another act was approved which provided that bills of exceptions in cases of applications for injunction should be tendered and signed within 10 days from the date of the decision, and the opposite party be served within 5 days, and the clerk of the trial court, within 5 days from the date of service, was required to make a transcript of the record and transmit the same immediately to the Supreme Court then in session, and, if not in session, then to the very next session; and its arrival by the first day of the term, or at any time thereafter during the term, was declared to be sufficient to insure a hearing. If the record being returned to the court then in session shall fail, after due diligence, to arrive in time for hearing before adjournment, then it should stand over until the next term. The clerk of the Supreme Court was required, immediately upon receipt of such cases, to place the same upon the docket of the circuit to which it belonged; but, at the request of either party, the Supreme Court was required to hear the case without delay and without respect to the order of circuits, or their order in the circuits, unless some rule for a more speedy and systematic hearing of such cases was adopted in compliance with the spirit of the act, giving them precedence. Acts 1870, p. 405; Civ. Code 1895, § 5558.

This court had held that neither the granting of an ex parte application for an injunction at chambers, nor the dissolution of an injunction so granted, were such judgments, decisions, or decrees of the judge, heard at chambers, as to authorize a writ of error to this court while the case was pending in the trial court. *Johnson v. Stewart*, 40 Ga. 167; *Nacoochee Mining Co. v. Davis*, 40 Ga. 800. These decisions were rendered in 1869, and the act of 1870 was evidently passed by the General Assembly to remedy the defect then existing in the law with reference to the hearing of such applications by the Supreme Court. The effect of this act was, so far as applications for injunction were concerned, to allow a party to the case in the trial court to bring under review by the Supreme Court a mere interlocutory decision of the judge. This was not permissible under the original act establishing the Supreme Court, which

founded the jurisdiction of the Supreme Court upon the fact that the case had been finally disposed of in the trial court. This act brings into the practice what is now commonly known as the "fast writ of error," originally applicable only in cases of applications for injunction, but subsequently extended to a large class of cases. See Civ. Code 1895, § 5540; *Gordon v. Gordon*, 109 Ga. 262, 34 S. E. 324. In 1877 an act was passed providing that no case should be dismissed by the Supreme Court, or the hearing thereof postponed, by reason of the failure of the clerk of the trial court to transmit the record and the bill of exceptions to the clerk of the Supreme Court, provided the bill of exceptions and record reached the office of the clerk of the Supreme Court before arguments on the circuit to which it belonged had been concluded; and when a case so reached the office of the clerk it was his duty to enter it on the docket of cases for the circuit, and the case was then to be heard at the term to which it should have been returned "after all of the cases on the entire docket for that term had been heard." This act provides, also, that, if the bill of exceptions and record do not reach the office of the clerk of the Supreme Court until after the arguments on the circuit have been concluded, it shall be docketed to the next term, and then heard with the cases from the circuit. Acts 1877, p. 99; Civ. Code 1895, § 5571. The latter part of this act, providing for the docketing of delayed cases reaching the court after the circuit to which they belonged had been passed, was declared unconstitutional, for the reason that the case was returnable to the preceding term, and, under the Constitution, the General Assembly had no authority to make it returnable to the next term. *Davis v. Bennett*, 72 Ga. 762.

In 1880 an act was passed which provided that no writ of error should be dismissed on any ground which could be removed during the term to which the writ was returnable, and making it the duty of the Supreme Court "to give such time during said term, even to the end of the same, as may be necessary to remove said ground if it can be removed during said term." Acts 1880-81, p. 123. In the case of *Davis v. Bennett*, supra, the case was called for argument on April 25, 1884. That was the last day for argument during the term. The case was transmitted too late for a hearing on the circuit to which it belonged. A diminution of the record was suggested, and a motion to dismiss was made. The record was defective, and time was asked, under the act above referred to, to complete the record. In the opinion delivered on the day following the court says: "By the act of 1880—Code 1895, § 4272 (c)—no writ of error can be dismissed on any ground which can be removed during the term to which it is returnable, even to the end of it. This cannot be removed. The end of the term is here

to-day." The writ of error was dismissed on that day, notwithstanding the court, according to the minutes, continued in session until June 10th, consulting and deciding cases which had been argued prior to April 25th. This was a distinct ruling by the court to the effect that the words "end of the term," in the act of 1880, were to be properly construed, as to remedying defects in the record, as being the last day on which argument was to be heard during that term. The court must have necessarily drawn a distinction between the "end of the term," within the meaning of the act providing for remedying defects in the record, and the "final adjournment of the term," which would follow thereafter at such time as the court, in its discretion, should fix.

It appears from the foregoing history of the practice in this court that at its origin it fixed by rule the time that the docket should be made up and closed for the term. The General Assembly thereafter saw fit to regulate the matter by providing that certain cases should be treated as of the term, although not within the operation of this rule; that is, cases arriving after the first day of the term, but before arguments on the circuit to which they belonged had been finished. The General Assembly recognized, even by the passage of this act, that there must be some way to fix the business of the term and ascertain the time when the docketing of cases should stop. The original rule provided that docketing of cases should stop on the first day of the term. The General Assembly, recognizing that there must be some rule in reference to this matter, simply provided that cases reaching the court during the term might be added to the docket of that term, provided arguments on the circuit had not been concluded when the bill of exceptions and record were filed in the clerk's office. The act of 1870, in reference to applications for injunction, brought into existence a class of cases before unknown to the practice of the court; that is, bills of exceptions and records that were being filed from time to time during the term, subject to be disposed of at the term when filed. The whole policy of the act was to provide speedy hearings for these cases; but there was nothing in the act, construing the language in the light of the past history of the court, which undertook to take away from the court the right to fix a docket of cases for the term and to provide when such docket should be no longer open for the entry of cases. So long as the docket was open for the entry of cases, cases within the operation of the act of 1870 were to be expedited; but there is nothing to indicate that it was the purpose of the General Assembly to deprive the court of the power to fix a time for closing the docket of the term, or to require the court to hold the docket open until the very day of final adjournment, in order

to speed any case or class of cases. The court, as it was constituted at the time of the passage of this act, construed the act as having no effect whatever upon the power of the court to fix the time for closing the docket of the term, and the practice originated at that time, when Mr. Chief Justice Warner was the presiding officer of the court, to close the docket for the entry of cases when the last case, in its regular order, was called. From that time no other cases were entered on the docket, and the court then proceeded to hear and determine those cases which had been passed to the heel of the entire docket.

The formal manner in which the able and venerable Chief Justice actually closed the book and gave instructions to the clerk to make no further entry of cases thereon during the term, is in the recollection of some of those still connected with the court in different capacities. In his formal and solemn way he would close the lids of the book, lay his hand upon the same, remark to the clerk that the docket of the term is now closed, and then, with equal formality and solemnity, he would reopen the book and proceed to call the cases which had been passed to the heel of the entire docket. This was the construction of the law by the court as it was then constituted, and of the meaning to be given to the act of 1870 in this particular. And this court, though it has changed often in personnel, followed the practice thus instituted without variation until 1891, when the act providing for the speedy hearing of criminal cases became the law. Acts 1890-91, p. 108. During this period Mr. Chief Justice Jackson and Mr. Chief Justice Bleckley were the presiding officers of the court, and the court, though differently constituted as to associate justices, followed without hesitation and without doubt the practice instituted almost simultaneously with the passage of the act of 1870. After criminal cases were put in the class of fast writs of error, the court, on January 18, 1892, passed a rule providing for the speedy hearing of such cases, and in the rule recognized that the court had authority to close the docket as to the entry of such cases, and provided for the disposition of cases which reached the court during the term but too late to be docketed for the term then in session. On January 21, 1895, this rule was amended, and the right to close the docket was again distinctly recognized by the court. On February 15, 1898, there appears upon the minutes an order directing the docket closed after a given date, so far as the entry of criminal cases was concerned. While this is the first formal order appearing on the minutes, an examination into the manner in which the court dealt with criminal cases from the date of the passage of the act of 1891 evidences the fact that oral orders must have been made in reference to the disposition of such cases; for it distinctly appears that records in such

cases arriving during the term were docketed to the next term of the court. When the court was reorganized in 1897 the right of the court to close the docket was recognized in the rules then adopted; the language of the rule being: "Criminal cases filed after the docket of the term has been closed will be heard at the next term in advance of all other business, and in the order of their filing." Rule 22, 97 Ga. xii, 36 S. E. v. This rule was amended in February, 1900, and the following appears in the amended rule: "Unless otherwise specially ordered, the criminal docket for each October term will stand closed on the last Saturday but one before the third Monday in the month of February following the beginning of such term. The criminal docket of each March term will be closed by special order."

Under the recent rules of the Supreme Court, adopted January 14, 1907, the authority of the court to close the criminal docket by special order is distinctly recognized. Rule 27, 126 Ga. xii. From necessity the court must have the authority to close the docket, and thus fix a limit to the business of the term. Otherwise it would be impracticable, if not impossible, to dispose of the business of the court according to the true intent and spirit of the Constitution and the laws. When the time for adjournment of the term arrives, the court loses jurisdiction of all cases heard at the preceding term, and affirmances by operation of law result. If the power exists, then the time when the docket shall be closed must necessarily be left to the discretion of the court. According to the practice instituted by Mr. Chief Justice Warner and his associates, this time was fixed when the last case on the regular call of the docket had been argued. When criminal cases were required to be given speedy hearing, the time of closing the docket as to those cases was fixed in the manner above referred to; that is, by an automatic rule fixing a certain time during one term, and by a special order fixing a given date during another term—it being practicable in the one instance, on account of the terms overlapping, to fix the time automatically, and not being practicable at the March term, which has not, and should never, overlap the October term, to fix the closing of the docket in any other way than by special order designating a particular day for this purpose. On June 22, 1906, an order was passed closing both the civil and criminal dockets of the March term, 1906, on July 7th. This appears to be the first time that the civil docket was ever closed by special order; but it has been, as has been shown, the practice to close the criminal docket in this manner for a long time prior thereto. The fast writs that are placed upon the civil docket come to this court in the same way as those which are placed upon the criminal docket. A fast writ of error is a fast writ of error, without reference to the character of the case which

the record discloses. If this court has no power to close the civil docket it is also without authority to close the criminal docket. The time in which either docket is to be closed is a matter within the discretion of the court, if it can be shown that the power to close under any circumstances exists.

While the manner in which the docket was closed has varied, there is nothing to indicate, either in the practice of the court or the utterances of its members, which brings up one single doubt as to the authority of the court to provide what shall be the business of a given term as to the cases brought under the system inaugurated under the act of 1870. For nearly 40 years the court has exercised this power, without dissent from any one who has been a member of the court during that long period of its history. During this period the authority of the court has, up to the present time, been recognized by the acquiescence of the bar in the practice which it has followed. For the first time is the authority of the court in reference to the matter brought in question. This court, and all other courts, will recognize the practice of co-ordinate departments of government, and allow the construction placed by the officers in such department upon statutes, and even the Constitution, to be operative, where there is room for construction. The long-continued practice of the executive or the legislative department will be treated as persuasive authority by the courts, and has, in numerous cases, been followed, although the individuals composing the court at the time would have doubt as to the true construction if the question were left unaffected by the construction placed upon it by another department of government. If this deference is shown by the courts to the practice of other departments of government, how much more are we authorized to show deference to the practice of our own department, unchallenged by any one who ever was a member of the department, even though there has been no express utterance that such practice is authorized by the Constitution and by the laws. There was, under the Constitution of 1868, and possibly under the present Constitution, the gravest doubt as to whether the Governor has any authority to approve a bill after the adjournment of the General Assembly. This doubt was voiced by Judge Warner in *Solomon v. Commissioners*, 41 Ga. 157; but the right of the Governor was recognized solely for the reason that the past history of the state showed the practice of the Governor to take five days after the adjournment of the General Assembly for the revision of bills, and this practice of the executive department of the government was followed by the courts, notwithstanding the doubt as to the true interpretation of the Constitution. Even if we should allow ourselves to settle into a condition of doubt as to the right of the court to close its docket for the term, we would not only be authorized, but we would be almost

constrained, to follow in the footsteps of our predecessors and continue the practice which was in existence so long, and which has been sanctified by the reputation and character of our predecessors who inaugurated as well as those who have followed it without hesitation or misgiving.

Let us for a moment consider what would be the consequences if this power did not exist and were not exercised. The court would be compelled to postpone its final adjournment until all of the cases of the preceding term have been decided. Since the docket was closed, on June 12th, 14 cases brought to this court by fast writs of error have reached the clerk's office, including the one now under consideration. If the docket is reopened, and this case placed thereon, the other cases must be given the same direction. Other cases are being almost daily received. There are now to be disposed of, by this court, more than 60 cases which the Constitution imperatively declares shall be decided during the present term; and then there are more than 170 cases of the present term, many of them brought to this term on fast writs of error, which are entitled to consideration at the earliest possible moment. If the power to close the docket does not exist, not only the cases now in the clerk's office must be heard, but all others that reach there between now and the first Monday in October. It is impracticable to dispose of the business of the court under the constitutional requirement, unless the business of the term can be fixed in some way which is reasonable and just, and proper to the litigants whose cases are before the court and the judges who have imposed upon them, under their oaths, the duty of deciding them. If the docket is not closed, on the first and third Mondays in July, August, and September the court must, under the rules, hear all fast writs of error as they are received from day to day by the clerk. It is not reasonable, it is not just, it is not practicable, for the court to transact its business unless it has the power which it has exercised. If there is no authority in the court to close the docket for the entering of cases, then it is not only impracticable, but it is impossible, to carry into effect the provisions of the act of 1877, as contained in Civ. Code 1895, § 5571. This section relates to delayed cases, and it is provided that such cases shall be heard "after all of the cases on the entire docket for the term have been heard." As long as cases can be entered on the docket for the term, these delayed cases are not subject to call for argument; and if the docket must remain open until the day of the final adjournment there will be no time for the hearing of the delayed cases. If the docket cannot be closed prior to the date of final adjournment, any case entered thereon before final adjournment is a case on the docket

for that term, and the delayed cases must await the hearing of all such cases. Not only must the delayed cases await the last day of the term, but the last moment of the last day.

This act indicates, by the strongest implication, that the Legislature contemplated that the court should exercise the power which it has always exercised from the date of its origin, and fix reasonable rules and regulations as to the docket of the term and the business to be disposed of thereon. The law authorizes it to exercise this power. As authority for this statement we simply cite the name of every Chief Justice and every Associate of this court who has presided here from 1870 down to the present time; and, as highly persuasive authority, we call attention to the unbroken acquiescence of the bar during that long period of time. When in 1906 the General Assembly proposed an amendment to the Constitution creating the Court of Appeals, it inserted in this amendment this language: "All writs of error in the Court of Appeals, when received by its clerk during the term of the court and before the docket of the term is, by order of the court, closed, shall be entered thereon, and when received at any other time shall be entered on the docket of the next term, and they shall stand for hearing at the term for which they are so entered, under such rules as the court may prescribe, until otherwise provided by law." Acts 1906, p. 26; 128 Ga. xviii, xix. The language of this amendment is in entire consonance with the long-continued practice of the Supreme Court. It is reasonable to presume that the General Assembly, in using the language above quoted in the amendment to the Constitution, intended to approve the practice of the Supreme Court in reference to closing its docket, and make it a part of the law governing the Court of Appeals. A casual reading of the amendment will indicate that the purpose of the General Assembly was to have the Court of Appeals, as nearly as may be, a court of last resort, for cases within its jurisdiction, of the same character as the Supreme Court. It not only makes the provisions of the Constitution and the statute relating to the Supreme Court applicable to that court, but in this instance expressly conferred upon that court the power which the General Assembly knew had always been exercised by the Supreme Court practically during its entire history. We recognize the importance of the case involved in this ruling. We also recognize the importance of all the other cases. We do not know what is in these other records. But every case which reaches this court is an important case to the litigant, and this case will not be the first by which an injury may have resulted from the fact that the docket has been closed and a delay in the hearing brought about. While we regret that the administration of

the law is such that great injustice sometimes results from following established procedure, it is far better that established procedure should exist, and the individual sustain loss as a consequence thereof, than that chaos should prevail in the administration of the law and many suffer in consequence thereof.

The motion to docket the case at the present term must be overruled. All the Justices concur.

(128 Ga. 775)

**GRAND LODGE KNIGHTS OF PYTHIAS OF GEORGIA v. CRESWELL et al.**

(Supreme Court of Georgia. July 19, 1907.)

**1. PARTIES—AMENDMENT—OPERATION AND EFFECT.**

When an equitable petition was filed by certain members and officers of a fraternal order not incorporated in this state, on behalf of themselves and other members, and on demurrer raising, among other points, the point of want of proper parties, and that it appeared that the Supreme Lodge of the order was a corporation of the District of Columbia and was not made a party, an amendment was presented for the purpose of making it a party, adding other allegations, and by order of the court the amendment was allowed, the Supreme Lodge was made a party, and the case was directed to proceed on behalf of both it and the original plaintiffs, to which order no exception was taken, this operated as an adjudication that there was an action pending with sufficient parties to authorize amendment, and that the party added was a proper party.

**2. INJUNCTIONS—PRELIMINARY INJUNCTION—GROUNDS—CORPORATIONS—INFRINGEMENT OF NAME.**

Inasmuch as some of the plaintiffs are members and officers of an unincorporated fraternal association of this state, and proceeding by equitable petition filed by themselves and others of the class, and another plaintiff is the Supreme Lodge of the organization incorporated in the District of Columbia, and the defendants have been operating and are seeking to be incorporated in this state under a name which is claimed to be an infringement of the name of the plaintiff's association, and the question is involved whether and how far the plaintiff, which is a foreign corporation, might be affected by the state's granting a charter to the defendants as a domestic corporation in the name and for the purpose asked, and also whether there is a fraudulent purpose or design to so infringe, under all the evidence the presiding judge should have enjoined the defendants from obtaining the charter applied for, so as to preserve the status in respect thereto until, on final jury trial, all of the questions of law and fact can be fully adjudicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 304-306.]

**3. SAME.**

Having determined that the court erred in refusing to grant an injunction as to the charter applied for, we allow the ruling of the chancellor denying the injunction in other matters to stand until the final trial or further order of court, leaving open all the other questions for future determination. See *Foster v. Blood Balm Co.*, 3 S. E. 284, 77 Ga. 216.

**4. SAME.**

The rulings here made do not conclude any questions of law or fact on the final trial of the case, except as ruled above, and all are left open to be then determined.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Grand Lodge Knights of Pythias of Georgia and C. C. Creswell and others. From the judgment, Grand Lodge Knights of Pythias of Georgia brings error. Affirmed, with direction.

John P. Ross and H. Douglas, for plaintiff in error. Bell, Pettigrew & Bell, for defendants in error.

ROAN, J. Judgment affirmed, with direction.

FISH, C. J., and EVANS and ATKINSON, JJ., being disqualified, Judges GOBER, of the Blue Ridge circuit, ROAN, of the Stone Mountain circuit, and EDWARDS, of the Tallapoosa circuit, were designated to preside in their stead.

(128 Ga. 632)

**FENDER v. VALDOSTA LUMBER CO.**

(Supreme Court of Georgia. July 10, 1907.)

**NEW TRIAL—GROUNDS.**

The only grounds of the motion for a new trial being that the verdict was contrary to law and the evidence, and the evidence being sufficient to support the verdict, there was no error in overruling the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 142.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action between J. F. Fender and the Valdosta Lumber Company. From an order denying a new trial, Fender brings error. Affirmed.

J. A. Whitaker, for plaintiff in error. Woodward & Smith and O. M. Smith, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(128 Ga. 635)

**BROWN v. CENTRAL OF GEORGIA RY. CO.**

(Supreme Court of Georgia. July 11, 1907.)

**CARRIERS—EXPULSION OF PASSENGER—EVIDENCE.**

Where a passenger boarded a railroad train at Fort Valley for the purpose of going to Smithville, and tendered in payment of his transportation a mileage book, which, upon examination, was found not to contain sufficient mileage for the journey, but only sufficient to carry the passenger to Marshallville, and the conductor informed the passenger that he intended to stop at Marshallville, that the ticket office would be open, and that the passenger could buy a ticket from the agent at that point, and on arriving at Marshallville the passenger left the train immediately for the purpose of purchasing a ticket, and found the ticket office open, but the agent, engaged in other business than selling tickets, did not wait on plaintiff immediately, and where it appeared

nia Gairdner, guardian. It was dated December 6, 1900, and expressed a consideration of \$243.40. Lavonia Gairdner, as guardian for James P. Gairdner, brought suit against Blackwell, as administrator of Hester, alleging: That up to December 6, 1900, she had advanced to Hester the sum of \$243.40, and that on said date she took an absolute deed from him to secure the payment of the sum named. That after the date of the deed she advanced to the decedent \$158.99 in the aggregate. "Said sum was advanced under the agreement with said Edmunds, alias Hester, that all such sums so advanced to him should be secured by said deed, and that your petitioner should not deed said land back until all of said moneys were fully paid petitioner." The giving of notice of an intention to sue in order to claim attorney's fees was alleged, in accordance with the act of 1900. The plaintiff prayed for a general judgment for the sum of \$470, besides interest, that the judgment should be a special lien upon the land described in the deed, that the plaintiff be allowed to make to the administrator a deed, and that the land be sold as the property of the estate for the purpose of first paying this debt and then being administered. The plaintiff amended her petition by alleging as follows: "At the time said deed was given said Anderson Hester owed petitioner the amounts of said notes, and in order to secure said notes said Hester gave said deed, and also to secure whatever might be advanced by petitioner subsequent thereto. Since the making of said deed and said notes, petitioner has advanced said sum of \$158.99 under the agreement that said deed should secure all future advancements made to said Anderson Hester by petitioner, and at the time said deed was made said Gairdner, plaintiff, agreed to make further advances." Plaintiff further amended by striking from the original petition every thing in conflict with this amendment. Matilda Hester, the widow of the decedent, alleged that the equity of redemption in the land had been set apart to her as a year's support, and she was made a party defendant. She filed a demurrer to the petition, which was overruled. She also filed an answer, in which she denied that the plaintiff was entitled to a lien upon the land for an amount in excess of \$243.40, with interest. She also denied that the plaintiff was entitled to recover attorney's fees, because the law under which the plaintiff gave the notice and claimed attorney's fees was not in force when the note sued on was given. On the trial, at the close of the evidence, the presiding judge directed a verdict in favor of the plaintiff for \$423.79 principal and \$112.58 interest. Defendant moved for a new trial. It was overruled, upon the plaintiff's writing off part of the recovery. Defendant Hester excepted.

C. P. Harris, for plaintiff in error. Joseph N. Worley, for defendant in error.

LUMPKIN, J. (after stating the facts).

1. The demurrer was without merit, and was properly overruled.

2. Objection was made to the admission of parol evidence offered for the purpose of showing that when the deed was made Hester and the agent of the plaintiff agreed that it was to secure, not only the amount of money already advanced, but also that which might be subsequently advanced, and that the plaintiff was not to convey the land back to Hester so long as any part of the money that might be subsequently advanced by her to him should remain unpaid. This was objected to on the ground that it tended to establish a parol agreement made contemporaneously with the deed, and thereby to add to the deed terms not expressed in it. The objection was overruled. Of course, the general rule is that a written contract cannot be varied by parol evidence. The deed here involved was on its face an ordinary warranty deed. It described no debt and contained no provision for any reconveyance. There was nothing to show that any bond for title, or written contract to reconvey title upon the payment of any particular debt or amount, was made. "A deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried." Civ. Code 1895, § 2725. If the debtor remained in possession, he or his widow, who took a year's support in the property, could show that the conveyance was only intended to secure a debt, and thus to operate as an equitable mortgage. *Carter v. Hallahan*, 61 Ga. 314. The creditor could bring ejectment on such a title; or, if the creditor chose, the deed could be foreclosed in equity as such a mortgage. *Bateman v. Archer*, 65 Ga. 271. It does not appear that the possession was surrendered to the grantee. The grantee did not claim the property as absolute owner, but claimed only that she held the title to secure an indebtedness. The defendant did not contest this fact, but only the amount of the indebtedness thus secured. The exact question, therefore, is whether the amount expressed as the consideration of the deed was conclusive as to the entire amount of the indebtedness secured, or whether it was competent to show by parol that the consideration of the deed included the securing, not only of the amount named, but also of other advances to be made.

If a deed is made to secure a particular debt, it cannot be extended by a subsequent parol agreement so as to secure other debts. This may be done by written contract. But to allow a deed to be extended by parol, so as to include an indebtedness which was not secured by it when made, would be, in effect, to change or add new conditions or purposes to a deed by parol. *Pierce v. Parrish*, 111



Ga. 725, 730, 37 S. E. 79; *Wylly v. Screven*, 98 Ga. 213, 25 S. E. 435; *Johnson v. Anderson*, 30 Ark. 745; *Stoddard v. Hart*, 23 N. Y. 556. But where there is nothing in the written contract between the parties limiting the security to a particular amount or debt, and the only amount stated is as a consideration for a deed which is in form an ordinary warranty deed, the actual consideration of such deed existing at the time of its making may be shown by parol. At common law the weight of authority was to the effect that the recital in a deed of conveyance of the payment of the consideration money could not be denied by parol; but even there the judges sometimes expressed doubt on the subject. See *Rountree v. Jacob*, 2 Taunt. 141; *Lampon v. Corke*, 5 Barn. & Ald. 606; *Baker v. Dewey*, 1 Barn. & C. 704. The weight of authority in America is to the contrary, and treats the recital of the payment of the purchase money like the mention of the date of the deed and other matters incidental and collateral to the principal thing, and holds that, while the grantor is estopped from denying the conveyance, yet the recital is considered at most but prima facie evidence only of payment, in an action of assumpsit to recover the price which is yet unpaid. At an early date it was held by this court that the recital of the payment of the consideration money in a deed does not fall within the rule by which a party is estopped to deny it. *Harwell v. Fitts*, 20 Ga. 723. In *Martin v. Gordon*, 24 Ga. 533, it was ruled that upon a suit for damages for a breach of warranty the amount of consideration money recited in the deed could be inquired into. Two of the judges held that this could be done, not only against the grantee of the warranty, but against any subsequent grantee. Judge McDonald dissented, urging that a grantor ought not to be allowed to name a consideration in his deed, and thus induce subsequent purchasers to rely on it, and afterwards prove that it was untrue, to the prejudice of a bona fide purchaser without notice. It was declared in the original Code, and has been preserved in each of the succeeding Codes, that "the consideration of a deed may always be inquired into when the principles of justice require it." Civ. Code 1895, § 3599. The exact meaning of the expression "when the principles of justice require it" has not been determined. In the case before us the deed was admittedly made to secure an indebtedness. An amount was stated as the consideration of it; and it was claimed that parol evidence could not be introduced to show, as a part of the consideration, the securing of advances beyond the amount so named. In *Dawson v. Briscoe*, 97 Ga. 408, 24 S. E. 157, where a deed to realty of considerable value purported on its face to be executed upon a nominal money consideration only, it was held that it could be supported by evidence showing that the grantee was the grantor's daughter, and that the real consideration

was love and affection. In *Thompson v. Cody*, 100 Ga. 771, 28 S. E. 669, it was held that, where the consideration of the deed was expressed as being love and affection, it was, nevertheless, competent to support it by evidence tending to show that there was an additional valuable consideration moving the grantor to its execution. We think, therefore, that it would be competent to introduce evidence to show that the actual consideration of the deed at the time of its execution covered, not only the securing of the debt then due, but also the securing of future advances to be made. But if, when the deed was made, it was to secure a particular debt, it could not be made a security for other debts by a subsequent parol agreement. See, also, on the general subject of parol evidence, *Atlanta & West Point R. Co. v. Hodnett*, 36 Ga. 680; *Johnson v. McComb*, 49 Ga. 123; *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356; *Carter v. Griffin*, 114 Ga. 321, 40 S. E. 290; *Harkless v. Smith*, 115 Ga. 350, 41 S. E. 634.

On the admissibility of parol evidence to explain the consideration or identify the debt to be secured by a mortgage, there have been numerous decisions. In *Sutton v. Sutton*, 25 Ga. 383, it was held that "a discrepancy between the debt and the mortgage given to secure it may be explained by parol proof." In *Gunn v. Jones*, 67 Ga. 398, the same ruling was made, and it was added: "But a draft having no apparent connection with a mortgage will not be admitted without explanation." The leading case on the subject is that of *Shirras v. Calg* (U. S.) 7 Cranch, 34, 3 L. Ed. 260. It was there held that "it is not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure; but it will stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards, upon the faith of the mortgage, before notice of the defendant's equity." In the opinion Marshall, C. J. (page 50 of 7 Cranch), said: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed which misrepresents the transaction it recites and the consideration on which it is executed is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact in-

jured and deceived by the misrepresentation." This ruling has been generally followed. *McKinster v. Babcock*, 26 N. Y. 378; *Miller v. Lockwood*, 32 N. Y. 293; *Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86; *Wilkerson v. Tillman*, 68 Ala. 532; *Bray v. Comer*, 82 Ala. 183, 1 South. 77; *Hendon v. Morris*, 110 Ala. 106, 20 South. 27; *Wilson v. Russell*, 13 Md. 495, 71 Am. Dec. 645; *Hendrix v. Gore*, 8 Or. 407; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Nicklin v. Betts Spring Company*, 11 Or. 406, 5 Pac. 51, 50 Am. Rep. 477; *Hall v. Tay*, 131 Mass. 192; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102. In most, if not all, of these cases, the amount for which a foreclosure was sought was less than the amount expressed in the face of the mortgage. The exact question as to whether, if a mortgage expresses a certain amount which it is made to secure, this amount can be increased by parol evidence, has seldom been dealt with. In *Edwards v. Dwight*, 68 Ala. 389, it was said that this was very doubtful; but the point was not decided. In the later Alabama cases above cited this distinction was not suggested. In 1 Jones on Mortgages (6th Ed.) § 374, it is said: "It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount. This definite sum will then limit the extent of the lien." But see section 384. Some of the decisions seem to hold otherwise. See *Bell v. Radcliff*, 32 Ark. 645; *Johnson v. Bratton*, 112 Mich. 319, 70 N. W. 1021; *Johns v. Church*, 12 Pick. 557, 23 Am. Dec. 651. In the section of Jones on Mortgages above cited (section 1067) it is also said: "An absolute conveyance may be used to secure future advances, or to secure an existing debt and also future advances. The agreement to reconvey when the advances are repaid is sufficient, although it exists in parol only."

As to a mortgage, the Code says it must "specify the debt to secure which it is given." Civ. Code 1895, § 2724. It may be doubtful whether, if a sum be thus specified as part of the agreement as to the amount to be secured, it can be enlarged by parol. One or two authorities have come to the notice of the writer in which a distinction is drawn between increasing by parol proof a specific amount agreed to be secured by a mortgage and the admission of parol proof to show what was in fact the consideration of a deed purporting to be an absolute conveyance, though really given as a security. It is not necessary in the present case to determine the rule of evidence in regard to mortgages or instruments stating on their face that they are given to secure only a named amount, or whether the amount so agreed to be secured is a limitation forming a part of a contract which cannot be enlarged by parol. Nor is it necessary to go as far as some of the cases above cited. As already

stated, the instrument here involved is not on its face a mortgage, but a deed. It does not declare that it is given to secure a specified amount, or any amount at all. Apparently no bond to reconvey upon payment of any specified amount was given. In order to show that it is a security at all, parol evidence is necessary. To do this the consideration of the deed must be inquired into, and it must be shown what the real consideration was. Having gone thus far in the introduction of parol evidence, under the rulings of this court already cited in regard to the admission of such evidence to prove that the real consideration of a deed was more or less than that recited, there was no error in admitting parol evidence to show that the indebtedness secured by the deed when it was made was greater than the amount of consideration expressed on its face. No third person has been misled, or has acted to his injury on the faith of the recital. The wife is entitled to a year's support only in the equity of redemption. It is practically a case *inter partes*. The rights of third persons are not involved.

3. Objection was made to asking a witness, "Whose note is that?" reference being had to a note of the decedent given to one Eberhardt, and afterwards transferred in writing to Jones, a witness. The transfer was in these words: "For value received, I hereby transfer the within note to W. O. Jones"—signed by the payee. The answer was, "Mrs. Gairdner's note." Objection was made on the ground that the note was transferred in writing by the payee to Jones, and parol evidence was not admissible to vary the indorsement thereon, or to show that the owner was different from the indorsee. The objection was overruled. The purpose apparently was to show that the note had been taken up by an agent with the funds of his principal, and, though transferred by the payee to the agent individually, that it was really taken up by the principal, and that the amount advanced for that purpose was a part of the indebtedness secured. If the note were transferred to the principal, or were surrendered and canceled, so as not to operate as an outstanding liability of the defendant in the hands of some third party, we see no reason why it could not be shown that the principal advanced the money which accomplished that result. But it is not competent to produce a note which is transferred in writing to one person and baldly show by parol that it belongs to another.

4, 5. The presiding judge erred in directing a verdict for the plaintiff. Counsel for defendant contends that the allegation in the original petition and that in the amendment in regard to the agreement differed, and that this made a question of fact for the jury. But we do not understand that, whenever a plaintiff withdraws or strikes an allegation and substitutes another by amendment, this makes an issue of fact in the pleadings of the party

himself, which must be submitted to a jury. Any admission made by him in his pleadings, though afterwards stricken or withdrawn by amendment, may still be tendered and used as an admission on his part by the opposite party. But a party by amendment does not raise issues of fact with himself, necessitating the assistance of a jury to determine them. There was, however, conflicting evidence in the case. Thus, Jones, the agent of the plaintiff, testified that "no agreement was made about this deed, except what is on its face." Smith, the bookkeeper of Jones, testified to the effect that there was an agreement and understanding between Jones and Hester. He said: "In addition to that, the understanding was that any further indebtedness made thereafter was also to be secured by the deed." Plainly no such agreement as this appears on the face of the deed. There may be some mode of reconciling or explaining these conflicting statements, but they should be passed upon by the jury, not by the judge.

Judgment reversed. All the Justices concur.

(128 Ga. 639)

### HALLIDAY v. BANK OF STEWART COUNTY.

(Supreme Court of Georgia. July 11, 1907.)

#### 1. TRIAL—EXCLUSION OF EVIDENCE—FAILURE TO DEMUR.

Failure to demur to a plea which sets up no valid defense in law does not preclude the plaintiff from moving to exclude evidence offered in its support.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1433, 1436.]

#### 2. RES JUDICATA—EVIDENCE.

The record of a former suit between the same parties is not admissible in evidence in support of a plea of estoppel by judgment, when it appears therefrom that the subject-matter of the second suit could not have been litigated under the pleadings in the first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1267.]

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by N. W. Halliday against the Bank of Stewart County. Judgment for defendant, and plaintiff brings error. Reversed.

Halliday brought suit against the Bank of Stewart County, alleging that defendant was indebted to him in the sum of \$22.62, besides interest from November 11, 1899, for money had and received to and for his use, etc., which defendant refused to pay; that it was in like manner and for like reason indebted to him in the sum of \$493.36, besides interest from November 28, 1899, which amount it also refused to pay. In its answer defendant denied generally the allegations of the petition, except those as to its corporate character and residence, and then, in the third paragraph, alleged: In 1898

defendant extended to plaintiff a line of bank credit, in its business as a cotton warehouseman and buyer of cotton, under an arrangement and agreement whereby defendant was to accept and pay checks or drafts drawn on it by him for the purchase price of cotton, in favor of the sellers thereof, which cotton plaintiff expected to buy from time to time during the cotton season of 1898; and plaintiff was to attach to the drafts the respective warehouse receipts for the cotton, and defendant was to hold in pledge and as security for the advances thus made a special property in the cotton. Plaintiff was to keep covered by the cotton receipts and other collateral securities, and deposits and payments of money, all such sums of indebtedness as might arise and become owing by him to defendant, as well from advances of money to pay for cotton as also from checks drawn by him on the bank for purposes other than the purchase of cotton. Under this arrangement plaintiff became largely indebted to defendant, and in addition to the cotton warehouse receipts deposited with defendant a certain rent note given by C. D. Grimes and held by plaintiff for 11 bales of cotton, for rent due and payable in 1899, and another rent note given by D. M. Geeslin, due and payable in 1899, for 4 bales of cotton, and agreed that defendant should apply the proceeds of said notes to plaintiff's indebtedness to it. The \$22.62 and the \$493.36 sued for are the proceeds of said rent notes, and said amounts were duly credited by defendant on the debt which plaintiff owed it; and all the cotton pledged by plaintiff with defendant has been accounted for at its true value, and that the two sums mentioned above, realized from the sale of the rent cotton, have been fully accounted for to plaintiff, and defendant has fully accounted for all property and money of plaintiff which has come into its hands, and is not indebted to him in any sum whatever.

In addition to this plea of payment, defendant in the fourth paragraph of the answer set up the following defense: On March 24, 1899, plaintiff brought in the superior court of Stewart county, against defendant, an action of complaint for personality, and defendant appeared and defended the suit and filed certain pleas therein. Copies of the pleadings in that case were attached to the answer; it appearing from the petition therein that the suit was in trover for 233 described bales of cotton, alleged to have belonged to plaintiff and to have been converted by defendant. "By said pleas in said case, and particularly the third and fourth special pleas therein, this defendant set up the indebtedness owing by the plaintiff to this defendant as a reason why \* \* \* plaintiff ought not, in equity and good conscience, recover of \* \* \* defendant the full value of the property sued for, without allowing and deducting the indebtedness owing by \* \* \* plaintiff to

this defendant, and as a reason why such verdict and judgment should be meet and just and according to equity and good conscience, making due allowance for and taking into account the claims and counter-claims growing out of the mutual dealings between the parties." The suit in trover was tried at the April term, 1901, of the court, upon the issues and pleadings therein, "and evidence was offered as to the indebtedness owing by \* \* \* plaintiff to this defendant, including and taking into account, as entering into and fixing the balance due on said debt, the aforesaid items of \$22.62 and \$493.36 in this present action sued for; and said items were passed upon by the court and jury in said case, and by the court the jury were instructed that they might allow the debt, including said items, in fixing the amount of their verdict, and the said items were considered and passed upon by the jury, and the plaintiff received credit therefor, and the same entered into and helped to fix the amount of the verdict and judgment in said case. And in said case a verdict was rendered upon said pleadings, issues, evidence, and instructions of the court, and a judgment duly entered up thereon, a copy of which verdict and judgment is hereto annexed." By an amendment to its answer the defendant added a prima facie case in favor of the plaintiff, and that plaintiff had "the right to recover the amount sued for, save and except for the defense set up in and by paragraphs 3 and 4 of the defendant's answer." It then reiterated its defense of estoppel by judgment as alleged in its original answer, and assumed the burden of proof.

Upon the trial the defendant offered in evidence the record of the trover suit. Plaintiff objected to its admission upon several grounds, one of which was that the record showed upon its face that the subject-matter of the present suit could not have been litigated in the former one. The court overruled the objections and permitted the record to be introduced in evidence. From this record it appears that the defendant in the trover suit filed a general plea of not guilty at the April term, 1899, and in April, 1901, filed an amendment to this plea, which amendment is relied on in the present case by defendant to show that the matter now in controversy was involved in the trover action, under the pleadings therein. The first paragraph of this amendment alleged: Plaintiff "at the beginning of the cotton season of 1898, made an arrangement and entered into an agreement with defendant, whereby defendant was to accept such checks or sight drafts as the plaintiff should draw on defendant, in favor of the sellers, for the purchase price of such cotton as the plaintiff in his business as cotton dealer might buy during said cotton season, \* \* \* and plaintiff was to attach to said drafts the ware-

house cotton receipts which represented said cotton, and \* \* \* said warehouse receipts representing the cotton were to pass into possession and belong to defendant upon payment of the drafts; \* \* \* and defendant was thereby to become the owner of the cotton." It was agreed that plaintiff should sell the cotton, or any part thereof, upon being called on by defendant so to do, and that upon his failure to do so, "upon request or whensoever plaintiff's account was not fully protected by the value of the cotton and plaintiff's bonus, then defendant had the right to sell in its discretion privately or publicly, and without other notice than that to be given plaintiff as aforesaid, \* \* \* and apply the proceeds thereof to the account of \* \* \* plaintiff with defendant," and place "any overplus which might remain \* \* \* to plaintiff's credit in defendant's bank, \* \* \* subject to his check." The cotton which forms the subject-matter of the trover suit "was purchased by \* \* \* plaintiff under and in pursuance of said agreement," drafts, with the warehouse receipts attached, being presented to defendant and by it paid, and defendant "became vested with the title to said cotton, with the right to call upon plaintiff to sell said cotton, and with the further right to sell said cotton at private sale, should plaintiff upon request fail or omit so to do." The "plaintiff being, on the ——— day of December, 1898, indebted to defendant in the sum of" \$5,860, "for the purchase price of said 233 bales of cotton, and the account of plaintiff being unprotected and in danger of loss by reason of the low price of cotton, and his bonus being exhausted, so paid for by defendant under and in pursuance of said agreement (and being the entire purchase price thereof), \* \* \* defendant on said day called upon" him to sell the cotton, for the purpose of reimbursing defendant, and plaintiff, though afforded a fair and reasonable opportunity so to do, wholly failed and omitted to sell the cotton, or any part thereof. Whereupon defendant, for its own protection, sold the cotton "fairly and honestly, in open market, for its fair value and the best price which defendant was able to obtain therefor," realizing from its sale the sum of \$5,378.65, "and said sum was applied to the debt owing to defendant by plaintiff for the purchase of said cotton. \* \* \* Wherefore defendant says that it is not in possession of the cotton mentioned and described in plaintiff's petition, and is not guilty of the wrongs and injuries set forth in said petition, and \* \* \* plaintiff ought not to further have and maintain his said action." The second paragraph alleged: The 233 bales of cotton were sold by defendant, "for and in behalf of said plaintiff, without objection and with his knowledge, acquiescence, and consent, and at a price which [he] authorized and consented to. The proceeds of the sale," \$5,378.65, "have been accounted

for by defendant to and with plaintiff, and applied by defendant to the payment of an indebtedness of" \$5,860.11, "then owing by plaintiff to defendant for money advanced and loaned for the purchase of said cotton at plaintiff's request, and were so applied \* \* \* in accordance with the agreement and understanding between plaintiff and defendant."

The third paragraph alleged: The plaintiff, being engaged in the cotton warehousing business in the town of Lumpkin, and desiring to buy cotton, undertook and agreed that, if defendant would accept and pay such sight drafts or checks as he might draw on it for the purchase price of cotton bought by him, he would attach to the drafts the warehouse receipts for the cotton, and that upon payment of the drafts the warehouse receipts should pass to the bank, and it should hold and own the cotton represented by the receipts, and have the right to deal therewith in accordance with the usage governing transactions of that character in that locality, which entered into the contract, and the general and universal custom of said business was that an acceptor, factor, or other person furnishing money with which to buy cotton, or making advances thereon and taking title thereto as security, had the right to sell such cotton fairly and honestly, at private sale in the usual manner of cotton sales, at the ruling market price, without 30 days' notice or other notice to the debtor or pledgor, except such reasonable notice as might be given him without working a delay, and that (for reasons stated) and usage and custom are reasonable, and were well known to persons engaged in buying cotton under such an arrangement. In pursuance of such agreement and arrangement plaintiff purchased the 233 bales of cotton sued for, and defendant accepted and paid the drafts or checks drawn by him for the purchase price thereof, and thereby became the holder of the warehouse receipts attached to such drafts, and thus became the holder and owner of the cotton. Afterwards, with defendant's consent, plaintiff shipped the cotton to Columbus, Ga., to be delivered to Blanchard, Humber & Co., upon payment by them to defendant of a draft in its favor sufficient to cover the amount due it by plaintiff; and defendant delivered the warehouse receipts to plaintiff, taking the bill of lading for the cotton in substitution for the same and in lieu thereof. This draft was dishonored; and plaintiff being indebted to defendant in the sum of \$5,860.11 for money advanced by it to pay for the cotton, being the full purchase price thereof, defendant called on him, in December, 1898, to sell said cotton for the purpose of paying this debt. He failed to sell the cotton or to pay the debt, or any part thereof. Defendant, after reasonable notice to him, then exercised its right to sell the cotton for its own protection, and did sell it fairly for its full market value and at the best price that

could be obtained. The cotton brought the sum of \$——, "and defendant has accounted to and with plaintiff therefor in reduction of plaintiff's said indebtedness. Wherefore defendant says that it is not guilty of the wrongs complained of, and the plaintiff ought not to maintain his said action."

The fourth paragraph was substantially as follows: The cotton sued for was delivered to defendant by plaintiff to secure his indebtedness to defendant, which indebtedness was created by the advancement by defendant of the purchase money of the cotton. The effect of the contract between them was to invest defendant with a special property in the cotton, for the purpose of securing such indebtedness and applying the proceeds of the cotton to the payment of the same, "and to the extent of said debt defendant is entitled to retain and hold said cotton or its proceeds." Plaintiff being indebted to defendant \$5,860.11 for money advanced by defendant for his use "in the purchase of said cotton, and constituting the entire purchase price thereof, and the said indebtedness being all of it due, and \* \* \* plaintiff, being called on so to do, having wholly failed to sell said cotton, owing to false classification or other cause, being less than the debt, \* \* \* defendant, in good faith and in the belief that it was acting within the scope of its rights under the contract, and for the bona fide protection of its own interests, and acting as it believed in the interest of the said Halliday sold said cotton fairly and honestly, for the highest market price which could be obtained therefor," etc. Defendant realized from such sale \$5,378.65, which entire sum was applied to the payment of the debt due to it by plaintiff; "said proceeds being less than said debt." If "defendant was mistaken as to its right of making said sale in that particular manner, and if by reason of informality of manner of exercising the right of sale, said sale might constitute in law a conversion to the extent of any damage that \* \* \* plaintiff might sustain thereby, \* \* \* plaintiff cannot in equity and good conscience, or upon legal principles, recover of defendant for such conversion, except compensation to the extent of loss and damage actually sustained in that behalf. And defendant says that, the said sale being for the full and fair market value of said cotton, \* \* \* plaintiff has sustained no loss or damage. And defendant prays that the question of alleged loss or damage, and the extent of such loss or damage, if any, may be inquired of, and that such verdict and judgment may be rendered in that behalf as may be meet and just, according to equity and good conscience."

The fifth paragraph, after setting up the agreement between the parties under which the cotton was bought by plaintiff and paid for by defendant, and that upon delivery of the warehouse receipts to defendant it should become vested with a special property in the

cotton, etc., and that afterwards plaintiff procured defendant's consent to ship the cotton to Columbus, as previously averred, alleged that plaintiff represented that the draft drawn in defendant's favor on Blanchard, Humber & Co. was drawn for an amount authorized by said firm, "based on a true and fair classification of said cotton," and that upon the faith of such representations defendant yielded up the warehouse receipts in exchange for the bill of lading for the cotton, and permitted the cotton to be shipped. Plaintiff, for the purpose of drawing the draft for a larger amount than was authorized by the drawees, "classified said cotton as of a higher grade than the same was entitled to, and \* \* \* drew for \$911.73 more than he was authorized to do, and by reason thereof said draft was dishonored." Plaintiff, when called upon to sell the cotton or otherwise protect defendant, wholly failed to do so, and the cotton by plaintiff's said acts was subject to demurrage charges and other expenses, and placed elsewhere than where the contract had contemplated; and defendant, for its protection from loss and injury from plaintiff's said acts, found it necessary to sell the cotton, and sold it fairly," etc. "Wherefore defendant says that, if plaintiff has suffered loss, it was through his own act, fault, and error, and he ought not to recover in said action."

After the introduction of further evidence by both parties, the jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, which motion was overruled, and he excepted.

T. T. James and S. B. Hatcher, for plaintiff in error. Hall & Wimberly, E. T. Hickey, Jno. Hall, and Olin Wimberly, for defendant in error.

FISH, C. J. (after stating the facts). 1. One ground of the motion for a new trial was that the court erred in admitting in evidence the record of the trover suit, over the objections urged by plaintiff against its admission. It is contended by counsel for defendant in error that objection to the introduction of this evidence came too late, as the record offered was "exactly the same" as that "annexed to the plea of *res adjudicata* as an exhibit, and by reference made a part thereof," and that, so far as the record of the present case discloses, there was no demurrer to this plea. As seen in the statement of facts, one objection urged to the admission of the record of the trover case was that it showed upon its face that the subject-matter of the case at bar could not have been litigated in that case. This objection did not come too late. "Objection to a plea insufficient in law may be made by a motion to strike the plea, and this practice is to be commended; but the same result may be accomplished by objection to evidence which is offered in support of the plea." *Walden v. Walden*, 124 Ga. 145, 52 S. E. 323; *Crew v. Hutchenson*,

115 Ga. 511, 42 S. E. 16; *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280.

2. Objection to the introduction of the record of the former suit, upon the above-stated ground, was well taken. It is clear that the matter in controversy in the case on trial could not have been litigated under the plaintiff's pleadings in the former suit. The former suit was in trover for the recovery of 233 described bales of cotton. The present action was brought for money had and received by defendant to plaintiff's use. From the answer of defendant in the immediate case it appeared that defendant had received the money sued for as the proceeds of 15 bales of cotton which it had collected on certain rent notes, payable in cotton, which plaintiff had pledged with it as collateral security for the payment of his indebtedness to defendant, and that these 15 bales of cotton were no part of the 233 for which the action of trover was brought, and in fact were not even in existence when that action was instituted. It is clear, therefore, that the rights of the parties relative to these 15 bales of rent cotton could not have been involved and determined in the trover suit, unless they were, as claimed by the defendant, brought into the trial of that action under the "equitable plea" filed therein by defendant, about two years after the institution of the suit. The plaintiff contends that, as the former suit sounded in tort and the present one sounds in contract, the subject-matter of this last suit could not have been litigated in the first action. In the view which we take of the case in hand, however, it is not for us now to determine what matters could have been properly pleaded in the trover suit. That was a question to be raised and determined in that case, not in this. The question with which we are concerned is: What were the issues which were actually raised by the pleadings in the former suit? Any issue which was clearly within the scope of the pleadings in that case might have been determined by the verdict and judgment rendered therein, whether the particular pleadings which raised such issues were, under the technical rules applicable to a case of that character, proper or improper. And any issue which was within the scope of such pleadings could not have been properly determined upon the trial of that case, no matter what evidence might have been introduced. The technical rules applicable to actions of trover are pertinent here only so far as the fact of their existence may be of assistance in construing allegations, in the trover pleadings, of obscure or doubtful import and purpose, as the intention to inject into the case an issue which could not ordinarily be raised in a trover case should clearly and unmistakably appear before the pleadings would be construed to have raised it.

Defendant contends that its "equitable plea" in the trover case was broad enough to allow and to require, upon the trial of

that case, a general accounting between the parties embracing all of their dealings with each other growing out of the business arrangement between them set out in its answer in that case, and that the transfer of the two rent notes to defendant by plaintiff as additional collateral security for his indebtedness, the collection by defendant of the 15 bales of cotton thereon, its conversion of this cotton into money and crediting the money on plaintiff's account, were a part of such dealings, and that, although it received this cotton after the institution of the trover suit, it was bound, under its plea, to account for it on the trial of that case. It further contends that in the trover trial this matter was fully gone into and evidence submitted thereon, and that the same was taken into consideration by the jury, and the verdict for the plaintiff was, to the extent of the amount received by defendant for this rent cotton, larger than it otherwise would have been. In other words, its plea amounts to this: that plaintiff has already, in the trover suit, recovered that which he seeks to recover in the present action. Upon the trial under review the defendant introduced evidence for the purpose of proving that this was true. This plea of defendant was not, strictly speaking, a plea of *res adjudicata*, but rather, as we have termed it in the above statement of facts, a plea of *estoppel* by judgment, though it is quite common to call both pleas by the former designation. *Draper v. Medlock*, 122 Ga. 234-238, 50 S. E. 113, 69 L. R. A. 483. It appeared from the plea itself that plaintiff's cause of action in the former suit was different from his cause of action in the present case. "A judgment is not a technical estoppel as to any matter, if the matter is not such that it had, of necessity, to be determined by the court or jury before the court could give the judgment." *Hunter v. Davis*, 19 Ga. 413; *Bradley v. Briggs*, 55 Ga. 355. But, although the mere production in evidence of the record in a former case between the same parties may not show that the subject-matter of the second suit is *res adjudicata*, because it had, of necessity, to be passed upon before the judgment in the previous suit could have been rendered, yet if such subject-matter might have been passed upon in the former litigation, under the pleadings shown by the record therein, the fact that it then was passed on may be shown by extrinsic evidence. *Draper v. Medlock*, *supra*, and authorities cited.

This principle was expressed in *Johnson v. Lovelace*, 61 Ga. 64, in the following language: "If the record shows that the same matters might have been litigated in the former action, then the fact that they were actually decided in that former action may be proved by extrinsic evidence." Obviously the converse of this is true; that is, if the record shows that the same matters could not have been litigated in the former suit,

then the fact that they were actually decided therein cannot be shown by extrinsic evidence. It is only matters which were put in issue by the pleadings in the former case which can be shown by extrinsic evidence to have been actually decided therein. Extrinsic evidence is not admissible both for the purpose of showing or raising the issues in the former case and showing which of such issues were actually decided therein. In courts of record the issues are made by the written pleadings. What the issues were must be shown by the record. Whether a particular matter, within such issues, was really litigated and decided upon the trial may be shown by extrinsic evidence. This principle is expressed in *Herman on Estoppel and Res Judicata*, in the following language: "But, while parol evidence may sometimes be admitted for the purpose of limiting the estoppel, it is never allowed to enlarge its operation, or to show what matters foreign to the record were embraced in the verdict." 1 *Herm. Estop.* 312. It was held in *Campbell v. Butts*, 3 N. Y. 173, that "a party insisting upon a former recovery as a bar to an action must show that the record of the former suit includes the matter alleged to have been determined." And in *Burdick v. Post*, 12 Barb. (N. Y.) 168, the rule was announced as follows: "A former suit is a bar only to such claims or matters as might have been litigated under the pleadings and issues as made." The Supreme Court of Indiana stated the rule thus: "The record produced to support a plea of a former judgment should be of a judgment in a suit in which the cause of action subsequently sued for might have been proved." *Athearn v. Brannan*, 8 Blackf. 440. In our opinion the record in the trover suit, which was introduced by defendant, will not stand any of these tests.

Let us analyze the amendment to the original answer in the trover case. The first, second, third, and fifth paragraphs thereof, each of which seems to have been intended as a separate plea, are clearly mere amplifications and explanations of the general plea of not guilty. None of them seek to have a balance struck between the aggregate amount of defendant's liabilities to plaintiff and the total indebtedness of plaintiff to defendant, and a verdict rendered accordingly, but each seeks simply a general verdict in favor of defendant, upon the ground that, under the circumstances and for the reason stated, it had the right to sell the 233 bales of cotton sued for, at the time when and in the manner that it did so, and appropriate the proceeds toward the payment of the debt due it by the plaintiff, and therefore was not guilty of a conversion in so doing. It is however, upon the fourth paragraph that defendant in error mainly relies to support its contention that the matters involved in the last suit were within the scope of the pleadings in the first; and this paragraph is called, in the brief of

its counsel, its "equitable plea" in the trover case. There is not in this plea any mention of or any reference to the rent notes of Grimes and Geeslin, which were deposited with defendant by plaintiff to secure his indebtedness to defendant, nor of the 15 bales of cotton collected by defendant on the notes: nor is there in such plea, or attached thereto, any itemized statement of the account between the parties, which, if completely set out, might have indicated an intention on the part of the defendant to have, upon the trial of the trover case, a complete accounting between the parties covering all their mutual dealings under the business arrangement between them set up in the plea, and also have shown that the matter now in controversy was embraced in such itemized account, and hence was intended to be taken into consideration in determining where and how the balance of indebtedness stood. There is not in this plea any reference whatever to any liability of the defendant to the plaintiff, past or present, except its liability for the value of the 233 bales of cotton, which it alleged had been extinguished by its appropriation of the proceeds of the sale of such cotton as a credit on the amount due it by the plaintiff for the money advanced by it to pay for the cotton. On the contrary, the plea, after alleging that the cotton sued for "was delivered to defendant by plaintiff to secure plaintiff's indebtedness to defendant, which indebtedness was created by advancement by defendant for plaintiff \* \* \* of the purchase price of said cotton," alleged that "to the extent of said debt the defendant is entitled to retain and hold said cotton or its proceeds." This allegation is inconsistent with the idea that it was the intention of the pleader that, if the money received by the defendant from the sale of the 15 bales of rent cotton should be taken into consideration and applied by the jury as a credit on the debt created by the advance of the purchase price of the 233 bales of cotton sued for, then defendant would not be entitled to retain and hold the proceeds of the cotton sued for to the extent of the debt created by the money advanced for its purchase.

Nor do we discover any prayer for a general accounting between the parties as to all matters connected with their mutual dealings, under the agreement or arrangement between them set up in the plea. The prayer, which immediately followed the allegation that the sale of the 233 bales of cotton embraced in the trover suit "being for the full and fair market value of said cotton," the plaintiff had sustained no loss or damage, was in the following words: "And defendant prays that the question of alleged loss or damage, and the extent of such loss or damage, if any, may be inquired of, and that such verdict and judgment may be rendered in that behalf as may be meet and just, and according to equity and good conscience." Whatever may

have been the undisclosed intention of the pleader, this prayer by its terms confined the questions to be inquired into and determined to the loss or damage, if any, of the plaintiff by the defendant's sale of the cotton, and the extent of such loss or damage. It seems clear that the question whether the plaintiff had lost anything by the defendant's selling the cotton when and as it did, and, if so, how much, could not involve the consideration of the disposition made of any other collateral held by the defendant. Especially would this seem to be true as to collateral subsequently disposed of. While the question whether defendant was indebted to plaintiff, or plaintiff indebted to defendant, might well involve a consideration of all the items embraced in a true account between them, we fail to see how the naked question of the loss or damage sustained by plaintiff by defendant's sale of a particular lot of cotton could involve the consideration of the question whether the defendant was otherwise indebted to the plaintiff. The concluding clause of the prayer, which counsel for defendant in error seem to stress in their brief, does not broaden the scope of the inquiry already prayed for, but merely prays "that such verdict and judgment may be rendered in that behalf as may be meet and just, and according to equity and good conscience." This apparently means no more than that such verdict and judgment may be rendered in behalf of the plaintiff's loss or damage by the sale of the cotton as may be meet and just and according to equity and good conscience.

Our construction of this plea is that it sought to escape the usual consequences, in a trover suit, of proof of conversion—that is, a verdict in favor of the plaintiff for the recovery of the property, or its highest proved market value—upon the ground that, if there had been a technical conversion of the cotton by the defendant, it was simply through an honest mistake on its part as to its rights, and, as it had acted in the utmost good faith in the matter, and had applied the entire proceeds received by it from the sale of the cotton to the payment of the debt which it held against the plaintiff, and the parties had agreed that when the cotton was sold its proceeds should be so applied, the plaintiff ought not to recover anything more than its actual loss or damage; that is, the difference between the highest proved value of the cotton and the amount for which the defendant sold it. The defendant did not in this plea, or in any of the others, plead set-off or recoupment; nor did it even allege any equitable ground upon which a plea of set-off or recoupment could be based in a trover case. While it alleged the amount of the plaintiff's indebtedness to it at the time that it sold the cotton, there was no prayer for a judgment for defendant for any balance of indebtedness that might be found in its favor; nor was there any prayer that, in the event the



proof should show a technical conversion of the cotton sued for, the plaintiff's indebtedness to defendant should be set off against the amount which the jury should find as the value of the cotton converted. The plea alleged the amount of the plaintiff's indebtedness to defendant at the time it sold the cotton; that this indebtedness was for purchase money which defendant had advanced to plaintiff to pay for this very cotton; that under the agreement between the parties defendant had held this cotton to secure this indebtedness, and, when it sold the same, had applied the proceeds to the payment of this debt. But these allegations were all apparently for the sole purpose of showing that, in equity and good conscience, the plaintiff ought not to be allowed to recover the full value of the cotton, but only what he had lost, if anything, by the irregular sale of the cotton by defendant. A fair test of the question which we have been considering would be to suppose that the plaintiff in the trover trial had, over the objection of the defendant, sought to increase his recovery by showing that the defendant was not only liable to him in damages for the conversion of the 233 bales of cotton sued for, but was also liable to him for the proceeds of the rent notes of Grimes and Geeslin, which he had deposited with defendant. He had not sued for the proceeds of these rent notes, and so the evidence would not have been admissible under the allegations of his petition; and we fail to see how he could have shown to the court that it was admissible under the answer of the defendant.

As the subject-matter of the present suit was not within the scope of the pleadings in the former suit, the court erred in admitting in evidence the record of the trover case. Having reached this conclusion, the subsequent rulings of the trial court, complained of in the motion for a new trial, become immaterial. They resulted from the admission in evidence of the record of the trover case, without the admission of which extrinsic evidence as to what matters were really litigated in the trial was not admissible.

Judgment reversed. All the Justices concur.

(128 Ga. 585)

GAINES et al. v. DYER et al.

(Supreme Court of Georgia. July 10, 1907.)

# 1. BRIDGES—ESTABLISHMENT—ROAD COMMISSIONERS—POWERS.

In the county of Hall, the commissioners of roads and revenues have jurisdiction to establish public roads and construct public bridges. In the matters of locating the site and constructing public bridges and determining the cost of the same, the commissioners have a broad discretion, which will not be disturbed by the court, unless plainly and manifestly abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 13.]

## 2. SAME—ABUSE OF DISCRETION.

It is not an abuse of discretion for the commissioners to levy a tax and enter into a contract for the construction of a public bridge in an existing public road merely because no bridge has previously existed, or because no public bridge has been formally established by legislation or previous judgment of the commissioners.

## 3. SAME.

It is an abuse of discretion for such commissioners to levy or collect a tax or enter into a contract for the construction of a public bridge at a site not embraced in an existing public road; but, where it appears that the bridge is intended to be constructed as a public bridge, and that the commissioners can legally establish a public road which would embrace the proposed site, this court will not unqualifiedly reverse a judgment of the chancellor who refuses to enjoin the enforcement of the levy and construction of the bridge, but, in affirming the judgment, will direct a modification to the effect that injunction do issue until such public road be established, at which time the enforcement of the levy and construction of the bridge shall be permitted to proceed.

## 4. SAME—MEETINGS.

The acts creating the commissioners of roads and revenues for the county of Hall (Acts 1886, p. 265; Acts 1903, p. 338) authorize special as well as regular meetings, and provide that two members of the board shall constitute a quorum. Two members of the board may exercise corporate authority, either at special or regular meetings, in the matter of levying a special tax for building public bridges and in the matter of executing contracts for the construction of such bridges.

## 5. OFFICERS—DE FACTO—VALIDITY OF ACTS.

The act of the ordinary of Hall county, participating as ex officio member of the board of commissioners of roads and revenues, in levying a special tax and making a contract for the construction of a public bridge, is valid, whether he be treated as an officer de jure or de facto; and, under the issues made in this case, it is not necessary to inquire into the constitutionality of the act of the Legislature making him such ex officio member.

## 6. SAME—TAXATION—VALIDITY—PREVIOUS EXECUTION OF CONTRACT—SPECIFICATION OF PURPOSE—RECOMMENDATION OF GRAND JURY.

It was competent for the commissioners on November 1, 1906, to levy a special tax for the purpose of building a public bridge for which there was a present necessity. This is true, although a previous levy may have been made for the same purpose and partly collected, and afterwards adjudged illegal and set aside.

(a) It was not necessary to the validity of the levy of such special tax that the contract for the construction of the bridge should have previously been executed.

(b) A levy of an extra tax was substantially in the language of Pol. Code 1895, § 404, par. 2, sufficiently specifies the purpose for which the tax was levied.

(c) A special tax levied for the purpose of constructing a public bridge is authorized by law, and a recommendation of the grand jury is not essential to its validity.

## 7. SAME—CREATION OF DEBT.

A contract between the county authorities and another person for the construction of a public bridge for which there is a present necessity, entered into after the levy of a special tax sufficient to pay for the bridge, and during the same year, does not create a debt, although it is contemplated that the contract price shall be paid in whole or in part during a succeeding year.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kinsey, Judge.

Action by H. W. T. Gaines and others for injunction and other relief against W. N. Dyer and others, as commissioners of roads and revenues of Hall county, and others. Judgment for defendants, and plaintiffs bring error. Affirmed with direction.

The board of commissioners of roads and revenues of the county of Hall was created by the act of the General Assembly, approved December 23, 1886. Acts 1886, p. 265. It was provided that the board should consist of three members, citizens of Hall county, to be elected by the grand jury, and authority was conferred upon the board to deal with county matters. It was also provided "that said commissioners shall hold at least one meeting each month; and may hold special sessions in addition to the regular monthly sessions, whenever the interests of the county demand it." It was also provided "that two of said board shall be a quorum, and two must concur to pass any order, or let any contract, pledge the county credit, or grant or allow any claim against the county." This act was amended by the act of the General Assembly approved July 30, 1903 (Acts 1903, p. 338), so as to provide that "at the next regular election for members of the General Assembly in said county of Hall, and at each succeeding regular election for members of the General Assembly, there shall be elected by the qualified voters of said county two citizens of said county, who shall, with the ordinary of said county, constitute a board of commissioners of roads and revenues, upon taking the oath herein-after prescribed." On October 23, 1905, W. N. Dyer was ordinary and claiming to act ex officio as a member of the board of commissioners of roads and revenues. At the same time D. H. Jarrett and R. C. Simmons were two members of the board of commissioners of roads and revenues, having been elected by the people under the provision of the act of 1903. On the date last mentioned Dyer and Jarrett held a special meeting at the office of the commissioners of roads and revenues, and passed an order "that sealed bids for a bridge across the Chattahoochee river at a point known as Browning's Ferry crossing be advertised for in the Gainesville Eagle, and also that sealed bids for a bridge across the Chattahoochee river at a point just below what is known as the Old Seven Islands Ford be advertised for in the Gainesville Eagle." In pursuance of that order, Dyer and Jarrett, as commissioners of roads and revenues of Hall county, prepared an advertisement and proceeded to publish the same, calling for sealed bids to be received by the commissioners of roads and revenues of Hall county on Saturday, the 24th day of November, 1906, for the erection of the two bridges in question. On the 1st day of November, 1906, Dyer and Jarrett, as commissioners of roads and revenues of Hall county, in regular session, sitting for county purposes, passed an order in part as follows:

"It appearing that the taxable property for Hall county for the year 1906 amounts to the sum of \$5,912,867, and it further appearing that the taxes levied by the state for the year 1906 is 48 cts. on each hundred dollars, it is therefore ordered that the following several per cents. on said tax be, and the same are hereby, levied for the following specific purposes for county taxes in the present year, 1906, to wit: To build and repair courthouses and jails, bridges, or ferries, or other public improvements according to contract, 24½ per cent. of 48 cents equals \$6,906.12." The item of \$6,906.12 was one among several items for county purposes. It is not necessary to state the others, for the reason that they are not involved in the case, and no question is raised with respect to them. After the levy of the tax just referred to the bids of W. W. King, a contractor, were on November 24, 1906, accepted by said Dyer and Jarrett acting as commissioners for the erection of the two bridges, one at \$2,950 and the other at \$2,450, and written contracts were executed therefor and entered upon the minutes of the board of commissioners. Fuller, as tax collector of Hall county, proceeded to collect the tax levy. In December, 1906, H. W. T. Gaines and others, in behalf of themselves and others as citizens and taxpayers of Hall county, filed a petition for injunction and other relief against Dyer and Jarrett and Simmons, as commissioners of roads and revenues of Hall county, and likewise against King, the contractor, and also against Fuller as tax collector. In the petition it was contended that the tax levy of \$6,906.12 was made only for the purpose of raising money to erect said two bridges. Numerous reasons were alleged as to why there was no authority for constructing said bridges, and as to why the contracts were illegal, and as to why the levy of the tax was unnecessary, unreasonable, and void. There were prayers to enjoin the tax collector from collecting the item objected to in the general tax levy, to which reference has been made, and to enjoin the contractor from building the bridges and to enjoin the commissioners from collecting the tax and from building the bridges. There were also prayers for a decree setting aside the levy of the special tax already mentioned, and canceling the contract entered into by Dyer and Jarrett as commissioners with King, the contractor. By amendment there was a prayer that, in the event the court should not enjoin the collection of the tax levy of \$6,906.12, the commissioners be enjoined from using any portion of the taxes for the purpose of paying for the erection of the bridges in question. Upon the hearing the court refused the injunction; and the plaintiffs excepted.

H. H. Perty, W. M. Johnson, and J. O. Adams, for plaintiffs in error. H. H. Dean, Thompson & Bell, and W. B. Sloan, for defendants in error.

ATKINSON, J. 1. In the petition for injunction complaint is made of the levy of an extra tax for the amount of \$6,906.12, from the proceeds of which it is alleged that the county authorities were intending to construct the two public bridges, one at Browning's Ferry crossing and the other at a point just below what is known as the "Old Seven Islands Ford." It was insisted that the levy of this tax was illegal and that the contracts for the construction of the two bridges in question were illegal, among other reasons, because (a) no public necessity for either of the bridges existed; (b) no public bridge had previously existed at either place where it was proposed to construct the bridges; (c) no bridges had been established at said points by any authority of law; (d) the cost was so great as to amount to useless extravagance. Under the act of 1886 (Acts 1886, p. 285), as amended by the act of 1903 (Acts 1903, p. 338), the commissioners of roads and revenues of Hall county have jurisdiction over the county affairs, and have authority to lay out public roads, construct public bridges, and make special tax levies, among others, for the purpose of providing funds for the construction of bridges. As an incident to the authority just stated, the commissioners primarily have the right to determine when a necessity exists for the construction of a public bridge, and what amount of money will be expended for the purpose. In the exercise of these several powers, the commissioners may exercise a broad discretion, which will not be disturbed by the courts, unless plainly and manifestly abused. In the case of *Anderson v. Newton*, 123 Ga. 512, 51 S. E. 508, where the powers of commissioners similar to those now under consideration were being reviewed, Mr. Justice Evans, speaking for the court, said (page 521 of 123 Ga., and page 511 of 51 S. E.): "The court correctly held that the board of commissioners was vested with discretionary power with respect to deciding whether or not the erection of a new courthouse was a present and urgent public necessity, and, if so, upon what site it should be built." In the case of *commissioners v. Porter Mfg. Co.*, 103 Ga. 617, 30 S. E. 549, Mr. Justice Cobb, speaking for this court, said: "The discretion vested in the county commissioners must be from the nature of the case a broad one, and therefore the reviewing power of the judge of the superior court must be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law." As to the existence of a public necessity for each of the bridges in question, and as to the reasonableness of the expenditure of the amount of money contracted to be paid, the evidence, though conflicting, was ample to support the conclusion of the commissioners that a public necessity actually existed, and that the expense was not unreasonable. It

follows that upon these points there was no abuse of discretion.

2. We may next consider whether the location and construction of the bridges at the particular places in question, where public bridges had not previously existed and where there had been no procedure in the courts or legislation formally establishing public bridges as such, was an abuse of discretion. In determining this question, we call attention to the fact that there is no separate provision of law requiring action, either by the courts or by Legislature, in order to establish a public bridge. A public bridge is no more than a part of the public highway. Pol. Code 1895, § 5. In an existing highway, where there is a public necessity for a bridge and the finances of the county will permit, it is as much the duty, and equally within the power, of the commissioners to construct the bridge by contract, or otherwise, as it would be within their power and duty to make any other improvement in the highway equally necessary to the public convenience. It does not require any formal procedure to authorize the commissioners to construct a public bridge in a public way, where the public convenience demands the construction of such bridge. We can see no abuse of discretion in undertaking to construct a bridge at Browning's Ferry crossing.

3. As to the bridge to be constructed "at a point just below what is known as the Old Seven Islands Ford," the question is somewhat different, because, while the place at which the bridge is to be constructed is "just below \* \* \* the Seven Islands Ford," it does not affirmatively appear that the place of contemplated location is in an existing public road. The pleadings and evidence are of such a character, however, as to show an irresistible conclusion that it is the intention of the commissioners to construct the bridge as a public bridge for the use of the public, and provide suitable approaches thereto from the public roads of the county, in such manner as to render the bridge a part of the public highway. If that be done, the distinction between this and the case of the bridge at the Browning's Ferry crossing would be eliminated. Both bridges would be a part of the public highway. It is possible for the commissioners to extend the public road in such way as to approach and include this bridge. That could be established in pursuance of section 520 of the Political Code of 1895, and by the exercise of the right of eminent domain, or by purchase or dedication. See *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508. But, while it is possible to create a public road which would embrace the location of the contemplated bridge in one of the methods just suggested, there are contingencies which could prevent such creation. It may be that the owners of the land would refuse to dedicate, or it may be that the owners of the land would refuse to sell, and the condition might arise by which the

authorities would be bound to pursue the provisions of the Political Code of 1895, § 520, and take the property by the exercise of eminent domain, in which event the viewfers provided for in section 520 may fail to agree to the location of the road at the particular point where it is proposed to construct the bridge. So long as these contingencies exist, it does not seem that it would be a wise exercise of discretion to levy or collect a tax or expend public money in the construction of the bridge, because the contingencies may eventually create a legal obstacle of such character as to prevent the public enjoyment of the bridge. Certainly the citizens should not be taxed for a purpose which the public could not enjoy. It is by no means certain in the case at bar that the contingencies mentioned will happen in such way as to create a legal obstacle of the character above mentioned; and, while, for the reasons indicated, it would have been proper for the authorities to have established the road in advance, we would not on that account alone unqualifiedly reverse the judgment refusing to grant the injunction. If the road is legally established and the bridge should be constructed, the citizens and taxpayers will derive every benefit from the bridge that would have been afforded had the road been previously established in one of the ways recognized by law. Under all of the existing conditions, we think it would have been better for the judge to have enjoined the construction of the Seven Islands Ford bridge, and the levy and collection of so much of the tax as was intended to be applied to that purpose, until the commissioners had, in accordance with law, established a public road so located as to embrace the site of the proposed bridge, providing, however, that, when the road was so established, then the officers be allowed to execute the levy and the contractor proceed with the construction. As already indicated, we see no abuse of discretion with respect to the bridge at the Browning's Ferry crossing, and see only occasion for modifying the judgment to the extent just indicated with respect to the Seven Islands Ford bridge.

4. Another objection to the levy of the special tax and execution of the contract for the construction of the bridges, which was raised and insisted upon as ground for injunction, was that there was no corporate action authorizing the levy or contract; that the only pretended corporate action was that of two of the commissioners in the absence and without the knowledge or concurrence of the third commissioner. The act as amended, which creates the board of commissioners of roads and revenues of Hall county, authorizes special meetings to be held, and makes two members of the board a quorum. Acts 1886, p. 265; Acts 1903, p. 338. The evidence disclosed that the levy was made at a regular meeting, and that the contract was authorized at a special meeting of the commissioners lawfully assembled at the office of the commis-

sioners. There was nothing to suggest fraud. One member was not present, but there was sufficient evidence to authorize the court to find that the absent commissioner did know of the meeting, and could have been present and could have participated if he had so desired. This completely answers the objection.

5. Another objection to the levy of the special tax and execution of the contract, which was relied upon as a ground for injunction, was that Dyer, the ordinary, had no right to act as one of the commissioners. Among the reasons assigned as to why he was not authorized to act was that the law declaring him *ex officio* a member of the board of commissioners was unconstitutional. If the contest were one of direct inquiry into his right to hold the office, the question as to the constitutionality of the law would be pertinent; but not so where that is not the question. Dyer, the ordinary, has color of office, and assumes to act and does act in the capacity of commissioner. His act is valid, even if he should only be an officer *de facto*. Under these conditions, it is not necessary to make inquiry into the right by which the ordinary acts as commissioner.

6. Other objections to the levy of the special tax, relied upon as grounds for injunction, were (a) that the levy was not made until November 1, 1906, after the tax collector had collected the tax for the year 1906 from many taxpayers and receipted them in full before the levy was made; (b) that a levy of taxes for county purposes for the year 1906 had been made on September 10th, which included an item similar to the bridge item now under consideration, and that part thereof had been collected; (c) that no contract had been made to complete the bridges at the time the levy was made; (d) that the levy for the purpose of constructing the bridges would be "an extra levy, extra of the fixed or standing yearly expenses of the county, and said purpose would have to be specially mentioned in said levy"; (e) that the amount of the levy was over 100 per cent. of the per cent. levied by the state for the year 1906, and was not recommended by the grand jury. These grounds of objection are not well founded in law. It was competent on November 1st to make a levy of taxes for the construction of the bridges. *Commissioners v. Porter Mfg. Co.*, 103 Ga. 613.<sup>1</sup> The fact that some part of the levy of September 10th had been collected before that levy was declared illegal and set aside does not of itself furnish grounds for enjoining a subsequent levy of a special tax for the same purpose which was otherwise legal. See, in this connection, *Johnson v. Pinson*, 127 Ga. 144, 56 S. E. 238 (4). The law does not require a contract to be made for the construction of the bridges before the commissioners would be authorized to levy a tax to provide funds to pay for the same. If it is necessary to levy a tax for the purpose of building bridges, the levy may be made before the contract is made. Commis-

<sup>1</sup> 30 S. E. 547.

sioners v. Porter Mfg. Co., supra. The Political Code of 1895, § 404, contains nine purposes for which taxes may be levied by the county authorities. Among the purposes mentioned is that of taxation in order to provide funds for the building of public bridges. The item of the levy which is objected to is in the language of the Code, and sufficiently specifies the purpose for which the levy was made. No recommendation by the grand jury was necessary for authority to levy that tax. *Sullivan v. Yow*, 125 Ga. 327, 54 S. E. 173. In the case of *Commissioners v. Porter Mfg. Co.*, supra, a levy was made "for other, lawful purposes." Objection was urged to that levy upon the ground that it failed to specify the particular purpose for which the levy was made. In commenting upon the objection, Mr. Justice Cobb, speaking for this court, said: "While it is possible for the county authorities to make the levy more full than it is, it is practically impossible for the levy to cover all items which might be legitimately paid out by taxes raised under this clause, and to fill up this clause in this tax levy with an enumeration of all possible charges other than those enumerated would amount in a great many cases to levies being specifically made for the purposes which would never be necessary during the current year. The Legislature having granted the power in this general way, we cannot say that a levy which was in the exact language of the statute is so indefinite that it should be enjoined." We think that the reasoning in that case is applicable to the point raised by objection to the levy in the case now under review. The commissioners are by law vested with a broad discretion, and must be the judges, within reasonable limits, of what is needed for the various purposes for which taxes may be levied. The Political Code of 1895, § 405, directs: "As soon as the county tax is assessed for the year, it shall be done by order of such [etc.] and entered on their minutes, which must specify the per cent. levied for each specific purpose." But, construing this section in connection with section 404, where the Legislature has undertaken to deal with the subject of special taxation as under nine separate subdivisions designating the special purposes for which county taxes may be levied, we think it a sufficient specification of the purpose if the levy is substantially in the language of the Code.

7. Another objection to the contract, urged as a ground for injunction, was that the effect of the same would be to create a debt against the county, because there was provision for payment in and during a year succeeding the year in which the contracts were made; there being no money on hand by the county with which to pay in compliance with the contracts. In *Manly Building Co. v. Newton*, 114 Ga. 248, 40 S. E. 274, it was said that the "county authorities may, without

being said to create a debt within the meaning of the Constitution, contract for the building of a courthouse to be paid for out of available funds in the treasury, or with the proceeds of taxes that have been or may lawfully be levied during the year in which the contract is made." In *Carruth v. Wagener*, 114 Ga. 740, 40 S. E. 700, and *Johnson v. Pinson*, 126 Ga. 121, 54 S. E. 922, the tax had been levied when the contract was made, which is also true in the present case. The question, therefore, as to whether a contract can be lawfully made in anticipation of a tax levy, is not now before us; and it is not necessary or proper that we should approve or disapprove the ruling in the *Manly Building Company Case* in reference to this matter. In other particulars the rulings in that case, so far as pertinent to the case now under consideration, are upon review approved and followed. The tax levy of November 1, 1906, was collectible during the year 1906. The contracts for both bridges were executed in the same year. There was nothing irregular in this. In *Johnson v. Pinson*, 126 Ga. 123, 54 S. E. 923, it was said: "As this tax was to be collected during the year, the county authorities were authorized at any time after this levy, although the tax was uncollected, to make a contract for the erection of the courthouse and the jail in any amount they saw proper, which was not in excess of the sum that would be realized from the collection of the tax." Under the pleadings and evidence in the case under review, the amount of the levy was sufficient to cover the cost of both bridges. The mere fact that payment for the bridges was to be made in whole or in part during the year succeeding the execution of the contracts would not characterize the transaction as the creation of a debt. If there was a present necessity for the bridges, and authority to levy the tax, and a lawful levy for that purpose, the collection was inevitable. Under those conditions all reasonable provision for payment for the bridges would have been made in advance of the making of the contract, and, under the rulings made in the cases cited, no debt would be created. The contracts to build the bridges remain executory until the work is completed. Whenever any sum becomes due to the contractor, the money is available by force of the levy of the tax to make the payment. After a careful examination of all of the assignments of error, we are satisfied with the ruling of the court in refusing to grant the injunction, with but one exception, and affirm the judgment, with direction that the judgment of the court below with respect to the bridge "just below the Seven Islands Ford" be modified so as to conform to the directions hereinbefore stated.

Judgment affirmed, with direction. All the Justices concur.

(128 Ga. 627)

**SOUTHERN RY. CO. v. GORE.**

(Supreme Court of Georgia. July 11, 1907.)

**1. CARRIERS—INJURY TO PASSENGER—NEGLIGENCE OF PASSENGER.**

In a suit by a passenger against a railroad company to recover damages for a personal injury, where the pleadings and evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it is error for the court to omit an instruction to the jury embodying the principle expressed in Civ. Code 1895, § 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."

**2. SAME—INSTRUCTIONS.**

The error referred to in the preceding note was emphasized by an instruction that, if the plaintiff and the agents of the company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him, without the qualification contained in Civ. Code 1895, § 3830.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by E. V. Gore against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. S. Griggs, Hugh M. Dorsey, and Lamar Rucker, for plaintiff in error. Lawton Nally and H. W. Nally, for defendant in error.

EVANS, J. In her petition against the Southern Railway Company to recover damages for injuries alleged to have been sustained by her while a passenger of defendant's train, Mrs. E. V. Gore made substantially the following allegations: Petitioner, in company with her adult daughter, presented herself as a passenger on one of defendant's trains, after having provided themselves with tickets. Just as they were about to enter the train, petitioner's daughter notified the conductor that petitioner was blind and 61 years of age, and requested that she and petitioner might have time to enter the cars, and get seats therein. Petitioner and her daughter were assisted by the conductor on the first step of the car, and immediately after helping petitioner on the step, and before she had an opportunity to enter the coach, the conductor signaled the engineer, and the train immediately started. While petitioner was on the outside of the platform of the car, endeavoring to enter the same, she was violently thrown against the door facing of the car by the jerking motion of the train, and sustained an injury to her left knee. Petitioner aided by her daughter proceeded into the car, and, on account of its crowded condition, it was necessary for her to go through the car to find a vacant seat, and, while looking for a seat, petitioner was thrown by the motion and sudden jerking of the car against the arm of one of the seats in the car, and, as a consequence, was greatly bruised and wounded in the right leg. She alleged that the injuries thus sustained are permanent in character, that she has suffered

great physical pain, and that she has expended a large sum for medicines and medical attention in her efforts to be cured of the soreness and lameness occasioned by her injuries. She alleged that the company was negligent, in that it did not give her a sufficient time to get aboard the train in safety, in not assisting her upon the train after her physical infirmities were made known to the conductor, in not allowing a sufficient time to petitioner to find a seat, in putting the train in motion while petitioner was outside on the platform endeavoring to get inside the car, and in not furnishing sufficient cars in which passengers thereon could have seats, and conveniently find them while boarding the train. The railroad company by way of plea denied all the allegations of negligence and injury, and further pleaded that, if petitioner was injured and damaged as set out in her petition, it was through lack of care on her part.

1. The plaintiff submitted evidence tending to show that she was injured as set out in her petition. Her daughter testified that the train did not stop long enough for her mother and herself to enter the car; that the conductor assisted plaintiff on the first step of the coach and signaled the engineer, and the train started with a jerk while plaintiff was on the coach platform, and before she had had time to enter the car, and the sudden jerk of the train caused plaintiff to be thrown against the facing of the car door. After entering the car, they found it crowded with passengers, and it was necessary to go half way through the car to find a vacant seat. While looking for a seat, the plaintiff injured her knee by striking it against the arm of a seat. The defendant submitted evidence tending to show that it was not negligent as alleged; that the train stopped long enough for the plaintiff to board the car and find a seat; that the car was not crowded; that the conductor was not informed and did not know of plaintiff's infirmity, and no one applied to him for assistance; and that no complaint of the plaintiff's injury was made to him. The trial resulted in a verdict for the plaintiff, and the defendant was refused a new trial.

From this brief reference to the evidence, it will be seen that there was a conflict as to the defendant's liability. Negligence and diligence are always questions of fact for the jury under appropriate instructions by the court upon the law. When it was shown that the plaintiff was a passenger, and sustained injuries caused by the running of the defendant's locomotive and cars, the plaintiff made out a prima facie case, and was entitled to recover unless the evidence showed (1) that the plaintiff's negligence caused the injury; or (2) that the railroad company was not negligent; or (3) that, if the railroad company was negligent, the plaintiff could have avoided the consequences to herself of that negligence by the exercise of ordinary care. In its motion for a new trial complaint is

made that the court entirely omitted to charge the principle involved in Civ. Code 1895, § 3830, that, if the plaintiff by ordinary care could have avoided the consequences to herself caused by the defendant's negligence, she was not entitled to recover. This principle is not alluded to in the charge, and, indeed, the court certified that he "nowhere charged the language or substance of section 3830." The defendant's plea and evidence not only made an issue as to the defendant's own negligence, but also as to plaintiff's diligence. The law denies a plaintiff the right of recovery, not only where her negligence causes the injury, but also where by the exercise of ordinary care she could have avoided the consequences to herself of the defendant's negligence. Granting the defendant may have been negligent, it was for the jury to say whether the consequences of that negligence could have been prevented by proper care on the plaintiff's part. This was one of the substantial defenses of the defendant, and the court was bound to notice it in defining the law appropriate to the issues made by the pleadings and evidence. In every case it is the duty of the court to furnish the jury the legal principles applicable and necessary to guide them in the solution of the substantive issues made by the pleadings and evidence. An omission to instruct the jury upon the law pertaining to a defense which finds support in the evidence, and which would be a bar to a recovery, is a denial of a substantial right to the defendant. The railroad company was entitled to have the jury weigh the circumstances attending the injury alleged to have been sustained, and to decide whether under those circumstances the plaintiff in the exercise of ordinary care could have avoided the consequences to herself caused by the defendant's negligence, if it was, in fact, negligent, and to have the jury instructed upon the law appropriate to this issue. A failure to charge the jury on this issue was substantial error. *Central R. Co. v. Harris*, 76 Ga. 501; *Atlanta Railway Co. v. Gardner*, 122 Ga. 92, 49 S. E. 818.

2. The error committed by the court in the failure to charge the substance of Civ. Code 1895, § 3830, was accentuated by the instruction: "No person shall recover damages from a railroad company for an injury to himself or his property where the same is done by his consent or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." This last charge is made a ground of exception in the motion for a new trial, because it joins and states in immediate connection, and without explanation, two distinct propositions of law without qualification. The charge of which complaint is made is substantially Civ. Code

1895, § 2322. In *A. P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, it was held to be error to give this entire section in immediate connection without qualifying it by an instruction to the effect that if both parties were at fault, and the alleged injury was the result of the fault of both, and the plaintiff could not, by the use of ordinary care, have avoided the alleged injury to herself, occasioned by the defendant's negligence, notwithstanding she may have been to some extent negligent, she would be entitled to recover, but the amount of damages should be diminished in proportion to the amount of default attributable her. *Macon Ry. Co. v. Streyer*, 123 Ga. 280, 51 S. E. 342, and citations.

The other grounds of the motion are without merit, and a new trial is granted for the errors herein pointed out.

Judgment affirmed. All the Justices concur.

(128 Ga. 633)

### KELLY & JONES CO. v. MOORE.

(Supreme Court of Georgia. July 12, 1907.)

#### 1. PLEADING—AMENDMENT.

There was no error in allowing the amendment offered by the plaintiff to be filed and proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 676.]

#### 2. JUDGMENT—RES JUDICATA.

An employé brought suit to recover installments of salary for the period of three months, alleging that the contract of employment was for a year, the salary being payable monthly, and that he had been wrongfully discharged before the end of the year. The defendant had notice that this suit was pending against him, and allowed a judgment to be taken therein by default. Subsequently the plaintiff instituted the present action to recover the salary for the other months of the year. *Held*, that the defendant was concluded in the second action as to all matters which the court must necessarily have adjudicated in the former case in order to reach the judgment there rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1256.]

#### 3. SAME.

The defendant was concluded as to the matters pleaded by him in his answer to the second action, and the court did not err in refusing to allow them to be proved.

#### 4. MASTER AND SERVANT—ACTION FOR SERVICES.

The evidence demanded the verdict; and the other errors complained of, if errors at all, were harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 49.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by V. A. Moore against the Kelly & Jones Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See 54 S. E. 118.

Reuben B. Arnold and C. D. Maddox, for plaintiff in error. Culberson & Johnson, for defendant in error.

BECK, J. Moore, the plaintiff in the court below, filed a declaration in attachment against the Kelly & Jones Company, a non-resident corporation, to recover \$1,000 alleged to be due plaintiff by defendant as salary. The plaintiff alleges that he was employed by the defendant as sales agent for the period of one year, beginning February 12, 1898; that he was wrongfully discharged during the following month of May; that he has heretofore obtained a judgment against this defendant for the salary due him from the time he was wrongfully discharged until September 12, 1898, and he brings this action to recover the amount of salary due him under said contract from September 12, 1898, to February 12, 1899. To this petition the defendant filed an answer, alleging that there was a written contract between the plaintiff and the defendant, under the terms of which defendant claimed that it had the right to discharge plaintiff before the end of the year, and that plaintiff's discharge was lawful; wherefore defendant denied being indebted to plaintiff in any amount whatever. After the filing of this answer, the plaintiff offered to amend his petition by alleging that the matters set up in defendant's answer had been adjudicated in a former case in the city court of Atlanta, in which case the plaintiff had recovered the part of the salary alleged to be due him by the defendant up to the 12th day of September, 1898. The defendant objected to the allowance of this amendment, and also objected to the admission of the said former judgment, upon certain grounds which will be noted in detail. The petition in the former case in the city court, after setting out certain letters that had passed between plaintiff and defendant, alleged that "in consequence of said correspondence, and in compliance with its terms, petitioner agreed to represent defendant as sales agent in the territory covered by the states of Louisiana, Mississippi, Alabama, Tennessee, Georgia, Florida, North Carolina, South Carolina, and Virginia, for one year from February 12, 1898, at a salary payable monthly of \$200 per month." The petition in the present case sets out substantially the same correspondence between the parties, and alleges that "shortly thereafter the Kelly & Jones Company wired petitioner to come to Pittsburg, which petitioner did, \* \* \* when defendant renewed his proposition to employ petitioner as sales agent for [the states above mentioned] for one year at a salary payable monthly at the rate of \$200 per month, beginning from February 12, 1898," which proposition petitioner accepted. It requires no argument to show that the suit in the city court and the case at bar were upon the same contract of employment; and that there is no merit in the contention of the plaintiff in error that the former suit "was based upon a different contract alleged to have been in writing, while in the present

case that contract was a verbal one, and is claimed to have been made in a personal interview."

Another objection urged by the defendant to the allowance of said amendment was that it "set forth a new cause of action." Clearly this contention has no foundation in fact. The amendment set forth no cause of action at all. The judgment from the city court, which was set up in the amendment, could not operate as the basis of any further demand against the defendant. Its only effect could be to estop the defendant from setting up any matter of defense in the present case that was adjudicated in the former suit.

But defendant further contends that "the judgment in said city court was a default judgment; that there were no issues made therein, and no plea filed by the defendant, while in the present case issues were made and a plea filed on various grounds; that the two suits made different issues, and that the judgment in the city court could not work an estoppel against defendant in the present case." In said former case in the city court the plaintiff, Moore, sued out an attachment against the Kelly & Jones Company, and a summons of garnishment was duly issued and served on the garnishee. The defendant dissolved the garnishment by giving bond and security as provided by the Code, and name of counsel was marked on the docket of the city court as representing the defendant; but, owing to a misunderstanding between defendant and counsel, no answer or plea was filed, and, when the case was called for trial, the plaintiff submitted evidence to sustain his case, and a verdict was rendered in his favor. The defendant filed a written motion to set aside the judgment entered upon said verdict; one of the several grounds of the motion being that there was an agreement between the parties in writing, and the writing was kept concealed and not exhibited to the court and jury trying the case, and by so doing the plaintiff made it appear that he had a just cause, when, in fact, he had no right of recovery. And this court held that the defendant was concluded by the judgment on this question, and could not reopen the proceedings. Mr. Justice Little, in delivering the opinion of the court, said: "The defendant in attachment acquired notice of the pendency of the suit, and sent one of its officers to the city of Atlanta, where the attachment proceedings were pending, and dissolved the garnishment. The effect of this act was equivalent to a personal service on it [the defendant]." *Moore v. Kelly & Jones Co.*, 109 Ga. 798, 35 S. E. 168.

As we have seen above, these two suits were between the same parties and upon the same contract of employment; the former being a suit to recover the salary due the plaintiff under said contract from June 12, 1898, to September 12th, and the latter (the present



case) to recover the balance of said salary from September 12th to February 12th of the following year. No issues were made, or sought to be made, in the second case which could not have been made on the trial of the first. The fact that there was a written contract between the parties, which settled their rights favorably to the defendant, if there was such a contract, was a fact known to the defendant before the first trial. The defendant had notice of that suit, and could have availed himself of this defense at that time. But this he failed to do, and the court adjudicated those issues in favor of the plaintiff. In entering the default judgment, the court was necessarily bound to find and hold that the plaintiff had a contract with the defendant as set out in his petition, that this contract was for a year, and that the plaintiff had been wrongfully discharged before the end of that year, and was entitled to recover the balance of the salary up to the time of bringing suit. No other issues were presented in the trial of the second case, which was for the salary that had accrued from the time of the bringing of the first suit until the end of the period contracted for. "It is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded." 24 Am. Eng. Enc. Law (2d Ed.), 768; Callaway v. Irvin, 123 Ga. 344, 51 S. E. 477. In the present case, the question as to whether or not there was a contract in writing between the parties, as defendant contends, under the terms of which the plaintiff could be lawfully discharged, and all other questions touching plaintiff's right of action against the defendant, were material, issuable facts, clearly involved and necessarily adjudicated in the former case in the city court. And, under the authorities above cited, it makes no difference, so far as the conclusiveness of that judgment is concerned, whether issue was actually joined upon them or not. In the case of Kennedy v. McCarthy, 73 Ga. 346, the following facts appear: A discharged employé claimed that his contract of employment was for a year, payable monthly, and that he was wrongfully discharged before the end of the year. At the end of the first month after he was discharged, he brought suit for the wages of that month. The employer defended on the ground of incompetency of the employé, and claimed that he had a right to discharge him. The employé obtained a judgment, which was paid. Subsequently the employé again sued for the other months of the year, and the defense was substantially as before. Under these facts the court held "that the decision in the first case was conclusive as to those defenses in the second." See Civ. Code 1895, § 3741. We are

constrained to hold, therefore, in this case that the court committed no error in allowing the plaintiff to amend his petition by setting up the judgment in the former case, and in holding that said judgment concluded the defendant as to all questions touching the nature and effect of the contract between the parties. No other defense was made; and, the plaintiff having introduced evidence which authorized a finding in his favor, the court did not err in directing a verdict accordingly.

In view of what has been ruled above, the errors complained of in the other grounds of the motion, if errors at all, were harmless. *Rowe v. Ware*, 30 Ga. 278.

Judgment affirmed. All the Justices concur.

(128 Ga. 687)

### WESTERN & A. R. CO. v. YORK.

(Supreme Court of Georgia. July 12, 1907.)

#### 1. PLEADING—PETITION—SUFFICIENCY.

The petition as amended set forth a cause of action as against a general demurrer and was not subject to any of the grounds set up in the special demurrers.

#### 2. WRIT OF ERROR—REVIEW—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Remarks of counsel while addressing the jury, which do not undertake to introduce any material fact not disclosed by the evidence, but which are merely oratorical in character, do not constitute sufficient ground for declaring a mistrial.

#### 3. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Under the facts of this case it was not erroneous for the judge to charge: "The duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 92.]

#### 4. TRIAL—QUESTIONS FOR JURY—WRIT OF ERROR—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Diligence of the person injured and negligence of the defendant were questions peculiarly for the jury. The evidence upon those questions and upon all other issues made was of such character as that we cannot say that the verdict in favor of the plaintiff was entirely unsupported. The discretion of the trial judge, therefore, in refusing to grant a new trial, will not be interfered with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3871-3874.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by L. E. York against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John L. Tye, Clay & Blair, and Tye & Bryan, for plaintiff in error. J. Z. Foster, for defendant in error.

ATKINSON, J. 1. The questions raised by demurrer are of such character as that we

do not deem it necessary to make further reference to them than is expressed in the first headnote.

2. During the progress of his argument before the jury, counsel for the plaintiff in the court below used the following language: "Man is the noblest creation of God. God made no greater creation than man. He is the grandest product of divine handicraft; and He hedged about him the law: 'Thou shalt not kill.' God told Cain that the blood of his brother Abel cried to him from the ground. The most eloquent sermon I ever heard in my life was from the text: 'The statutes of the Lord are right.' 'Thou shalt not kill' is the statute of the Lord God Almighty. It was made for the protection of the lord of creation—for man; and it applies to a railroad corporation just as much as it does to an individual. If a man is dead by the reckless negligence of the servants and agents of the railroad corporation, the full consequences to him are the same. He is just as dead as if he had died by the uplifted and directed and murderous hand of his brother man. The shedding of innocent blood is just the same—just the same. Our land is defiled when innocent blood is shed therein, whether it be by the hand of a railroad corporation, or whether it be by the murderer's hand, or some one contending in a death grapple with his brother man; and the curse of God, which is charged against that, is upon it just the same. Gentlemen of the jury, when George W. York died on that public crossing in the city of Acworth, last October was a year ago, his innocent blood stained the right of way of this defendant." Whereupon counsel for the defendant moved the court to declare a mistrial upon the ground that the remarks by counsel for the plaintiff were improper. The court refused to declare a mistrial. Exception is taken to such ruling, and the same is made a ground of the motion for new trial. We do not think the remarks of counsel were of such character as to require the court to declare a mistrial. A mere flight of oratory of counsel when addressing the jury is not ground for a mistrial. Counsel may bring to his use in the discussion of the case well-established historical facts, and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case. It is not impassioned oratory which the law condemns and discredits in the advocate, but it is the introduction of facts not disclosed by the evidence, which requires the judge to use his power of declaring a mistrial. In this connection, see *W. & A. R. Co. v. Cox*, 115 Ga. 719, 42 S. E. 74; *Patterson v. State*, 124 Ga. 409, 52 S. E. 534; *Taylor v. State*, 121 Ga. 354, 49 S. E. 303 (7); *McNabb v. Lockhart*, 18 Ga. 507, and citations. An examination of the remarks of counsel which are complained of will show that there was no effort

to introduce any fact not disclosed by the evidence.

3. While instructing the jury, the court charged as follows: "The duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence." In one of the grounds of motion for new trial this charge is complained of as erroneous, for the reason that it was inapplicable to the facts of the case, and because it did not correctly state the law; it being contended that the plaintiff's duty to exercise ordinary care for his own safety begins as soon as the defendant's negligence comes into existence. We have carefully examined the evidence, and cannot agree with counsel for the plaintiff in error that this rule is inapplicable to the facts of the case. The charge of the court is not exactly in the language of the opinions in the cases of *W. & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, and *Williams v. Southern Ry. Co.*, 126 Ga. 710, 55 S. E. 948, but is substantially in accord with the principle therein ruled.

4. Diligence of the person injured and negligence of the defendant were questions peculiarly for the jury. Under the principle announced in *Williams v. Southern Ry. Co.*, supra, the evidence upon these questions was of such character as to authorize the case to go to the jury. See, also, *Shaw v. Ga. R.*, 127 Ga. 8, 55 S. E. 960; *G. C. & N. R. Co. v. Mathews*, 116 Ga. 424, 42 S. E. 771. The amount of the verdict was such as to indicate that the jury regarded the plaintiff's husband as guilty of some negligence, but not of such conduct as would amount to a want of ordinary care for his own safety after the negligence of the defendant came into existence and was known, or by the exercise of ordinary care could have been known, by him. The evidence upon this point was of such character as to support such a finding, and the evidence as a whole was sufficient to support the verdict. Under these conditions we will not interfere with the discretion of the trial court in refusing to grant a new trial. See, in this connection, *L. & N. R. Co. v. Gassoway* (decided April 13, 1907) 57 S. E. 231; *Southern Ry. Co. v. Rumsey*, 124 Ga. 742, 52 S. E. 812. Judgment affirmed. All the Justices concur.

(129 Ga. 1)

MACK et al. v. KIME et al.

(Supreme Court of Georgia. Aug. 9, 1907.)

# 1. RELIGIOUS SOCIETIES — ECCLESIASTICAL TRIBUNALS — BINDING EFFECT OF DECISIONS.

A voluntary religious society, which constitutes a subordinate part of a religious organization having established tribunals authorized, either expressly or impliedly, to decide

all questions of faith, discipline, rule, or ecclesiastical government, is bound by the decisions of all such tribunals on all questions determined by them within the respective jurisdictions of each. In such cases, where a right of property asserted in a civil court is dependent on a question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and that question has been decided by the highest tribunal within the organization, to which it has been regularly and properly carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Religious Societies, §§ 154–157.]

## 2. SAME.—JUDICIAL SUPERVISION.

The general rule is that, where property rights are involved, the civil courts will interfere to protect the members of an ecclesiastical organization who adhere to the tenets and doctrines which the organization was organized to promulgate, and protect them in the right to use the property, as against those members of the organization who are attempting to divert the same to purposes utterly foreign. The constituted authorities of a church cannot, where members' rights are involved, entirely abandon the purposes for which the church was organized, and divert the property to other uses. The civil courts, in determining whether there has been an abandonment of the tenets and doctrines of the organization, will look to the decisions of the constituted tribunals of the church having jurisdiction to decide differences as to teachings and doctrines, and will in no case undertake to revise the judgment of such tribunal so long as the question before it was one clearly within its jurisdiction; and interference will only be had when it is manifest that what the church tribunal has adjudicated is not a difference of opinion as to doctrine or teachings, but an attempt, in the form of such adjudication, to utterly abandon the purposes for which the church was organized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Religious Societies, § 146.]

## 3. SAME.

When property acquired by an ecclesiastical organization is devoted, by the express term of a gift, grant, or sale, to support any specific religious doctrine or belief, the civil courts, when necessary to protect the trust to which the property has been devoted, will inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust. But if property is acquired in the ordinary way of purchase or gift, for the use of a religious society, the civil courts will only inquire as to who constituted that society, or its legitimate successors, and award to them the use of the property, but it will not, in case of a schism in the organization, inquire into the existing religious opinion of those who adhere to the acknowledged organization.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Religious Societies, §§ 146, 147–153.]

## 4. SAME.

The General Assembly of the Cumberland Presbyterian Church, under the constitution of that organization, has executive, legislative, and judicial authority. It is the highest court of the church, and also the highest authority in legislative and executive matters. When the provisions of the constitution in reference to the authority of the General Assembly are taken together with and in the light of the purposes for which the organization was formed and the history and antecedents of the organization itself, a reasonable construction of the terms of the constitution gives to the General Assembly authority to determine whether the teaching and doctrines and form of govern-

ment of another organization are in accord with it, and, if so, to unite with such organization upon such terms and under such name as the judgment of the General Assembly shall dictate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Religious Societies, §§ 87–88.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. R. Kime and others against George H. Mack and others. Judgment for plaintiffs, and defendants bring error. Reversed.

A brief historical statement as to the organization and progress of the Cumberland Presbyterian Church is appropriate and will be more or less helpful in the determination of the legal questions which will be hereafter discussed. The Cumberland Presbyterian Church was organized in Dickson county, Tenn., February 4, 1810. It was the outgrowth of the great revival of 1800—one of the most powerful revivals that this country has ever witnessed. The founders of the church were Finis Ewing, Samuel King, and Samuel McAdow. They were ministers in what is now commonly known as the Northern Presbyterian Church, but they rejected the doctrine of election and reprobation, as taught in the Westminster Confession of Faith. These three ministers, on the date above referred to, met in a log cabin and organized an independent presbytery, calling it the Cumberland Presbytery; and this was the beginning of the Cumberland Presbyterian Church. In three years the church had become sufficiently large to form three presbyteries, and these presbyteries, in 1813, met and constituted a synod. This synod, in a paper called the "Brief Statement," set forth the points wherein the Cumberland Presbyterian dissented from the Westminster Confession. They were as follows: "(1) That there are no eternal reprobates. (2) That Christ died, not for a part only, but for all mankind. (3) That all infants dying in infancy are saved through Christ and the sanctification of the Spirit. (4) That the spirit of God operates on the world, or as coextensively as Christ has made atonement, in such a manner as to leave all men inexcusable." In 1814 the synod revised the Westminster Confession of Faith in the particulars above referred to. Subsequently the General Assembly of the Cumberland Presbyterian Church was formed, and in 1829 this judicature made such changes in the form of government as were demanded by the formation of this court. Such, in brief, was the early history of this church.

It is to be noted that in its form of government it is patterned largely, if not altogether, after the form of government of the parent church. It asserted, in forcible and strong terms, the differences which exist-

ed between it and the parent church; but there seems to have been no substantial or material difference, in the form of government which they adopted, from that which the church from which they sprang was then using. The Cumberland Presbyterian Church grew in numbers and in influence, and especially in the state in which it was organized and adjacent states; but its territory was not limited to these. In 1906 it contained 17 synods, 114 presbyteries, and a total membership of nearly 200,000. As is true in nearly every case where there is a division on ecclesiastical teachings and a separation resulting therefrom, there were in this instance persons in both churches who seemed to be desirous of reconciling the differences and bringing together the two organizations upon such terms as would be consistent with the consciences of each side. How far back this desire for reunion may be traced is immaterial. In 1903 it took definite shape, and committees were appointed by the General Assemblies of the two churches to take into consideration the question of the reunion of the two bodies. This movement for reunion does not seem to have been limited merely to a reunion of the two branches of the Presbyterian Church involved in the present controversy, but was broader in its scope, and intended to accomplish, if practicable, the reunion and consolidation of the various ecclesiastical organizations in the United States that adhere to and teach the doctrines of what is commonly known as the "Presbyterian Church." The record discloses, in detail, the various steps that were taken by the General Assemblies of the two churches in reference to the union. This finally culminated in the report of the committee on union and reunion being adopted by the General Assembly at Decatur, Ill., in May, 1906. This report set forth the terms upon which the union was to be established. The result of the vote of the General Assembly of the Cumberland Presbyterian Church was as follows:

Ministers voting in the affirmative.....	85
Ruling elders voting in the affirmative....	78
<b>Total affirmative vote.....</b>	<b>165</b>
Ministers voting in the negative.....	50
Ruling elders voting in the negative.....	41
<b>Total negative vote.....</b>	<b>91</b>
<b>Affirmative majority.....</b>	<b>74</b>

The moderator then declared that the resolution adopting the report of the committee on fraternity and union had been carried, and that thereby the report of the committee on fraternity and union had been accepted, and in accordance with this report the General Assembly adjourned sine die, to meet thereafter only as a component part of the General Assembly of the Northern Presbyterian Church. It also appeared that prior

to the action of the General Assembly the question of reunion had been submitted to the different presbyteries, and 111 presbyteries had expressed themselves; 60 of them voting approval, and 51 disapproval. It thus appears that a majority of the presbyteries and a majority of the commissioners in the General Assembly had declared in favor of the union. It is contended, however, by the dissenting members of the Cumberland Presbyterian Church that an analysis of the vote in the presbyteries will show that a majority of the individuals composing these presbyteries did not favor the reunion; that is, that while a majority of the presbyteries, as such, favored the union, the majority of the members composing the different presbyteries did not approve of the union. Before the adjournment of the General Assembly at Decatur those commissioners who were opposed to the union entered their protest against the adoption of the report of the committee; and after the General Assembly had adjourned without a date, to meet in subsequent years as a component part of the Northern Presbyterian Church, the dissenting members assembled themselves together and declared themselves to be the General Assembly of the Cumberland Presbyterian Church, and proceeded to exercise, as far as they could, the powers of such body. The case which we now have in hand is one of the numerous controversies which sprang up in the territory covered by the Cumberland Presbyterian Church, bringing in question the regularity of the alleged union between that church and the Northern Presbyterian Church.

Kime and others brought an equitable petition in behalf of the members of the First Cumberland Presbyterian Church of Atlanta, Ga., against Mack and others, who were alleged to have been members of that church, but who now claim and profess to be officers and members of the Presbyterian Church of the United States of America (hereinafter referred to, for convenience, as the "Northern Presbyterian Church"), and the Penn Mutual Life Insurance Company, alleging that the First Cumberland Presbyterian Church of Atlanta was an existing voluntary association of persons for the purpose of divine worship, etc., in harmony with the constitution, creed, etc., of the Cumberland Presbyterian Church, which had had its complete machinery for the administration of its affairs and property since its organization in 1810, and that the constitution and laws of said church did not authorize any person or body of persons to destroy its existence as a separate and distinct church, or to carry it over, as a body, with its property, into another organization; that the Northern Presbyterian Church is a separate and distinct church, having its peculiar constitution, creed, etc., as well as complete machinery for the administration of its af-

fares; that one important difference between the two churches is that the white and black races are not brought together in the presbyteries, synods, and assemblies of the Cumberland Presbyterian Church, while in the Northern Presbyterian Church this is possible, and is optional with the negro Presbyterian churches; that the First Cumberland Presbyterian Church of Atlanta owns certain described real property; that Kime and others are trustees of the Atlanta church, and custodians of the title of the property owned by it, and as such they have made a loan deed to property owned by it to secure an indebtedness of \$5,000, evidenced by notes payable to the Penn Mutual Life Insurance Company, and \$4,000 of said indebtedness is still unpaid; that it has other outstanding obligations to the extent of \$2,200 or more; that Mack has been pastor of the church, and still occupies the pulpit and exercises the functions of pastor thereof, but not as a Cumberland Presbyterian minister, but as a minister of the Northern Presbyterian Church, of which he claims to be a member; that certain named parties are elders, and the only elders, of the Atlanta church, and that other named parties who were elders are still using the property and assuming to act in an official capacity, but not as elders of the Cumberland Presbyterian Church, but as elders of the Northern Presbyterian Church; that the defendants, and the class whom they represent, were formerly members of the Cumberland Presbyterian Church, and have been for a long time advocating the destruction of that church and its union with the Northern Presbyterian Church, by virtue of which the Cumberland Presbyterian Church, with all its membership and property, would pass out of existence; that since May 24, 1906, they have been declaring that they are no longer members of the Cumberland Presbyterian Church but members of the Northern Presbyterian Church, and that the Cumberland Presbyterian Church has passed out of existence and its property has passed into the Northern Presbyterian Church; that the said defendants are interfering with the plaintiffs and other loyal members of the Atlanta church in their efforts to worship in the building and the performance of other duties, and are preventing plaintiffs from so worshiping, and are usurping the rights of the members of the First Cumberland Presbyterian Church by holding all religious and business meetings of the said congregation as meetings of the Northern Presbyterian Church; that the defendants are attempting and threatening to proceed to have the property of the said First Cumberland Presbyterian Church transferred and assigned to the Northern Presbyterian Church; that the membership of the Atlanta church has heretofore numbered about 100, but since May 24, 1906, 40 thereof, including the defendants, profess to have become members of

the Northern Presbyterian Church, and about 40, including petitioners, still remain loyal members of the First Cumberland Church of Atlanta, and will not consent to any union with the Northern Presbyterian Church, because they cannot conscientiously do so, nor to the transfer of any property, and that the remainder of the membership have either withdrawn or remain indifferent to the results flowing from the alleged union; that the conduct of the defendants has greatly damaged the usefulness of the church and impaired its financial resources; that the rights of the creditors are also seriously affected; that the property of the Atlanta church was donated and acquired by it for specific purposes and trusts, to be carried out under the constitution of the Cumberland Presbyterian Church, and the transfer of the same to the Northern Presbyterian Church would be a diversion of church funds; that subscriptions were made and collected upon the faith that the church was to continue as the Cumberland Presbyterian Church. The prayers of the petition were that the defendants be enjoined from transferring the property of the Atlanta church, or any part thereof, to the Northern Presbyterian Church, and from interfering with the use and control of the property by the members of the Atlanta church, or in any manner changing the present status of the property and title, and from using, in the name of the Northern Presbyterian Church, the property of the Atlanta church, except by permission of that church. Upon this petition being presented to the judge, he granted a restraining order and set the case down for a hearing.

The defendants filed an answer, to which they attached numerous exhibits, from which appear the history of the organization of the Cumberland Presbyterian Church and the differences between the teachings and doctrines of that church and the Northern Presbyterian Church, and also the various efforts which had been made from time to time to reconcile the differences between these two branches of the Presbyterian Church, and in which are set forth in detail the different steps that had been taken by the two branches of the church looking to a reconciliation of the differences between the two and a union of the same, and also the various preliminary actions by the different bodies of the two churches which finally culminated, in 1906, in the union of the two branches of the church. At the hearing the evidence was voluminous, all bearing upon the issues which were set forth in the pleadings. The judge granted an injunction as prayed for, his order stating: "The union between the Presbyterian Church of the United States of America and the Cumberland Church was null and void. The action of the General Assembly of the Cumberland Presbyterian Church seeking to effect such union was

without constitutional authority and in conflict with the express provisions of their constitution." To the judgment granting the injunction the defendants excepted.

The following parts of the constitution of the Cumberland Presbyterian Church were in evidence:

#### Church Courts.

"(24) It is necessary that the government of the church be exercised under some certain and definite form, and by various courts, in regular gradation. These courts are denominated Church Sessions, Presbyteries, Synods, and the General Assembly.

"(25) The Church Session exercises jurisdiction over a single church; the Presbytery over what is common to the ministers, Church Sessions, and Churches within a prescribed district; the Synod over what belongs in common to three or more Presbyteries, and their ministers, Church Sessions, and Churches; and the General Assembly over such matters as concern the whole church; and the jurisdiction of these courts is limited by the express provisions of the constitution. Every court has the right to resolve questions of doctrine and discipline seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity, or progress of the church; and, although each court exercises exclusive original jurisdiction over all matters specially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation."

"(27) The Church Session is charged with maintaining the spiritual government of the church, for which purpose it is its duty to inquire into the doctrines and conduct of the church members under its care; to receive members into the church; to admonish, suspend, or excommunicate those found delinquent, subject to appeal; to urge upon parents the importance of presenting their children for baptism; to grant letters of dismission, which, when given to parents, should always include the names of their baptized children; to ordain and install ruling elders and deacons when elected, and to require those officers to devote themselves to their work; to examine the records of the proceedings of the deacons; to establish and control Sabbath schools and Bible classes, with especial reference to the children of the church; to order collection for pious uses and church purposes; to take the oversight of the singing in the public worship of God; to assemble the people for worship when there is no minister; to concert the best measures for promoting the spiritual interests of the church; to observe and carry out the injunctions of the higher courts; and to appoint representatives to the higher courts, and require on their return a report of their diligence."

"(31) The Presbytery has the power to ex-

amine and decide appeals, complaints, and references brought before it in an orderly manner; to receive, examine, dismiss, and license candidates for the holy ministry; to receive, dismiss, ordain, install, remove, and judge ministers; to review the records of the Church Sessions, redress whatever they may have done contrary to order, and take effectual care that they observe the government of the church; to establish the pastoral relation, and to dissolve it, at the request of one or both of the parties, or where the interests of religion imperatively demand it; to set apart evangelists to their proper work; to require ministers to devote themselves diligently to their sacred calling, and to censure and otherwise discipline the delinquent; to see that the injunctions of the higher courts are obeyed; to condemn erroneous opinions which injure the purity or peace of the church; to resolve questions of doctrine and discipline seriously and reasonably proposed; to visit particular churches, to inquire into their conditions, and redress the evils that may have arisen in them; to unite or divide churches with the consent of a majority of the members thereof, and, for cause, to dissolve the relations between it and a particular church, which shall thereafter cease to be a constituent of the Cumberland Presbyterian Church, and forfeit all rights as such; to form and receive new churches; to take special oversight of vacant churches; to concert measures for the enlargement of the church within its bounds; in general, to order whatever pertains to the spiritual welfare of the churches under its care; to appoint representatives to the higher courts; and, finally, to propose to the Synod, or to the General Assembly, such measures as may be of common advantage to the church at large."

"(37) The Synod has power to receive and decide all appeals, complaints, and references regularly brought up from the Presbyteries; to review the records of the Presbyteries, and to redress whatever they may have done contrary to order; to take effectual care that Presbyteries observe the government of the church, and that they obey the injunctions of the higher courts; to create, divide, or dissolve Presbyteries, when deemed expedient; to appoint ministers to such work, proper to their office, as may fall under its own particular jurisdiction in general; to take such order with respect to the Presbyteries, Church Sessions, and Churches under its care as may be in conformity with the principles of the government of the church and of the word of God, and as may tend to promote the edification of the church; to concert measures for promoting the prosperity and enlargement of the church within its bounds; and, finally, to propose to the General Assembly such measures as may be of common advantage to the whole church."

"(40) The General Assembly is the highest court of this church, and represents in one

body all the particular churches thereof. It bears the title of the 'General Assembly of the Cumberland Presbyterian Church,' and constitutes the bond of union, peace, correspondence, and mutual confidence among all its churches and courts."

"(43) The General Assembly shall have power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the church, in all cases submitted to it; to review the records of the synods; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide, or dissolve Synods; to institute and superintend the agencies necessary in the general work of the church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical and other disputations according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church; to authorize Synods and Presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts and lying within their geographical bounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth, and holiness throughout all the churches under its care."

"(60) Upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof voting thereon, the confessions of faith, catechism, constitution, and rules of discipline may be amended or changed when a majority of the Presbyteries, upon the same being transmitted for their action, shall approve thereof. The other parts of the government—that is to say, the general regulations, the directory for worship, and the rules of order—may be amended or changed at any meeting of the General Assembly by a vote of two-thirds of the entire number of commissioners enrolled at that meeting, provided such amendment or change shall not conflict, in letter or spirit, with the Confession of Faith, Catechism, or constitution."

The defendants in error contend that the teachings of the Cumberland Presbyterian Church are radically different, which they claim appears when the teachings and doctrines of the two churches are placed side by side, as they are in the parallel columns which follow:

Presbyterian Church in the United States of America.

Confessions of Faith.

Chapter III.

Of God's Eternal Decree.

III. By the decree of God, for the manifestation of his glory, some men and angels are predestined unto everlasting life, and others foreordained to everlasting death.

IV. These angels and men, thus predestined and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.

V. Those of mankind that are predestined unto life, God, before the foundation of the world was laid, according to his eternal and immutable purpose and the secret counsel and good pleasure of his will, hath chosen in Christ unto everlasting glory out of his mere free grace and love, without any foresight of faith or good works, or perseverance in either of them, or any other thing in the creature, as conditions or causes moving Him thereunto; and all to the praise of his glorious grace.

VI. As God hath appointed the elect unto glory, so hath He, by the eternal and most free purpose of His will, foreordained all the means thereunto. Wherefore they who are elected, being fallen in Adam, are redeemed by Christ, are effectually called unto faith in Christ by his spirit working in due season, are justified, adopted, sanctified and kept by His power through faith unto salvation. Neither are any other redeemed by Christ, effectually called, adopted, justified, sanctified and saved, but the elect only.

VII. The rest of mankind, God was pleased, according to the unsearchable counsel of His own will, whereby He extendeth or withholdeth mercy as He pleaseth, for the glory of His sovereign power over His creatures to pass by, and to ordain them to dishonor and wrath for their sin, to the praise of His glorious justice.

The Larger Catechism.

Q. 12. What are the decrees of God?

A. God's decrees are the wise, free and holy acts of the counsel of His will, whereby from all eternity He hath, for His own glory, unchangeably foreordained whatsoever comes to pass in time, especially concerning angels and men.

Q. 13. What hath God

Cumberland Presbyterian Church.

Confession of Faith.

Decrees of God.

8. God, for the manifestation of His glory and goodness, by the most wise and holy counsel of His own will, freely and unchangeably ordained or determined what He himself would do, what He would require His intelligent creatures to do, and what should be the awards respectively of the obedient and the disobedient.

9. Though all divine decrees may not be revealed to men, yet it is certain that God has decreed nothing contrary to His revealed will or written Word.

Free Will.

24. God, in creating man in his own likeness, endued him with intelligence, sensibility and will, which form the basis of moral character, and render man capable of moral government.

25. The freedom of the will is a fact of human consciousness, and is the sole ground of human accountability. Man, in his estate of innocence, was both free and able to keep the Divine law, also to violate it. Without any constraint, from either physical or moral causes, he did violate it.

especially decreed concerning angels and men?

A. God, by an eternal and immutable decree, out of His mere love for the prayers of His glorious grace, to be manifested in due time, hath elected some angels to glory; and in Christ hath chosen some men to eternal life, and the means thereof; and also according to His sovereign power, and the unsearchable counsel of his own will (whereby He extendeth or withholdeth favor as He pleaseth), hath passed by and foreordained the rest to dishonor and wrath, to be for their sin inflicted, to the praise of the glory of His Justice.

#### The Shorter Catechism.

Q. 7. What are the decrees of God?

A. The decrees of God are His eternal purpose according to the counsel of His will, whereby, for his own glory, He hath foreordained whatsoever comes to pass.

#### Chapter X.

##### Of Effectual Calling.

I. All those whom God hath predestined unto life, and those only, He is pleased in his appointed and accepted time effectually to call by His word and Spirit out of that state of sin and death, in which they are by nature, to grace and salvation by Jesus Christ; enlightening their minds spiritually and savingly to understand the things of God; taking away their heart of stone, and giving unto them a heart of flesh; renewing their wills, and by his almighty power determining them to that which is good; and effectually drawing them to Jesus Christ, yet so as they come most freely, being made willing by His grace.

II. This effectual call is of God's free and special grace alone, not from anything at all foreseen in man, who is altogether passive therein, until, being quickened and renewed by the Holy Spirit, he is thereby enabled to answer this call, and to embrace the grace offered and conveyed in it.

III. Elect infants, dying in infancy, are regenerated and saved by Christ through the spirit, who worketh when, and where, and how he pleaseth. So also are all elect persons, who are incapable of being outwardly called by the ministry of the Word.

IV. Others, not elected, although they may be called by the ministry of the Word, and may have some common operations of the Spirit, yet they never truly come to Christ, and therefore cannot be saved. . . .

#### Catechism.

Q. 7. What are the decrees of God?

The decrees of God are His wise and holy purposes to do what shall be for His own glory. Sin not being for His glory, therefore, He has not decreed it.

#### Divine Influence.

23. God, the Father, having set forth His Son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the Holy Spirit with the same intent to every man.

#### Regeneration.

51. Those who believe in the Lord Jesus Christ are regenerated or born from above, renewed in spirit, and made new creatures in Christ.

54. All infants dying in infancy, and all persons who have never had the faculty of reason, are regenerated and saved.

#### The Larger Catechism.

Q. 67. What is the effectual calling?

A. Effectual calling is the work of God's almighty power and grace, whereby (out of his free and especial love to his elect, and from nothing in them moving him thereunto) He doth in his accepted time invite and draw them to Jesus Christ, by His Word and Spirit, savingly enlightening their minds, renewing and powerfully determining their wills, so as they (although in themselves dead in sin) are hereby made willing and able freely to answer His call, and to accept and embrace the grace offered and conveyed therein.

Q. 68. Are the elect only effectually called?

A. All the elect, and they only, are effectually called, although others may be and often are outwardly called by the ministry of the Word, and have some common operation of the Spirit, who, for their willful neglect and contempt of the grace offered to them, being justly left in their unbelief, do never truly come to Jesus Christ.

#### The Shorter Catechism.

Q. 19. What is the misery of that estate wherein man fell?

A. All mankind, by their fall, lost communion with God, are under His wrath and curse, and so made liable to all the miseries of this life, to death itself, and to the pains of hell forever.

Q. 20. Did God leave all mankind to perish in the estate of sin and misery?

A. God, having out of his mere good pleasure from all eternity elected some to everlasting life, did enter into a covenant of grace to deliver them out of the estate of sin and misery, and to bring them into an estate of salvation by a Redeemer.

Q. 21. Who is the Redeemer of God's elect?

A. The only Redeemer of God's elect is the Lord Jesus Christ, who, being the eternal Son of God, became man, and was so, and continueth to be God and man, in two distinct natures and one person forever.

#### Chapter XI.

##### Of Justification.

I. Those whom God effectually calleth He also justifieth. . . .

IV. God did, from all eternity, decree to justify all the elect; and Christ did in the fullness of time die for their sin, and rise again for their justification; nevertheless they are not justified until the Holy Spirit

#### Catechism.

21. What are the evils of that estate into which mankind fell?

Mankind, in consequence of the fall, have no communion with God, discern not spiritual things, prefer sin to holiness, suffer from the fear of death and remorse of conscience, and from the apprehension of future punishment.

22. Did God leave mankind to perish in this estate?

No; God out of his mere good pleasure and love did provide salvation for all mankind.

23. How did God provide salvation for mankind?

By giving His Son, who became man, and so was and continues to be both God and man in one person, to be a propitiation for the sins of the world.

##### Justification.

43. All those who truly repent of their sins, and in faith commit themselves to Christ, God freely justifies. . . .



both in due time actually apply Christ unto them.

#### Chapter XIII.

##### Of Sanctification.

I. They who are effectually called and regenerated, having a new heart and a new spirit created in them, are further sanctified, really and personally, through the virtue of Christ's death and resurrection, by His Word and Spirit dwelling in them.

##### The Larger Catechism.

Q. 76. What is sanctification?

A. Sanctification is a work of God's grace, whereby they whom God hath before the foundation of the world chosen to be holy are in time, through the powerful operation of his spirit, applying the death and resurrection of Christ unto them, renewed in their whole man after the image of God.

#### Chapter XIV.

##### Of Saving Faith.

I. The grace of faith, whereby the elect are enabled to believe to the saving of their souls, is the work of the spirit of Christ in their hearts, and is ordinarily wrought by the ministry of the Word, by which also, and by the administration of the Sacraments and prayer, it is increased and strengthened.

#### Chapter XVII.

##### Of The Perseverance Of The Saints.

I. They whom God hath accepted in his beloved, effectually called and sanctified by the Spirit, can neither totally nor finally fall away from the state of grace, but shall certainly persevere therein to the end, and be eternally saved.

II. This perseverance of the saints depends not upon their own free will, but upon the immutability of the decree of election, flowing from the free and unchangeable love of God the Father, upon the efficacy of the merit and intercession of Jesus Christ, the abiding of the Spirit of the seed of God within them, and the nature of the covenant of grace, from all which ariseth also the certainty and infallibility thereof.

John M. Gault and E. V. Carter, for plaintiffs in error. E. Marvin Underwood, W. C. Caldwell, and J. J. McOlellan, for defendants in error.

COBB, P. J. (after stating the facts). 1. The present case presents one of those controversies which have, unfortunately, in the past often found their way into the civil courts of this country. The courts of this

##### Saving Faith.

48. Saving faith, including assent to the truth of God's Holy Word, is the act of receiving and resting upon Christ alone for salvation, and is accompanied by contrition for sin and a full purpose of heart to turn from it and live unto God.

##### Preservation and Believers.

60. Those whom God hath justified he will also glorify. Consequently the truly regenerated soul will not totally fall away from a state of grace, but will be preserved to everlasting life.

61. The preservation of believers depends on the unchangeable love and power of God, the merits, advocacy, and intercession of Jesus Christ, the abiding of Holy Spirit and seed of God within them, and the nature of the covenant of grace.

state have been remarkably free from cases originating in schism in a religious body. Numerous cases appear in the briefs of counsel, from different courts of this country, as well as some in the English and Scottish courts, involving controversies growing out of differences of opinion between parties and factions in ecclesiastical organizations. On account of the union between the church and the government in England, the decisions of the civil courts of that country cannot be implicitly followed by the courts of this country, where the civil authorities have no right to interfere in matters peculiarly ecclesiastical. The first amendment to the Constitution of the United States denies to Congress the power to make any law respecting the establishment of religion or prohibiting the free exercise thereof. Civ. Code 1895, § 6014. That instrument contains no limitation on the powers of the states in this particular, but every state in the Union has in its Constitution a provision denying to the civil authorities the right to control or interfere in any way in matters purely ecclesiastical. The people of no state in the Union, as a political entity, have any creed or religion. The people of the United States, as a political entity, have no creed or religion. Each individual within the jurisdiction of the United States, whether he be within the limits of a state or elsewhere, has a right to determine for himself all of those questions which relate to his relation to the Creator of the universe. No civil authority can coerce him to accept any religious doctrine or teaching, or restrain him from associating himself with any class or organization which promulgates religious teachings. Whether he shall adopt any religious views, or, if so, what shall be the character of those views, and the persons with whom he shall associate in carrying out the particular views, are all questions addressed to his individual conscience, which no human authority has the right, even in the slightest way, to interfere with, so long as his practices in carrying out his peculiar views are not inconsistent with the peace and good order of society. We have confined our investigations in this case almost entirely to the decisions of the courts of this country, for the reasons above referred to.

When an individual becomes a member of a religious organization, his uniting with it is his voluntary act, and he becomes bound by the rules and usages of the organization. A religious association usually adopts a constitution, by laws, and form of government. A member, when he enters the organization, voluntarily assumes the duty of obeying the laws of the association. As to all matters purely ecclesiastical he is bound by the decisions of the tribunal fixed by the organization to which he belongs, as an arbiter to determine the disputed questions relating to matters peculiarly within the province of the organization. In attempting to carry out the

purpose for which religious associations are formed it becomes necessary, in almost every instance, for the organization to hold and own property. The members of the organization therefore become interested in the property so owned. Differences may arise which bring about disputes as to what interest a members or class of members of an organization may have in this property. Rights of property are as peculiarly within the jurisdiction of the civil courts of the land as purely religious rights are within the jurisdiction of the ecclesiastical tribunals of a religious organization. How far the civil courts will interfere in the affairs of a religious body, where property rights are involved, is a question which has been addressed to many courts of this country. Often the controversy as to the right of property grows out of a controversy as to creed, doctrine, or teaching. While all of the rulings of the American courts cannot be said to be entirely uniform, the great weight of authority is to the effect that if a religious organization has, under its form of government, a tribunal constituted with jurisdiction to decide differences between its members as to creed, teaching, or doctrine, the civil courts will not undertake to review or revise the judgment of the church tribunal in reference to such matters. The cases which support this ruling seem to be founded upon sound reasoning, when we take into consideration the constitutional provisions which deny to Congress and the law-making powers of the different states the right to interfere in matters purely ecclesiastical. In some cases it has been said that the decisions of the church tribunals are persuasive, and not to be departed from by the civil courts, except where the decisions are clearly wrong. But the sounder rule is that laid down in those cases in which it is held that, if the matter relates to creed, doctrine, or teaching, the judgment of the constituted church tribunal is absolutely conclusive upon the civil courts, whether, in the opinion of the judge of such courts, the decision appears to be right or wrong. Where a right of property turns upon such a decision the civil courts will allow the property to go in that direction in which the decision of the church tribunal carries it. One of the leading cases on the subject in this country is *Watson v. Jones*, 13 Wall. (U. S.) 679, 20 L. Ed. 636. It was there held that in a case where the right of property asserted in the civil courts is dependent upon a question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and that question has been decided by the highest tribunal within the organization to which it has been carried, the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it. In the opinion Mr. Justice Miller says: "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the

ablest men are in reference to their own. It would therefore be an appeal from the more learned tribunal in law, which should decide the case, to the one which is less so." Page 729 of 13 Wall. (20 L. Ed. 636). See, also, 7 Rose's Notes, 769; *Brundage v. Deardorf*, 92 Fed. 214, 34 C. C. A. 304; *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; *Lamb v. Cain*, 14 L. R. A. 518, 129 Ind. 486, 29 N. E. 13; *Watson v. Avery*, 65 Ky. 332; *Trustees of Trinity M. E. Church of Norwich v. Harris*, 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636; *White Lick Quarterly Meeting of Friends, by Hadley et al., Trustees, v. White Lick Quarterly Meeting of Friends, by Mendenhall et al., Trustees*, 89 Ind. 136.

2. The constituted tribunal of the religious organization has jurisdiction to determine all ecclesiastical questions which are submitted to it under the law and usages of the society. It has also the authority to determine for itself whether it has jurisdiction in a given case. The highest church court of a religious society is like the highest civil court. It has submitted to it not only questions growing out of controversies, but it has, of necessity, imposed upon it the duty and responsibility of determining what are within the limits of its jurisdiction. In the case of *Watson v. Harris*, 45 Mo. 183, it was held that the General Assembly of the Presbyterian Church, commonly known as "Old School," possessed extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself. In the opinion Judge Wagner says (page 197): "Now, the General Assembly is the highest court or judicatory known to the Presbyterian Church. It possesses extensive original and appellate jurisdiction; and whether the case, in the matter of the Declaration and Testimony signers, was regularly or irregularly before it, was a subject for it to determine for itself, and no civil courts can revise, modify, or impair its action in a matter of purely ecclesiastical concern." When a controversy involving the rights of a member is presented to the civil courts, they will examine into the constitution and laws of the religious society, to determine whether a tribunal has been erected for the decision of ecclesiastical questions, and they will also examine into the laws of the association, to determine whether the decision by the tribunal was concerning a matter which was within its jurisdiction. If its jurisdiction depends upon the construction of its own laws, and such laws have, either expressly or impliedly, conferred upon it the right to determine the limits of its jurisdiction, the decision of the church tribunal as to its jurisdiction will be no less binding than its decision on the merits of the ecclesiastical question determined by it. However, if it develops, from an examination of the constitution, laws, and usages of the church, that the judgment is beyond the jurisdiction of the church tribunal, and so manifestly

beyond it that there can be no difference of opinion as to this fact, the civil courts will interfere to protect the members in their rights of property, involved in such a lawless and revolutionary action by the ecclesiastical organization. Where it is manifest that the church court has decided a question which, under no reasonable construction of the rules of the church, could be within the jurisdiction of the tribunal, the civil courts will recognize, as the true church, those members who adhere to the tenets and doctrines of the organization, and who are adhering to the rules of the church and living under the form of government prescribed by its constitution, and cause the property to follow the line as recognized by this class. So long as church tribunals merely decide questions which arise from time to time in regard to the teachings, doctrines, or government of the church, connected with the purposes for which it was organized, the civil courts, even though rights of property are involved, will not interfere. But whenever a majority in those organizations in which a majority of the members ordinarily control, or where the highest courts in those organizations which provide for various courts to determine these questions, take such steps as to clearly indicate an abandonment of the original scheme and purpose of the organization, and use it for ends which were not expressly contemplated, and under no reasonable construction of the rules could ever have been contemplated, those who are faithful to the original purposes of the organization are to be treated as the true church and the owners of the property committed to it for the promulgation of its teachings and doctrines. In *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 49 N. W. 81, 13 L. R. A. 198, it was held that the majority of the members of a Baptist church, although it was independent in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants, and on attempting to do so they may be enjoined from interfering with the proper use and control of the property by the minority. It was also held, in that case, that the decision of a Baptist council, on the joint call of both factions of a Baptist church, which agree to accept it as final, that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive, and may be adopted by a court as the basis of its action in giving the control of the church property to the other faction. In *Christian Church of Sand Creek v. Church of Christ of Sand Creek*, 219 Ill. 503, 76 N. E. 703, the ruling was that, where members of a religious congregation divide and a new organization is formed by the withdrawing faction, the title to property of the congregation remains in the part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was

originally dedicated. There was also a ruling to the effect that where members of a seceding faction of a congregation form a new organization, and teach and practice innovations not recognized or taught by the original congregation, they abandon their interest in the property belonging to the original congregation at the time of the division. See, also, *Smith v. Pedigo*, 19 L. R. A. 433, 32 L. R. A. 838, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Appeal of Ramsey*, 88 Pa. 60; *Bear v. Heasley*, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

The principle at the foundation of all these rulings, as well as a great many others along the same line that might be cited, is that property which is devoted to the purposes of a given religious organization must be used for the purpose to which it is devoted, and that where the controlling authority of the organization (whether it be a majority of the congregation of those churches having a congregational form of government or the highest court of a church in those churches which have different tribunals, with appeals from one to the other) engages in a palpable attempt to divert the property to a purpose utterly variant from that to which it was originally devoted, the civil courts will interfere, even at the instance of a minority, in cases where the form of church government is congregational, or at the instance of the dissenters, without regard to number, where the form of government is other than congregational, and protect them in their property rights against those who, without authority, are attempting to carry the property along lines that are utterly variant from the purpose for which the organization was formed. But in all cases of this character it must appear that the governing authorities of the church have abandoned the tenets and doctrines of the original organization. Whether they have so abandoned them is an ecclesiastical question; and if, under the form of government of the church, there is a tribunal of any character erected for the decision of these questions, the civil courts will not undertake to revise or review the judgment of this tribunal, provided the question is of such a character that it would admit of dispute, and would therefore be proper for decision by the ecclesiastical tribunal. So long as the case rests upon debatable ground, as to whether there has been an abandonment of the purpose of the original organization, the courts will allow the judgment of the church tribunal to stand without question: but where, in a given case, the facts are such that there can be no question that there has been a complete abandonment, and as a result the property will be diverted to purposes never contemplated by the original organization, the civil courts will interfere at the instance of those who adhere to the teachings of the

original association. If property is acquired by a Baptist church, which, at the time of its organization, is teaching the doctrines of the Baptist faith as it is ordinarily understood, and thereafter a majority of the congregation should determine to dissolve the organization and unite with an ecclesiastical body which was teaching doctrines utterly antagonistic to what are commonly understood as the doctrines of the Baptist Church, the civil courts would protect the minority, who adhere to the doctrines of the original organization, in their right to hold the property, even though such minority consisted of only one person. But if the question should arise in a Baptist congregation as to what is the doctrine of the Baptist Church, and the differences should be such as it was manifest that there could be, in the light of the history of the particular church and other churches of similar faith, doubt as to what was the true rule to be followed by a Baptist church, and the church tribunal, constituted according to the customs and usages of Baptist Churches, should decide these differences, the civil courts would not attempt to interfere with the judgment of this tribunal determining the doctrinal differences between the members of the congregation.

There is a radical difference between an abandonment of all the teachings and doctrines of a church and a mere difference of opinion among the members of an organization as to what are the true doctrines and teachings of the organization. There may be cases where the entire abandonment will be attempted, and such intention would be clear and palpable. But the cases which are most apt to arise are those which are upon the border line, when it is hard to determine, in the particular case, whether the action of the constituted authorities of the church is an abandonment of its original teachings, or merely a judicial determination as to what are the true teachings of the church. The fact that there are cases lying so near to this border line is the reason that there are apparently conflicting decisions by the courts in this country as to when it is proper for the civil courts to interfere in the affairs of an ecclesiastical organization. It is true, in this class of cases, as it is in every case arising under the law, that the civil courts have generally laid down the correct rule that they will not interfere with the affairs of an ecclesiastical organization, where the rights of property are involved, unless there has been a palpable attempt by the governmental authorities of the church to abandon altogether the teachings of the original organization. But there are cases where this rule has been, as to the facts of the particular controversy, wrongly applied. If the members of a church abandon the tenets of the church, they lose their interest in the property of the church. If they adhere to the doctrines of the church, but abandon

the organization, they also lose their interest in the property of the church. This latter proposition is, in effect, the ruling in the case of *Godfrey v. Walker*, 42 Ga. 562. In that case the property was conveyed to trustees, for the use of the colored members of the Methodist Episcopal Church South, within the jurisdiction of the General Conference of that church, and a large portion of the congregation severed their connection with this church and united with the African Methodist Episcopal Church; and it was held that they thereby lost all their interest in the property, and it became subject to the control of the General Conference of the Methodist Episcopal Church South, and did not become the property of the African Methodist Episcopal Church.

The Code declares: "A majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned." Civ. Code 1895, § 2360. It will be noted that this section is a mere codification of the ruling made in *Bates v. Houston*, 66 Ga. 198. That case involved a controversy arising in a Baptist church which had a congregational form of government. The rule laid down there is the one which is laid down by all the courts, and which is the one above referred to, that the abandonment of the teachings of the church by members of the organization will cause them to lose their interest in the property of the original organization which was set apart for the promulgation of certain teachings. No question as to the effect of the ruling of ecclesiastical tribunals in reference to mere difference as to what were the doctrines of the church was involved in that case. But another general rule, recognized by all of the courts, was also laid down in that case, which is embodied in Civ. Code 1895, § 2362, in the following language: "Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but when property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the trust." The case of *Harris v. Brown*, 124 Ga. 310, 52 S. E. 610, 2 L. R. A. (N. S.) 828, did not involve any of the questions now before us, and the section of the Code last cited was simply mentioned to emphasize the rule therein laid down.

8. When an ecclesiastical organization acquires property by deed, or will, or other instrument, and the instrument in express terms provides that the property shall be devoted to the teaching, support, and spread of some specific form of doctrine or belief, the civil courts have authority to interfere in the affairs of the organization for the purpose of preventing a diversion of the property from the uses to which it was, by the instrument, devoted. This rule is laid down

and recognized by Mr. Justice Miller in the case of *Watson v. Jones*, supra. See, also, *First Baptist Church of Paris v. Fort*, 93 Tex. 215, 54 S. W. 802, 49 L. R. A. 817. But where property is acquired by an ecclesiastical organization, and there is nothing in the instrument under which the title passes to the organization, or to trustees in its behalf, which imposes a limitation upon the uses to which the property shall be devoted, it is to be presumed that it was the intention of the donor that the property was to be devoted to religious purposes, and in such manner and in such way as the governing body of the organization, whatever it may be, shall, under its constitution and rules, determine, and so long as any existing religious organization can be ascertained to be that organization, or its regular legitimate successor, it is entitled to the use of the property. See *Baptist Church v. Fort*, supra. In case of a schism in such an organization, no inquiry will be had into the existing religious opinions of those who comprise the legal and regular organization. The proper inquiry is: Which of the two factions constitute the church? And those who adhere to the acknowledged organization are entitled to the use of the property, whether adhering or not to the doctrines originally professed. *Watson v. Jones*, supra; *Baptist Church v. Fort*, supra.

4. The instrument under which the Cumberland Presbyterian Church of Atlanta acquired title, through its trustees, to the property in controversy, does not in express terms provide that the property shall be used for the promotion of any particular teaching or doctrine. The trustees hold the title for the benefit of the ecclesiastical organization known as the "Cumberland Presbyterian Church," of which the Atlanta church was a component part. Hence there is nothing in the present case which authorizes the interference of the civil courts upon the ground that there has been a diversion of a trust fund on account of a violation of the terms of the instrument creating the trust. The title to the property was acquired in the ordinary way, by gift or purchase, without limitation, except that it was to be used for religious purposes, and the religious purposes are those of the Cumberland Presbyterian Church. The only question to be determined, therefore, is whether, under the form of government of the Presbyterian Church, the property of the Atlanta church can be transferred to the Northern Presbyterian Church. In determining this question inquiry must be had into the constitution and rules of the Cumberland Presbyterian Church. If, under the form of government of the church, the governmental authorities have a right to make this transfer, the civil courts will not interfere. If they have not, the right interference may be had at the instance of those who can be designated as the lawfully constituted authorities of the Cum-

berland Presbyterian Church. The controlling question, therefore, is whether, under the form of government as set forth in the constitution of the Cumberland Presbyterian Church, the governmental authorities of that body had the right to unite with the Northern Presbyterian Church. The constitution of the church creates certain church courts. It declares that the government of the church is to be exercised in some certain and definite form, and by various courts, in regular gradation. These courts are denominated "Church Sessions," "Presbyteries," "Synods," and the "General Assembly." The jurisdiction of each of these courts is defined in the constitution. The Church Session has jurisdiction of a single church; the Presbytery has jurisdiction over the Church Sessions, and jurisdiction within a prescribed district; the Synod has jurisdiction over three or more Presbyteries; and the General Assembly has jurisdiction over such matters as concern the whole church. Every court is declared to have the right to resolve questions of doctrine and discipline seriously and reasonably proposed; and although each court exercises exclusive and original jurisdiction over all matters especially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation. The General Assembly has jurisdiction to review and decide all references and complaints regularly brought before it from the inferior courts, and to decide all questions respecting doctrine and discipline, and "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church." So far as any controversies in reference to doctrine are concerned, by the very terms of the constitution the General Assembly is made the highest court, and, of course, its judgment on the matter is final and conclusive. The General Assembly of the Cumberland Presbyterian Church, hence, has jurisdiction to determine whether the matter in controversy is within its jurisdiction, and also to determine the controversy itself.

On the question as to whether there should be a reunion of the Cumberland Presbyterian Church and the Northern Presbyterian Church, it was for the determination of the General Assembly as to whether these two organizations were in accord with each other as to doctrine and order. This question was determined by the General Assembly at Decatur, Ill., in 1906. That it was a question about which there could be honest differences of opinion is manifest; for these differences appear in the records of the proceedings prior to and at the time the judgment was rendered that there was no substantial difference between the two organizations in teachings and doctrines. There were members of the General Assembly of the Cumberland Presbyterian Church who not only took a contrary view, but entered their protest

upon the minutes of the General Assembly, and who thereafter withdrew and organized themselves into a body which they styled the "True Cumberland Presbyterian Church." We will not undertake to determine whether this judgment of the General Assembly is correct. The constituted tribunal of the church has determined the question, and, whether determined rightly or wrongly, we, as a civil court, having no ecclesiastical jurisdiction whatever, will not attempt to revise the conclusions and findings of those who are learned in the ecclesiastical law. The General Assembly of the Cumberland Presbyterian Church have accepted the declaration of the Northern Presbyterian Church as to its interpretation of its confession of faith, and, when so accepted, it has determined that there is no substantial or reasonable difference between the teachings and doctrines of the two organizations. This question is therefore to be treated as settled forever by the judgment of the General Assembly of the Cumberland Presbyterian Church.

With this question settled, the other question arising is: Have the General Assembly of the Cumberland Presbyterian Church authority, under the constitution of the church, to provide for a reunion with the Northern Presbyterian Church? In *Fussell v. Hall*, a case decided on June 1, 1907, by the Appellate Court for the Third District of Illinois, the identical question with which we are now confronted was involved. The very act of the Cumberland Presbyterian Church which is now in controversy was involved in that case. In the opinion Ramsay, P. J., after referring to the authority of the General Assembly of the Cumberland Presbyterian Church, as indicated in the constitution, says: "The effect of such sections is to make the General Assembly, not only a legislative and administrative body, but one with judicial powers upon ecclesiastical questions as well. It represents, in one body, all the particular churches in the Cumberland Presbyterian Church organization, and constitutes one bond of union. Why is it not possible to promote the prosperity and enlargement of the church by uniting with another body that teaches a doctrine or faith identical with its own? If these two churches, in their confessions of faith and their religious teachings, are the same, then these interests may be promoted by uniting all those who preach, teach, and believe in and care for those interests, the same as can be done by individuals joining their interests in copartnerships or corporations. United action is productive of more good than divided action under the circumstances. The General Assembly has power to receive under its jurisdiction other ecclesiastical bodies of the same faith. This clause must be read with the clause that directs the taking of measures to promote and enlarge the church; and in our judgment the church is enlarged,

and its prosperity made more sure, by receiving the support of a stronger sister church. If a smaller church can be received, surely affiliation and union can be made with a stronger sister church, if thereby the church, as a religious body, is prospered and enlarged." The learned judge then called attention to the fact that many such unions have been formed among the Presbyterian Church bodies upon the faith of the inherent or implied power to do so. In 1785 the synods of New York and Philadelphia took steps for the organization of the General Assembly, with a view to the union of all the Presbyterian bodies, and in 1789 resolved such synods into a General Assembly. In 1801, after having failed in efforts to unite with both the Reformed Dutch and Associated Reformed Churches, the General Assembly so organized agreed upon a plan of union with the General Assembly of Connecticut. This action seems to have been taken upon the faith of an inherent power so to act. It was from that organization, so formed, that the founders of the Cumberland Presbyterian Church in 1810 withdrew because of a doctrinal difference, and took such action that the organization of the Cumberland Presbyterian Church followed; and attention has already been called to the fact that the organization of the Cumberland Presbyterian Church closely followed, in its constitution, the form of government from which it withdrew. Many kindred unions have been formed in like manner, between similar bodies, not only in the United States, but in Canada as well, and upon no different authority. Among them may be mentioned the union of the Associated Reform Church with the Associate Church in 1858, forming the United Presbyterian Church; the Independent Presbyterian Church of the Carolinas with the General Assembly of the Presbyterian Church South in 1863; the Old School Presbyterian Church with the New School in 1870; the Alabama Presbyteries of the Associate Reform Church with the Presbyterian Church South in 1867. Ramsay, P. J., after calling attention to the historical matters just referred to, concludes the discussion relating to the power of the Cumberland Presbyterian Church to unite with the Northern Presbyterian Church in the following language: "The General Assembly of the Cumberland Presbyterian Church, when once created, had the same implied power and authority in that church that its kindred assembly had in the Presbyterian Church of the United States of America. That such General Assemblies and like bodies have an implied power to unite with others of the same faith or teachings seems to be supported by the authorities and to spring from the very nature of the case."

The authority of the General Assembly of the Cumberland Presbyterian Church is derived from the constitution. This church, in its form of government, is like its predeces-

sors. The form of government is not unlike the federal form of government under which we live. The General Assembly of the church is the highest legislative, executive, and judicial power of the church. It has, in these three capacities, all of the authority that is expressly conferred by the constitution, as well as that which is to be necessarily implied from any of the express powers therein granted or from the general design and purpose for which the organization was formed. It being settled by the judgment of the General Assembly, as the final arbiter of the church in all such matters, that there is no substantial difference between the teachings and doctrines of the two churches, the question as to whether it was expedient for the two churches to unite under one name and form of government was a matter addressed to the sound judgment of the General Assembly of the Cumberland Presbyterian Church itself. The very constitution contemplates union with the other churches. It is authorized to receive into its jurisdiction other ecclesiastical bodies and organizations that conform to the doctrine and order of the Cumberland Presbyterian Church. When this provision was inserted in the constitution, it was probably contemplated that such organizations would generally be organizations of less power and less strength and less numbers than the existing Cumberland Presbyterian Church; but there is no limitation in the constitution upon the power to receive other organizations, and this power carries with it the implied power to unite with other organizations, under the same limitations under which they could receive in their name and in their jurisdiction similar organizations. In the judgment of the General Assembly of the Cumberland Presbyterian Church, the purpose for which it was organized is to be promoted by the reunion with the church from which it sprang. They may be mistaken in this. This reunion may thrust upon them and their associates perplexing questions, which in time to come may bring about disagreement and separation. But all of those matters are matters for the ecclesiastical body itself, and, when determined by it, those members of the church who are not in accord with the governing authority must either bow in submission to the powers that be or make their alignments with other organizations with whom they can live in accord and harmony. It was argued that the constitution of the Cumberland Presbyterian Church could not be amended, except by a two-thirds vote, etc. But, under the view that we have taken, no amendment is necessary to effect the reunion, and therefore it is not necessary to say more in reference to this point. The General Assembly, as the highest church court, has determined the questions arising as to the alleged differences of doctrine. The General Assembly, as the highest authority of the

church, executive, legislative, and judicial, has determined that it is wise and best that the reunion should take place, and the constitution of the church, as we have interpreted it, gives that body power and jurisdiction to deal with this question, and the question of reunion has been settled in form and manner as the constitution prescribes. We see no reason whatever for the interference of the civil courts in the controversy presented in the present record.

There were other questions argued in the briefs, as to the rights of sureties on the notes given by the Atlanta church to the insurance company, etc.; but the trial judge did not pass on these questions, and based his judgment solely upon the ground that the reunion of the two churches was not authorized by the constitution of the Cumberland Presbyterian Church. We have confined our discussion to the question decided by him, and will determine no other at the present time. Having reached a contrary conclusion to that reached by the able, learned, and painstaking trial judge, no other course is open to us than to reverse the judgment.

Judgment reversed. All the Justices concur.

(128 Ga. 841)

## CENTRAL OF GEORGIA RY. CO. v. CITY MILLS CO.

(Supreme Court of Georgia. Aug. 9, 1907.)

### 1. CARRIERS — CARRIAGE OF GOODS — LIMITATION OF LIABILITY.

A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract releasing him from liability not arising from his negligence, and will then be governed thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 675.]

### 2. SAME.

A milling company, which did a large amount of shipping over a railroad, with the assent of the railroad company prepared and had printed for itself a blank form of shipping receipt, which included the words, "as per conditions of the company's bill of lading." The agent who prepared the form testified that he intended to make it subject to the conditions in the company's regular bill of lading; that the meal which was involved in the controversy was loaded on a car by the milling company, and the receipt made out by its agent and presented to the agent of the railroad company for signing; that it was his intention, as representing the milling company, in making out every paper or contract of shipment, that it should be subject to the terms and conditions of the company's standard bill of lading; and that it was so expressed in the paper, and so understood by him, but that he had never read one of the bills of lading, although he had seen thousands of them. One of the conditions contained in the company's ordinary and regular bill of lading for the transportation of goods other than cotton, live stock, and one or two special kinds of shipments, containing the stipulation that "no carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the consignee." Held, that it was error to charge the jury: "Did both of

the parties, the plaintiff and the defendant, understand by that, at the time this receipt was signed, that liability of the defendant company was limited to its own line, and until delivery to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them?" Such a charge was calculated to leave the jury to infer that, although the shipper may have deliberately and expressly adopted the conditions of the regular bill of lading as a part of the contract, intending to make the shipment subject thereto, and although it may have had ample opportunity for knowing what they were, yet, if its agent did not understand or have in mind this particular condition at the time of the shipment, it would not be a part of the contract.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; R. W. Freeman, Judge.

Action by the City Mills Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The City Mills Company brought suit against the Central of Georgia Railway Company, alleging that it made a shipment of certain meal from Columbus, Ga., to Jacksonville, Fla., and that the defendant failed to deliver the freight at the point of destination. The bill of affreightment was as follows: "Received from City Mills Company, Columbus, Ga., 11, 20, 1902, by C. R. R. Co., by steamer, in apparent good order, the articles named below, to be delivered in like good order, without unnecessary delay: To Peacock, Hunt & West Co., at Jacksonville, Fla. Car—Marks: L. & N. 4863. As per conditions of company's bill of lading. Shipper's order notify." Then followed a description of the property, weight, and rate; and the paper was signed by the agent of the railway company. The only part of the defense which it is necessary to mention is that the defendant company had no line of railroad running from Columbus to Jacksonville, but that, as was well known to the plaintiff when it delivered the car to the defendant, after loading it, the defendant would deliver it at Albany, Ga., to a connecting line of railroad, which would transport it from that point to Jacksonville; that a memorandum receipt was given, which is set out above, and which stipulated that the car was received to be transported by the defendant as per conditions of the company's bill of lading, one of which was that the defendant agreed to deliver the car to its connecting carrier on the route to its destination, and when it did so then all further liability for the shipment should cease as to this defendant; that it did transport the car to its terminus at Albany, and there delivered it in good order to the connecting carrier; and therefore it contends that its liability ceased.

The secretary and treasurer of the plaintiff testified, among other things, as follows: "The receipt signed by the agent of the railway company for this shipment was on the form prepared by the City Mills Company.

The receipt was made out by the plaintiff and presented to the agent of the railway company, Mr. Fengin, to be signed. The receipt was made out by myself, and it was in my handwriting. This form was used at the direction of the railway company and with their approval. It was a matter of convenience, both to the railway company and to us. This receipt is not signed by me, or the City Mills Company, and no other bill of lading was shown or read to me. I have seen thousands of the Central of Georgia Railway Company's bills of lading, but I never read one of them. I do not know whether they are all alike. The form of the paper on which we have sued states that it was subject to the terms of the bill of lading. I will say that it was my intention, as representing the City Mills Company, in making out every paper or contract of shipment, that it was subject to the terms and conditions of the company's standard bill of lading, and it was so expressed in the paper, and I so understood it. The regular bill of lading of the company was not presented to me. I do not know the verbiage of the bills of lading. I never read it at all. We have always used this other form, and the question has never arisen. This form of paper sued on I had printed myself, and the verbiage of the contract reads: 'As per conditions of the company's bill of lading.' Candidly, I had never read a bill of lading of the defendant railway company. I have seen these bills of lading, as I have others; but, as I have stated, I did not have occasion to read them. I cannot say whether the regular form of lading now shown me is the kind referred to in the receipt or contract of shipment attached to our suit. I presume, of course, that the contract prepared by me for the City Mills Company refers to their regular bill of lading. I do not know how many they have. \* \* \* I certainly did know that the bill of lading contained the terms and conditions for the protection of the company in shipments, but I was not aware of those conditions, nor what they were. \* \* \* It was my intention, when I made out that receipt on the City Mills Company paper, and which I had prepared, to make it subject to the company's bill of lading. The bill of lading referred to was the company's regular shipping bill of lading. It was my object and intention to make it refer to the company's regular bill of lading, but I never read the conditions."

The agent of the defendant company testified, among other things: "The railway company at that time issued several different bills of lading. The one handed me is the one they used in contracting and receipting for general merchandise. Then we have a form that applies exclusively to live stock. Then we have two cotton forms of contract, one a domestic and one a foreign shipment. We have a general form for miscellaneous articles, which includes nearly everything



except cotton, live stock, and household goods. It is my opinion that the general bill of lading, or standard bill of lading, is the one referred to in the receipt of the City Mills Company for the shipment of these goods. The receipt issued on the City Mills Company's form, containing the words, 'as per conditions of company's bill of lading,' refers to the form of bill of lading handed me, which is the regular bill of lading of the company. So far as I know, this receipt was not signed either by Mr. Baird or the City Mills Company. \* \* \* The bill of lading referred to carries the conditions of the contract of shipment. \* \* \* If household goods were shipped, then the rate and value limitation would apply; but the condition as to the limiting liability to the end of the company's line is a general limitation that applies to all shipments. These conditions are not changed."

The form of the defendant's bill of lading introduced in evidence contained the following clauses: "The railway company agrees to carry to destination the goods shipped, if on its road, or otherwise to deliver to another carrier on the route to said destination. \* \* \* In consideration of the rate charged under the conditions of this bill of lading, it is mutually agreed as to each carrier severally, but not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face or back thereof, all of which are agreed to by the shipper as owner, or agent for the owner, and accepted for himself or his assigns, as just and reasonable." One of the conditions on the back of the bill of lading was as follows: "No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee."

The jury found for the plaintiff \$111.22, and interest at 7 per cent. from December 2, 1902, to February 5, 1906, \$24.65, making a total of \$135.87. The defendant moved for a new trial on the general grounds, and also because the court charged as follows: "What conditions, from the evidence in this case, were referred to by the words, 'as per conditions of company's bill of lading'? Did both of the parties, the plaintiff and the defendant, understand by that, at the time this receipt was signed, that liability of the defendant company was limited to its own line, and until delivered to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them? You look to the evidence, and you decide what the truth about the matter is." The motion was overruled, and the defendant excepted.

Charlton E. Battle, for plaintiff in error.  
A. W. Cozart and J. H. Martin, for defendant in error.

LUMPKIN, J. "A common carrier cannot limit his liability by any notice given, either by publication or by entry on receipts or tickets sold. He may make an express contract, and will then be governed thereby." Civ. Code 1895, § 2276. As to contracts seeking to waive the results of negligence as a common carrier, see *Central Railway Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170. The express contract referred to above may be signed by the parties, but is not obliged to be so. The mere acceptance of a bill of lading or a ticket which contains a limitation upon liability will not amount to an express contract. *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783. Whether an express contract has been made limiting, in the absence of any signature of the shipper or his agent, is generally a question for the jury, if there be evidence tending to show such a contract. *Southern Express Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 58; *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473; *Wallace v. Sanders*, 42 Ga. 486, 490.

The presiding judge charged the jury as follows: "Did both of the parties, the plaintiff and the defendant, understand by that, at the time this receipt was signed, that the liability of the defendant company was limited to its own line, and until delivered to the connecting carrier in good order? Did they both understand it that way? Was that the contract between them? You look to the evidence, and you decide what the truth about that matter is." On looking to the evidence it appears that the plaintiff's agent testified that the plaintiff itself prepared and had printed the form which was used. It was not a blank prepared by the railroad company and signed by its agent and delivered to the shipper; but the agent of the latter himself made out the receipt in his own handwriting and presented it to the agent of the railroad company to sign. The car was furnished by the company, and loaded, closed, and fastened by the plaintiff before being delivered to the railroad company. The shipment was made by "shipper's load and count." The plaintiff knew that the defendant did not have a line of railroad to Jacksonville, and that it was necessary that the car should be transported over a connecting line in order to reach its destination. It was not a matter of haste, or of mere acceptance of a receipt on the part of the plaintiff, but of deliberation and preparation. The plaintiff voluntarily placed in a receipt prepared by it a statement that the shipment should be "as per conditions of company's bill of lading." Its agent testified that he knew the bill of lading referred to

contained terms and conditions for the protection of the company in shipments, but he did not know what those conditions were. Nevertheless, without taking the trouble to inform himself, though he testified that he had seen thousands of the bills of lading, he placed this stipulation on the face of the receipt, and induced the railroad company to sign it, with such reference to the bill of lading as an integral part of it. He also testified that it was his intention, as representing the plaintiff, in making out every paper or contract of shipment, that it should be subject to the terms and conditions of the company's standard bill of lading, that such was his intention when he made out the receipt relied on, and that the bill of lading referred to was the company's regular shipping bill of lading, but that he never read the conditions thereof. If the shipper deliberately prepared a contract for the railroad company to sign, and himself placed in it an adoption of the conditions of the company's regular bill of lading, with the express assent of the company, and with the purpose of binding the shipper thereby, and thus induced the railroad to accept and use it, instead of using the regular bill of lading, it would be doing violence to the most fundamental principles of contracts of good faith between parties to allow the plaintiff afterwards to say that he was not bound by the conditions of the company's bill of lading because the shipper's own agent did not take the trouble to know what he meant by or included in the contract which he himself prepared. There is no pretense that he did not have ample opportunity to know what the conditions were before and when he adopted them as a part of the receipt which he was preparing. We think the charge of our brother of the superior court might have led the jury to believe that, although it may have been intended and expressly agreed that the shipment should be subject to the conditions of the company's bill of lading, yet if the plaintiff's agent, at the time of the shipment, did not understand the contract which he had previously prepared in blank and then filled out, and thus prepared for the other party to sign, however ample opportunity he may have had for understanding it, or however negligent it may have been not to understand it, nevertheless the plaintiff would not be bound by it.

It was contended by counsel for the plaintiff that it was not certain that the form of the bill of lading which was introduced in evidence was the one referred to in the receipt. But while at one point in his evidence the plaintiff's agent did make use of the expression, "I cannot say whether the regular form of the bill of lading now shown me is the kind referred to in the receipt or contract of shipment attached to our suit," he immediately added, "I presume, of course, that the contract prepared by me for the City Mills Company refers to their regular bill of lading," and at another time stated that the bill of

lading referred to the company's "regular shipping bill of lading."

Judgment reversed. All the Justices concur.

(128 Ga. 695)

**BEARDEN MERCANTILE CO. v. MADISON OIL CO.**

**FITZPATRICK v. SAME.**

(Supreme Court of Georgia. July 12, 1907.)

**1. SALES—CONSTRUCTION OF CONTRACT—ENTIRE OR SEVERABLE CONTRACTS.**

When an executory contract for the sale of goods provides in one distinct paragraph for the sale of articles of a given character at a stated price, to be delivered during a given period and in a stated manner, and in another distinct paragraph, beginning with the words, "We have also sold you," provides for the sale of articles of a separate and distinct character to be delivered in a given manner, but with no time for delivery stated, the contract is divisible, containing two separate and distinct agreements for the sale of the different articles therein referred to; and this is true, notwithstanding the contract concludes with a guaranty that as to the articles referred to in the second paragraph local prices shall not be less than a given amount "for the balance of the season," and an agreement to handle only cash trade, except car load lots out of town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 171-179.]

**2. SAME—TIME OF PERFORMANCE.**

In a contract of a character above indicated, time would be of the essence so far as the article referred to in the first paragraph was concerned; but it would be otherwise as to the articles referred to in the second paragraph.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 218, 222.]

**3. SAME—QUESTION FOR JURY.**

When a contract fixes no time for performance, it is to be construed as allowing a reasonable time for that purpose; and what is a reasonable time is a matter of fact, to be determined by a jury under all of the circumstances of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 945, 947.]

**4. SAME—MODIFICATION—WAIVER OF STIPULATION.**

While parties to a contract may, by a course of dealing after a contract has gone into effect, waive a stipulation therein, still, in order to bring about this result, it must appear from the circumstances that it was the mutual intention of the parties to so change the contract.

**5. SAME.**

The answer and the amendment thereto, in so far as each related to that part of the contract referring to the sale of the hulls, set forth no ground of defense; but those portions relating to the sale of meal set forth a cause of action.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Two actions by the Madison Oil Company—one against the Bearden Mercantile Company, and the other against H. H. Fitzpatrick. From a judgment in each case for plaintiff, defendants bring error. Reversed.

The Madison Oil Company brought suit against the Bearden Mercantile Company on an account for \$1,627.96. The bill of par-

ticulars attached to the petition contained items of cotton seed hulls and meal, sold at different dates from September 1, 1903, to March 8, 1904. The total amount of the account was \$1,958.28, which was credited with \$330.32, leaving a balance due as above stated. The defendant filed an answer, in which it admitted that the goods set out in the petition were sold and delivered to the defendant as therein alleged, and that the plaintiff was entitled to recover, unless the defense set up by it was sustained. The answer then alleged that on October 15, 1903, the defendant, jointly with H. H. Fitzpatrick, entered into a written contract of which the following is a copy:

"Messrs. Bearden Mercantile Co. and Mr. H. H. Fitzpatrick, Madison, Ga.—Gentlemen: Please note and confirm that we have this day sold you 400 tons of cotton seed hulls, f. o. b. our Madison mill, at the price of \$4.50 per ton for loose hulls and \$5.50 per ton for baled hulls. Same to be delivered to you either on cars or in wagons at our mill at your option, between now and January 1, 1904. We, if possible, will store for you not over 150 tons in our hull house after this time, provided it is possible to do so. Same to be delivered as desired after that time. In case this is necessary, the hulls are stored at buyer's risk. Settlement for hulls delivered to be made at the end of each month.

"We have also sold you 200 tons of cotton seed meal, at \$21.00 per ton of 2,000 pounds, f. o. b. our mill, either delivered to wagons or loaded on cars; but, should you desire to take part of this contract in second grade, or what is known as 'off meal,' and we have the same on hand as you call for it, this off meal to be billed to you at \$20.00 per ton f. o. b. our mill, either on your wagons or on cars. Payment for all meal delivered to be made at the end of each month.

"We guarantee our local prices to be not less than \$22.00 per ton, f. o. b. our mill, for meal in small quantities, for the balance of this season, and further agree to handle only cash trade, except car load lots out of town. Madison Oil Co., D. H. Hicky, Secy. & Treas.

"Accepted. Bearden Mercantile Co. H. H. Fitzpatrick."

It was alleged that the items in the account prior to October 15, 1903, and subsequently to February 3, 1904, were not delivered under the contract, but such items were covered by another transaction; that the goods in the items between the dates of October 15, 1903, and February 3, 1904, were delivered under and in pursuance of the contract above set out, the defendant having received, during these dates, 90½ tons of hulls and 28½ tons of meal; that the legal effect of the contract was to give the defendant a half interest in the goods therein referred to, but that he has not received of the plaintiff his half of the goods. He has at all times been ready and willing, and has offered,

to receive the goods that he was entitled to under the contract, and has been at all times ready and able to pay for the same as provided by the contract. On January 1, 1904, plaintiff did not have on hand sufficient hulls to deliver all that might have been demanded of it; but defendant waived prompt delivery and accepted later deliveries, and was willing to accept the same. On February 3, 1904, plaintiff, without lawful excuse, refused to deliver any more goods under the contract, and notified defendant that it would not do so. It then and there repudiated and terminated the contract. The defendant persisted in an effort to obtain satisfaction, but, being unable to do so, on April 5, 1904, offered to pay petitioner the amount sued for in this case, less the damages that it had sustained on account of the breach of the contract by the plaintiff. A tender of \$798.05 was made, which is the amount admitted to be due by the defendant after crediting the account with the amount of the damages above referred to. At the time of the breach of the contract the market price of hulls at the place of delivery was \$10.50 for loose and \$11.50 for baled hulls, and the market price of meal was \$24 per ton.

At the trial the defendant offered an amendment to its answer, in which it was alleged that the defendant was at all times ready and willing to pay under the terms of the contract, and has never refused; that the plaintiff kept the books, and it was the custom of the plaintiff, in its business, to present statements for payment, but it presented to defendant no statement at the end of each month, or at any time during the deliveries, though defendant requested the same. Defendant was known to be amply solvent, and by tacit consent of both parties a prompt settlement and payment at the end of each month was waived, and the plaintiff did not object to making further deliveries after the end of each month because settlements had not been made by the defendant; but it waived payment at such times and continued to make deliveries under the contract. Plaintiff was a manufacturer of hulls and meals, and was manufacturing the same during the continuance of the contract, and up to February, 1904, and thereafter. On January 1, 1904, plaintiff had not the hulls contracted to be sold on hand, which was well known to both parties; but the plaintiff was expected to manufacture the same. Had it had the hulls to deliver, there was ample room, and it was entirely possible, to have stored 150 tons of said hulls in plaintiff's warehouse, as stipulated in the contract. Defendant waived a strict delivery of all hulls due on January 1st, and by mutual consent and tacit understanding the hulls were continued to be delivered from time to time thereafter upon the contract; both parties thus departing from the enforcement of the time stipulations. It was not the intention of either party to aban-

don the contract or waive a final performance. Were it otherwise, it was the duty of the plaintiff to have stored for the defendant in its warehouse at least 150 tons of hulls on January 1, 1904, to be delivered as desired after that time. This the plaintiff did not do, but, on February 3, 1904, notified defendant that it would make no more deliveries. Defendant then demanded a full performance, and offered to perform all obligations on its part, but plaintiff refused, to the damage of defendant. The court refused to allow this amendment, and struck the original answer on general demurrer; and judgment was entered against the defendant for the amount sued for. The defendant excepted.

The facts in the case of *Madison Oil Company v. Fitzpatrick*, except as to the amounts, are practically the same as those embraced in the foregoing statement.

Samuel H. Sibley and Williford & Middlebrooks, for plaintiffs in error. Foster & Butler and F. C. Foster, Sr., for defendant in error.

COBB, P. J. (after stating the facts). 1. The contract involved in the present case is not a contract for the sale of goods. There were no particular articles identified by the contract, and it lacked this essential element of a sale. It is an executory agreement for the sale of goods to be delivered at a future date. As such it is valid and binding; and this is true, notwithstanding the seller had not the goods in his possession, had not contracted to purchase them, and had no other expectation of acquiring them other than by purchase or manufacture at some time before the date of delivery. *Forsyth Manufacturing Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28. The contract did not provide for the sale of a single article, but for articles of a given class; and there were two separate and distinct classes of articles referred to therein. It is therefore to be determined whether the contract was entire, or whether it was severable in its nature; that is, whether it contained one contract for the sale of hulls and meals, or whether the paper contained two contracts—one an agreement to sell hulls, and the other an agreement to sell meal. If the contract is entire, the whole must stand or fall together. If it is severable, the failure of a distinct part does not void the remainder. The character of the contract, as to whether it was severable or entire, is to be determined by the intention of the parties, as indicated by the terms of the agreement. Civ. Code 1895, § 3643. And if the contract is upon one consideration, this fact is a strong, and in some cases a controlling, circumstance in determining the character of the contract and that it was the intention of the parties that it should be entire.

This contract, however, is not based upon a single consideration. The amount to be

paid was dependent upon the quantity of the articles that were ordered from time to time. The payments were to be made at specified times after delivery; that is, at the end of the month. The contract deals first with the subject of hulls, and stipulates the price, time, place, and manner of delivery, as well as other matters connected therewith. After having concluded with this matter, the contract in a distinct paragraph approaches the subject of meal with the significant language: "We have also sold you," etc. This paragraph of the contract provides for the price, place, and manner of delivery, and also other matters in reference to this subject-matter. The parties in the paper have dealt with the two subject-matters separately, and there must have been some reason for this in the minds of the contracting parties. There was an intention to separate, and this intention the law will allow to prevail. The paper contains two separate and distinct contracts, independent of each other. If time was of the essence as to that portion of the contract relating to hulls, and time was not of the essence as to that portion of the contract relating to meal, it would be possible for the defendants to have lost their right to demand the delivery of the hulls and still be in a position to demand the delivery of the meal. But if time was not of the essence as to either of the subject-matters of the contract, and the defendants had a reasonable time, without reference to the date stated, to call for a performance, it might be that, under the circumstances of the case, a reasonable time would elapse as to one of the articles before it would expire as to the other.

But it is said that the last paragraph in the contract, in which the plaintiffs guarantee local prices for meal at a given figure "for the balance of this season," etc., indicates that it was the intention of the parties to make the transaction in reference to both subject-matters concurrent as to time as well as in other particulars. It does not appear, from the terms of the contract, what was the season. Whether it expired on the 1st day of January following the execution of the contract, or at some other time, we cannot tell. There is no averment in the pleadings which can be looked to to resolve this ambiguity in the contract. Whatever may have been the season for the sale of the articles, the contract provides that this guaranty shall be operative; but we do not think that this guaranty has the effect to change the character of the contract and render it entire, when it would otherwise be divisible. When the contract is construed as a whole, we think it a reasonable interpretation that it was the intention of the parties that it should be divisible as to the two classes of articles referred to therein.

2. At common law time was always of the essence of the contract; but in equity it was otherwise, unless it was the manifest in-

tention of the parties to make time of the essence. This intention might be either expressed or implied. Clark on Contracts (2d Ed.) 408; Hammon on Contracts, 881. Our Code has adopted the more liberal rule of the equity courts, and declares: "Time is not generally of the essence of the contract; but by express stipulation or reasonable construction it may become so." Civ. Code 1895, § 3675, par. 8. Interpreting the contract, therefore, under this rule, we must not stop merely at finding the time for the performance specified, and hold the parties strictly to performance within that time, but must go farther, and determine whether, under the terms of the contract, this time is expressly declared to be of the essence of the undertaking, or whether, if not so expressly declared, a reasonable construction of the provisions of the contract would necessarily lead to that conclusion. Applying this rule, we have little difficulty in reaching the conclusion that it was undoubtedly the intention of the parties that time should be of the essence of the contract in the present case, so far as it related to the sale of hulls. The contract says, "We have this day sold you," etc., describing the articles and the price, "same to be delivered to you" in a given way "between now and January 1, 1904." No other interpretation can be properly placed upon this language than that it was the intention of the parties that at least a demand for the hulls should be made before the 1st day of January, 1904.

A strict construction might require that the demand should be made in time for the delivery before that date; but certainly the contract bears the interpretation that the demand should be made before that date, even though it might be followed by a delivery thereafter. The right to demand a delivery of the articles terminated, so far as the hulls were concerned, on the 1st day of January, 1904. In reference to the meal the time for the delivery does not appear in the paragraph of the contract dealing with that subject. This may have been an oversight, or it may have been the result of deliberation. Keeping in mind the rule above referred to, that in order for time to be of the essence there must be an express stipulation, or terms demanding a reasonable construction to that end, we cannot say, where a contract is entirely silent in reference to a particular article which is dealt with in a distinct paragraph, that a reasonable construction requires that time shall be of the essence of the contract. If we were to attempt to do so, what time would we fix? The parties have omitted to specify any time. Must we look to an entirely distinct paragraph of the contract, dealing with an entirely different subject of sale, and fix that as the time? We do not know judicially that hulls and meals are so intimately connected with each other, so far as the purposes of commerce and trade are concerned,

that the time in the contract for the sale of one would be appropriate in a contract for the sale of the other. Of course, we know that cotton seed oil and cotton seed meal are the products of cotton seed, and are the products, or manufactured from, the same thing, because this is a matter of such common knowledge that every person knows it; but our judicial knowledge in reference to the uses of trade in reference to the two articles is not so broad as it is as to the fact that both articles are produced from the same thing and at the same time.

But it is said the last paragraph of the contract, in reference to guaranteeing the local price during a given season, might be looked to to determine this. As stated above, we do not know what is the season for the sale of either of these articles. There is nothing in the contract to indicate that the season for the sale closed on January 1, 1904, as to the meal, and in fact nothing to indicate that the season closed at that time in reference to hulls. And on the question as to what is the season for the sale of these articles we are in ignorance, both judicially and individually. It may have been the purpose of the contracting parties to make time of the essence as to the meal. But they have failed to provide any such express stipulation, and a reasonable construction of the contract does not call for such an interpretation.

3. When a contract fixes no time for performance, the contract is to be construed as allowing a reasonable time for that purpose. Clark on Contracts (2d Ed.) 408; Hammon on Contracts, 881. Where a party to a contract undertakes to do a particular act, the performance of which depends entirely upon himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time. 9 Cyc. 613. Of course, it was not intended by the parties that this executory agreement should continue for all time. The parties had definitely agreed that the agreement should not be in existence after January 1, 1904, so far as the hulls were concerned. The plaintiff had agreed to sell to the defendants meal. Whether they were entitled to receive the hulls depended upon whether they demanded the delivery prior to January 1, 1904. Whether they should be entitled to demand the meal depended upon whether the delivery was called for within a reasonable time after the execution of the contract. The plaintiff was under no obligation to tender either the hulls or the meal. It was under obligation to deliver in the one instance in the time provided in the contract, and in the other in the time authorized by law. What was a reasonable time in which to call for a delivery of the meal under the contract is a question of fact, to be determined by a jury under all of the circumstances of the case. The answer alleges that the defendants demanded full performance

on February 3, 1905. Full performance would have meant the delivery of all of the articles that defendants were entitled to demand under the contract and had not been delivered prior to that time. This was a sufficient allegation of a demand for delivery, and whether this demand was made within a reasonable time is to be determined as above indicated.

This case is to be distinguished from the case of *Electric Railway Co. v. Tennessee Co.*, 98 Ga. 189, 26 S. E. 741, in that the contract there under consideration was an executory agreement for the sale of a given quantity of articles to be delivered daily for a period not specified. It was held that the contracting party who was to furnish the articles could not terminate the contract without notice, but that it could be terminated by giving notice. In the present case the articles were not to be delivered daily, but they were to be delivered when called for. The time in which they were to be called for not being fixed by the parties, the law implies that it was the intention of the parties that a reasonable time should be allowed for this purpose. In addition to this, that case did not deal with the question as to when notice of discontinuance should be given. There is nothing in that case to indicate that even a contract of the character there involved can be discontinued by notice without allowing the parties a reasonable time to make other arrangements in reference to the matter which was the subject-matter of the undertaking. The case rested upon the principle stated in *Clark on Contracts* in this language: "If a continuous contract fixes no time during which it is to last, and no time is fixed by law or by usage, it may be determined at the will of either party by notice." *Clark on Con.* (2d Ed.) 430.

4. It is said, though, that it appears that the defendant did not comply with the contract in reference to payment at the end of each month, and therefore this was sufficient reason for the plaintiff to refuse to make further deliveries. Under the averments of the answer it is evident, so far as the time of payment was concerned, that the course of dealing between the parties had been such as to nullify this stipulation of the contract. The contract provided for statements to be rendered at given times, which were not rendered, although demanded, and payment was received at other times without objection. It is said, too, that the stipulation as to time in that portion of the contract providing for the sale of hulls has also been waived. There are in the pleadings averments that by mutual agreement and tacit consent, or similar words, certain things had been done. No express agreement changing the time is set up in the pleadings. The facts relied upon to show such agreement are set forth, and the words above referred to seem to be merely the conclusion of the pleader from the facts alleged, and the presiding judge,

in an opinion which appears in the record, states that it was admitted in the argument before him that these words were to be given no more effect than mere conclusions from the facts pleaded. It appears that there were hulls delivered after the 1st day of January. This might constitute a waiver as to the demand being made before that date, so far as these hulls were concerned. But would this waiver go any further than the particular transaction? While a distinct stipulation in a contract may be waived by the conduct of the parties, it must appear that it was the intention of the parties to treat such stipulations as no longer binding. The mere fact that one party so intended would not bring about this result. It must appear that it was the mutual intention; that is, the circumstances must be such as, in law, to make practically a new agreement as to stipulations contained in the original contract. And, construing the answer most strictly against the pleader, we cannot say that the averments are sufficient to show that there was such a course of dealing as to show a mutual intention to do away with the stipulations in the original contract as to the time that the hulls were to be delivered.

5. It is contended by counsel for plaintiff in error that under the contract the oil company was bound to store a certain quantity of hulls on the 1st day of January, 1904, for delivery thereafter. The contract was to deliver when called for a given quantity of hulls. If all were not delivered prior to January 1, 1904, and the quantity undelivered was equal to or less than the quantity in the provision in reference to storing, then the plaintiff was, on application, to store for the benefit of the defendants; but we do not think that it was the intention of the parties that this quantity should be stored, without reference to a request on the part of the defendants. A reasonable interpretation of the contract was that if the defendants, in their business, could not use the entire quantity before the 1st day of January, 1904, the plaintiff would keep stored not exceeding a certain quantity for delivery thereafter. But there was no positive duty imposed upon the plaintiff by the terms of the contract to hold or store this amount for the benefit of the defendants. There is no allegation that there was any request on the part of the defendants, prior to January 1, 1904, to store this quantity. The right of the defendants to demand delivery, as well as to demand storage, terminated on the date provided in the contract. The answer and the amendment thereto, so far as each related to that portion of the contract providing for the sale of hulls, set forth no defense; but those portions of the answer, and the amendment thereto, relating to the contract for the sale of meal, set forth a cause of action.

Judgment reversed. All the Justices concur.

(128 Ga. 654)

**COLEY v. COLEY.**

(Supreme Court of Georgia. July 11, 1907.)

**1. WRIT OF ERROR — DISMISSAL — WAIVER OF OBJECTIONS.**

Where a wife filed suit against her husband for permanent alimony, and also applied to have temporary alimony awarded for the benefit of herself and their child of tender years, and where the presiding judge declined to award temporary alimony or attorney's fees to the wife, but directed that a certain amount should be paid by the husband each month for the support and maintenance of the child, and to the ruling denying temporary alimony and attorney's fees for her the wife excepted, the fact that while the case was pending in this court she collected some of the amount awarded for the support of the child will not be ground for dismissing the bill of exceptions.

**2. DIVORCE — TEMPORARY ALIMONY — DISCRETION OF COURT.**

Where a wife sues her husband for permanent alimony on the ground that they are living separately, and applies for temporary alimony pending the suit on the hearing of the application for temporary alimony the merits of the case are not in issue, and the presiding judge will not generally refuse alimony merely because the evidence is conflicting, or the right to permanent alimony on the final trial may be doubtful; but it is not an invariable or arbitrary rule that alimony must be awarded upon proof of the marriage and separation, without regard to the circumstances of the case. The presiding judge, in fixing the amount of alimony, may inquire into the cause and circumstances of the separation rendering the alimony necessary, and in his discretion may refuse it altogether, if the evidence so warrants, or, if there is a minor child, he may award an amount for the support of the child, and refuse to award alimony for the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 1084, 1085.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by Mary Coley against B. B. J. Coley. From the judgment, plaintiff brings error. Affirmed.

Mrs. Mary Coley brought suit for temporary and permanent alimony against her husband, B. B. J. Coley, alleging that her husband had driven her away from home without cause, that they were living in a bona fide state of separation, and that she had no means of support for herself and their minor children, except to seek employment as a domestic servant. On the hearing of the application for temporary alimony, she alone testified on her own behalf. Ten witnesses were introduced on behalf of the defense, several of whom testified that they knew her general character for truth and veracity in the community in which she lived, that it was bad, and that they would not believe her on oath. Several others testified that she was not driven from home by the defendant, but left of her own accord; that she was violent and abusive toward him, cursing him, threatening to kill him, and indulging in the most foul, vulgar, and indecent language in his presence and that of his young children by a former marriage; that she left once, and

afterwards returned, and then left again; that when she came back she said that she "didn't have anything on" the defendant, and that she had come back to get something against him, but that she had been unable to do so, and was going to leave again. Prior to her marriage she had been employed in a hotel. The presiding judge refused to grant temporary alimony or attorney's fees to the wife, but allowed \$5 per month for the benefit of the minor child. The plaintiff excepted.

Hardeman & Jones, for plaintiff in error.  
Fort & Grice, for defendant in error.

**LUMPKIN, J.** (after stating the facts). 1. On the call of the case in this court a motion was made to dismiss the writ of error, on the ground that the plaintiff had collected some alimony under the order and had sought to collect more. In support of the motion a letter, bearing date after the filing of the bill of exceptions, from counsel for plaintiff to one of the counsel for defendant, was presented. A statement in it indicated that the plaintiff had collected three or four of the payments ordered to be made for the benefit of the child, and the attorneys urged that other payments which were in arrears should be made. If a judgment is rendered in favor of the plaintiff, which she thinks too small, she may except and have the question tested, or she may suppress her dissatisfaction and collect the judgment. She cannot do both. *Owens v. Read Phosphate Co.*, 115 Ga. 768, 42 S. E. 62. Were this judgment in favor of the wife and for her benefit, the motion to dismiss would prevail; but where the presiding judge refused alimony for the wife, and only made provision for maintenance of the little child of the two parties, we do not think it would be within either the spirit or the justice of the law to hold that she must repudiate this entirely, and allow the child to suffer, in order to permit her to except to the refusal of alimony for her. The motion is overruled.

2. Formerly a wife had no separate property. What she had at marriage and what she acquired afterwards vested in the husband. If a separation occurred, whether a divorce was pending or not, starvation or suffering was often imminent, unless provision were made for her support from the property of her husband, or unless she was cared for by the charity of friends or relatives. It was thus almost a matter of course to grant temporary alimony to the wife where a divorce suit was pending between her and her husband. In the great change which has come into the law in respect to the property of married women, under which she not only retains the property which she had at marriage, and that which she acquires subsequently, but sometimes holds the title of all the family property, the rigid application of the old rule in regard to the granting of

alimony has been somewhat modified. In the first Code of the state it was provided that, "on application for temporary alimony, the merits of the cause are not in issue, though the judge, in fixing the amount of alimony may inquire into the cause and circumstances of the separation rendering the alimony necessary, and in his discretion may refuse it altogether." See Civ. Code 1895, § 2460. When the original Code was adopted there was no provision for granting temporary alimony except pending a divorce suit. In 1870 an act was passed (Acts 1870, p. 413), which is now codified. Civ. Code 1895, § 2467. It provided that "when husband and wife are living separately, or are bona fide in a state of separation, and there is no action for divorce pending, the wife may, in behalf of herself and her minor children, if any, or either, institute a proceeding by petition setting forth fully her case; and upon three days notice to the husband, the judge may hear the same in term or in vacation, and grant such order as he might grant were it based on a pending libel for divorce," etc. It will be seen at a glance that the Legislature placed the granting of temporary alimony pending a suit for permanent alimony, where the parties are living separately or are in a bona fide state of separation, on practically the same footing as an application for temporary alimony pending a divorce suit. It was distinctly declared that the presiding judge might "grant such order as he might grant were it based on a pending libel for divorce." If it were based on such a libel, the section of the original Code already quoted, which was in existence when the act of 1870 was passed, and is still in the Code, stated what manner of order might be granted, and provided for the use of the judge's discretion in respect thereto. The duty of a husband to support his wife still remained, and was not destroyed by the change in the law in respect to the property of married women. The first provision of section 2460 of the Civil Code of 1895, which declares that on applications for temporary alimony the merits of the cause are not in issue, indicates that the judge will not take the place of the jury on the ultimate trial, decide the whole merits of the controversy between the parties, and grant or refuse temporary alimony as if he were granting or refusing a divorce. It may be very commonly necessary and proper that the wife should be supported during the suit, and should have counsel fees, in order that her side of the contention may be fairly submitted to the jury on the final trial; but, on the other hand, it is not an arbitrary and unvarying rule that the judge must grant alimony or attorney's fees. He is allowed some discretion; and, if the facts are such as to demonstrate the impropriety of granting the alimony, in the discretion of the judge it may be refused.

The great weight of the testimony here was to the effect that the plaintiff shamefully mistreated her husband, threatening to kill him, using physical violence upon him, and employing such foul, indecent, and profane language to him in the presence of his children by a former marriage, and in the hearing of neighbors and other members of the family, as to shock the moral sense of decent people. The testimony also indicated that, instead of being driven from home by her husband, she attempted to aggravate him into striking her, for the avowed purpose of using his conduct against him in a suit for alimony, and that, failing in this, she deserted him. She denied this. Several witnesses impeached her veracity, and testified that she was unworthy of belief, and she brought none to sustain her. Before her marriage she had been employed in a hotel, where she worked for a living; and while a return to labor may have been less satisfactory to her than alimony, it does not appear to have been a hardship to which she was unaccustomed. *Dicken v. Dicken*, 38 Ga. 663; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782. In *Hawes v. Hawes*, 68 Ga. 142, a husband and wife agreed that she should stay at her sister's and he would support her and "do what was right." She brought suit against him for alimony. The court held that this constituted a case of voluntary separation within the meaning of the Code. In the opinion Crawford, J., added: "Had this agreement never been made, and he had stood upon his legal rights and obligations under the other facts of the case as disclosed by the record, his liability would have been governed by section 1740 [now section 2460] of the Code, as construed by this court in *Dicken v. Dicken*, 38 Ga. 663." In *Glass v. Wynn*, 76 Ga. 319, in the first division of the opinion, it was declared that, "the evidence is distressingly conflicting in respect to the party whose fault caused the separation, but this court defers to the judgment of the court below thereon, it being of opinion that there is evidence enough to sustain the judgment against any idea that he abused his discretion; and so in respect to the treatment of the wife by the husband the testimony conflicts, and we must adjudicate all these decisions on facts, where they are thus uncertain, in the same way." Discretion in deciding the question necessarily involves the power to decide it either way, if the evidence so authorizes it. In the next division of the opinion it was said that the act of 1870 declares that this procedure may be had at the instance of the wife, when husband and wife are living separately, or are bona fide in a state of separation, there being no action for divorce pending; and the cause before the court was held to fall within the provisions of the act. It is true that the able Chief Justice who delivered the



opinion made use of the expression, "And, in our judgment, it is immaterial what brought this separation about," and that he also said: "We do not see that Hawes v. Hawes conflicts with this view of the section. If so, the remark is obiter." In the third division of the opinion it was said that, "even if there must be cruel treatment or voluntary separation in order that this proceeding may be had, we think in such a case cruel treatment may exist from conduct other than blows."

It was contended that this was an adjudication that, if parties were living in a state of separation, it was immaterial what brought about that state, and that the presiding judge had no discretion to refuse temporary alimony to the wife, regardless of the conduct of the parties, but was bound to award it, if it were shown that the parties were married and were living separately. We do not think that this is a proper interpretation to put upon the decision in that case; and, although the language quoted was used, it was employed arguendo, and was unnecessary to the decision. If the construction contended for were given, it would place the court in a somewhat singular attitude of holding three propositions: (1) That the presiding judge had a discretion in the matter, and that it did not abuse it in that case; (2) that he had no discretion, but was bound to award alimony, regardless of discretion; and (3) that, if cruel treatment or voluntary separation must be shown, there was sufficient evidence of it, and the court did not err in his finding, or, in other words, that he did not abuse his discretion. We are unwilling to give a construction to the ruling in that case which will produce such a conflict of positions. Nor do we believe that the court meant to say that, if marriage and separation were shown, the presiding judge must disregard all other evidence and award alimony in all events. Suppose a wife should desert her husband without cause, and take up her abode in a house of ill fame as a common prostitute, would any court hold that her husband was bound to pay her alimony merely because they had been married and were living separately? The case of *Glass v. Wynn*, so far as has come to the knowledge of the writer, has been but twice cited—once in the case of *Ray v. Ray*, 106 Ga. 263, 32 S. E. 91, where it was cited on the subject of what might constitute cruel treatment; and once in *Ring v. Ring*, 118 Ga. 183-188, 44 S. E. 861, 32 L. R. A. 878, where it was criticised. Probably the expression quoted above from the opinion in the case of *Hawes v. Hawes* was an obiter dictum; but, if so, we think it was a correct statement of the law.

In the present case there was no abuse of discretion in the order granted by the presiding judge.

Judgment affirmed. All the Justices concur.

(1 Ga. App. 358)

# MATHIS v. HARRELL. (Nos. 190, 191.)

(Court of Appeals of Georgia. March 2, 1907.)

## 1. CONTRACTS—MODIFICATION—CONDITIONS.

The petition as amended sets forth a cause of action, and the court did not err in overruling the defendant's demurrer.

## 2. SAME—CONDITIONS—WAIVER.

The court erred in directing a verdict.

## 3. SAME—ACTIONS—EVIDENCE—ADMISSIBILITY.

No other error appears.

(Syllabus by the Court.)

Error from City Court of Bainbridge; Harrell, Judge.

Action by P. L. Mathis against one Harrell. Judgment for defendant, and plaintiff brings error. Defendant assigns a cross-bill. Judgment on main bill reversed, on cross-bill affirmed.

E. S. Longley and J. R. Wilson, for plaintiff in error. Russell & Hawes, for defendant in error.

POWELL, J. The instrument under which the plaintiff's cause of action arose is as follows: "Bainbridge, Ga. Contract between Mart Clothing Company, of the first part, and P. L. Mathis, second part. The Mart Clothing Company is to furnish P. L. Mathis a stock of goods, such as they think best and in such amounts as they think advisable, to do a general business in Bainbridge, Ga., on Water Street, in the Hicks block, to be known as the Bazaar. Said Mathis is to be manager, keep a strict account of the cash, sales and expenses, remit all cash to the Mart Clothing Company, and to sell strictly for the cash; and the minute that anything is charged or sold to any one on a credit, said P. L. Mathis then and there loses all interest in the business, and turns same over to the Mart Clothing Company, without any further claim, and at any time the business does not prove satisfactory, or is not being run satisfactory to the Mart Clothing Company, said Mathis is to turn over the business to the Mart Clothing Company, and to receive sixty dollars per month for his services for each month he has been manager of the Bazaar, less what he has already drawn out. Am to take stock at least once a year, and said Mathis is to receive one half of the net profits for running and managing the same, and P. L. Mathis is to draw not more than fifty dollars for living expenses, or for other use, and the amount he draws is to be deducted from his half of the profits. In case of fire P. L. Mathis is to receive sixty dollars per month for each month he has been manager, less what he has already drawn, and relinquish all further claims to the business. This 3rd Nov., 1904. The Mart Clothing Company, per C. C. H. P. L. Mathis." The petition brought by Mathis alleges that Mrs. Harrell is the sole owner of the Mart Clothing Company, and that he was to receive for his services under the contract with her, set

out above, a salary of \$60 per month; that under the contract he took charge of the store and worked in the same as manager for 13 months and 20 days, performing his contract as agreed; that in November, 1905, by mutual consent of himself and of Mrs. Harrell, he severed his connection with the business, and upon his turning it over to Mrs. Harrell she agreed to pay him, as the balance due him, the sum of \$137, but that she neglects and refuses to pay the same, although due under said contract; wherefore this suit is brought, etc. The defendant filed a general demurrer to the petition, on the ground of no cause of action; also a special demurrer on the ground that "it does not appear how or in what manner defendant became indebted to plaintiff in the amount sued for. It does not allege that the amount sued for represents one-half of the net profits, or that it was the balance due upon the salary plaintiff was to receive, according to the terms of the contract." The plaintiff filed an amendment to the petition, amplifying the original allegations, as follows: "That defendant is indebted to him in the sum of \$137, under the contract attached to plaintiff's petition; that under said contract plaintiff was to receive a salary of \$60 per month for his services as manager of said store; that he worked as manager for the term of 13 months and 21 days; that during said term he drew only \$50 per month, and that this defendant is due him the sum of \$137 on his salary under said contract; that when he left the service of the said defendant she agreed, through her agent, C. C. Harrell, to pay him this amount within one week. Defendant has failed to pay the same or any part thereof." The court overruled the demurrer, and this ruling is complained of in the cross-bill of exceptions. The defendant answered, admitting the execution of the contract, but denying the other material allegations of the petition, and pleading further that the plaintiff had, without her consent, broken the contract, and left her employment; that under the plaintiff's management the business had made no net profits; that, in violation of the terms of the contract, the plaintiff had, during his management of the business, sold on credit goods to the amount of \$200 to various persons, many of whom were insolvent, and that she did not know of this violation of the terms of the contract prior to the time plaintiff left her employ.

The only witnesses sworn in the case were the plaintiff and C. C. Harrell, who was admitted to be the defendant's manager and general agent throughout the transaction. Mathis, by his testimony, substantiated his allegations as to the length of service performed by him. He further testified that, having the opportunity of working for better wages elsewhere, he told Harrell that he was going to quit, and Harrell consented, and the stocks and books were turned over. Harrell

inquired as to how they should settle. Mathis replied that the quickest way was for Harrell to pay him the \$60 per month, unless he desired to take stock. Harrell agreed to settle on this basis, and promised to pay the amount the next week. Harrell requested Mathis to wait a while longer, until he could collect some of the accounts which were outstanding on the books. After a few days another demand for payment was made, and Harrell still claimed that he had not collected the accounts. Mathis replied that he would take the accounts as payment on the amount due him. Harrell then told him: "I will not pay you at all. I have consulted a lawyer, and he says I don't have to pay you." Harrell testified that Mathis, instead of selling for cash only, as required by the contract, sold goods on credit to various named persons, the aggregate of these credit sales being about \$150. During the 13 months in which Mathis ran the business it lost money, but he was unable to say how much. Defendant did not object to his quitting, but refused to pay him, because he had broken the contract and because the business was losing money. Mathis, being recalled, admitted that he had sold a portion of the goods mentioned on credit, the amount of the same aggregating about \$110, but denied making the other credit sales claimed by Harrell. As to two of the largest credit sales, amounting to about \$75, he asserted that these were made with Harrell's knowledge, and without complaint on his part. Harrell returned to the stand and admitted that credit had been extended to these two customers with his knowledge and approval, and explained that he was willing for the extension of the credit to them, because they were his regular customers and he could not supply them with the goods they wanted from his other store. This substantially states the entire testimony; and upon it the court directed a verdict for the defendant.

1. Under the allegations of the petition, especially as amended, we think a cause of action is laid. Counsel for Harrell contend that the demurrer should have been sustained because the plaintiff seeks to recover salary at the rate of \$60 per month, though, under the contract, he was to have this rate of salary only upon the happening of one or the other of two conditions—either that the business did not prove satisfactory, or that it was destroyed by fire—neither of which is alleged to have occurred. It will be seen, however, that the plaintiff did not predicate his action directly upon the contract, but upon a settlement agreed on between the parties at the mutually satisfactory termination of the contract. In our opinion the sum so agreed upon was in strict accordance with the terms of the contract, for this was the amount to be paid "at any time the business does not prove satisfactory" and the allegation that the arrangement was discontinued by mutual consent can have no other reason-

able intendment than that it was satisfactory to quit, and therefore unsatisfactory to continue the business. However, it is unnecessary for us to decide this much, for irrespective of the rights of the parties under the contract, if in a bona fide attempt to settle the matter the parties agreed on this sum, such an accord would be binding. *City Elec. Ry. Co. v. Floyd Co.*, 115 Ga. 655, 42 S. E. 45, and cases therein cited.

2. We infer from the briefs of counsel that our able and impartial Brother of the trial bench directed the verdict for the defendant on the theory that it affirmatively appeared that Mathis had forfeited his rights under the contract by reason of having sold goods on credit. While it is undisputed that the plaintiff violated the terms of the original contract in this respect, still such a violation could be waived by the opposite party, and it is by no means certain, under the evidence, that such a waiver has not taken place. This is a question for the jury. If Harrell, with notice that these credit sales had taken place, still agreed upon the settlement as claimed by Mathis, he cannot repudiate it. Indeed, even in the absence of the contract of settlement, if, during the continuance of the business, Harrell was cognizant of the fact that Mathis was extending credit to customers and made no objection, the jury would be authorized to find that it was his intention to waive this clause of the original contract. *Civ. Code 1895, § 3642*, provides: "Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement." There being evidence from which the jury might have found that Harrell had, either in making the settlement or by his conduct pending the continuance of the business, waived the provisions of the contract as to these things, the direction of a verdict was erroneous.

3. Counsel for Mathis further complains that the court erred in excluding his testimony to the effect that Harrell had failed to furnish additional goods for the replenishing of the stock upon request of Mathis. Proof of this fact was entirely irrelevant to the plaintiff's case as laid. Besides, as we construe the contract, the character and quantity of the goods to be furnished was left to Harrell's discretion. If the kind or amount furnished was not satisfactory to Mathis, he had his remedy under the contract. We hold that the court did not err in excluding the testimony. If Mathis were suing upon the original contract, and upon the theory that the contract terminated because the business did not prove satisfactory, it would be competent for him to testify that the business had become unsatisfactory by reason of

Harrell's failure to furnish the goods desired; but such is not the case.

Judgment on main bill of exceptions reversed, on the cross-bill affirmed.

(1 Ga. App. 5)

# DAVIS v. KIRKLAND. (No. 2.)

(Court of Appeals of Georgia. Jan. 11, 1907.)

## 1. TRIAL—QUESTIONS FOR JURY.

The decision of every issue of fact is exclusively for the jury.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 46, Trial, § 320.*]

## 2. SAME—DIRECTING VERDICT.

A verdict should not be directed, unless there is no issue of fact, or unless the proved facts, viewed from every possible legal point of view, can sustain no other finding than that directed.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 46, Trial, §§ 376-379.*]

## 3. SAME.

Where there is conflict as to any material issue of fact, it is erroneous to direct a verdict.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 46, Trial, §§ 342, 343.*]

(Syllabus by the Court.)

Error from City Court of Douglas; Roan, Judge.

Action by H. Kirkland against Mrs. R. B. Hall (now Davis). Judgment for plaintiff. Defendant brings error. Reversed.

C. A. Ward, P. L. Smith, and W. W. Bennett, for plaintiff in error.

RUSSELL, J. H. Kirkland brought suit against Mrs. R. B. Hall. He asked to recover money paid to her for timber for turpentine purposes. He alleges that he parted with his money upon condition that it should be repaid to him, or to the party who might gain a certain mentioned case then pending in the superior court. He averred that Mrs. Hall (now Davis) lost in that suit and refused to pay him as agreed. During the trial the petition was amended by striking H. Kirkland and inserting the words "H. & D. Kirkland." The defendant filed a general demurrer, and also demurred specially: (1) Because it is not alleged that he took any warranty for his lease, that he was ever ousted therefrom, or attorned to any one else with the consent of the defendant. (2) Because the promise alleged was without consideration. (3) Because plaintiff in no way connected himself with the suit in the Coffee superior court referred to. These demurrers were overruled. We think they should have been sustained; but, in view of what is said hereafter, it is not necessary now to pass on them.

The defendant, in her answer, though she did not remember the exact amount of money paid her, admitted all of the plaintiff's allegations, except as to the promise to repay. She denied absolutely that there was ever such an agreement on her part as was alleged by the plaintiff upon that subject

The controlling, and indeed only, issue of fact raised by the pleadings was whether the defendant promised to return the money to the plaintiff upon the terms and conditions he set up. The judge directed a verdict for the plaintiff, and the defendant excepted.

There was evidence in behalf of the contentions of both parties. The legal quarrel, begun in the pleadings, warmed into a well-drawn battle in the testimony. And the lines of the two armies of fact at issue did not harmonize or fraternize any more after the heavy cannonading of the witnesses than they did at first in the desultory firing along the picket lines of the pleadings. For this reason we think the judge erred in directing a verdict. In a Georgia trial the judge is the impersonation of the law he expounds, construes, and enforces. The jury is the sole arbiter—the only god of battles—to still the conflict and decide the victor, in the struggle between antagonistic testimony marshaled under opposing leaders, each contending for supremacy. After the legal battle lines have, by the permission of the judge, moved from the skirmishing of the pleadings into full action and real conflict between contending statements of fact, he is transformed into a mere representative of a neutral power, friendly alike to both belligerents—the law—who will see that there is no violation of those rules of war, enforced by law, and that neither combatant shall smuggle or receive from the territories of law any contraband of war in the form of illegal evidence. The law, whose representative he is, is friendly to both. But he cannot stop the conflict as long as it proceeds under law's rules of war. Should the two armies meet, panoplied in their pleadings, and either fail to fight, for the total lack of the ammunition of evidence, then, as the representative of his country, the law, he declines to recognize a state of war, and makes no protest when the victor overruns and absorbs his opponent's territory. If they fight until the arbiter of battles of fact, the jury decides the conflict and acclaims the victor, the judge then only embodies in his judgment proclamation to the world at large of the law's recognition and approval of the substantial results accruing to the victorious party.

In the justly ordered universe of jurisprudence there has never been friction between these separate nationalities, the law and the evidence. Law has ever held a protectorate over facts, and guarantees its autonomy. These nations differ greatly in intrinsic characteristics. The law is serene and conservative through the ages, and peace and order are universal in her wide domain. The territory of facts is in well-nigh constant revolution, and its every inhabitant is volatile, erratic, or capricious, and especially inclined to change his costume or disguise himself at the behest of each new forensic tailor. The law does not exercise her suzerainty over

the domain of evidence with an iron hand with a view of enforcing absolute peace among its inhabitants, because the very reason for her sovereignty is found in certain, continual, and irrepressible feuds and dissensions. Frequent as are these contentions, and however well calculated to tax the patience of law's ministers, the law will not allow her judge to enter the domain of evidence while it is unsettled, nor even to express an opinion as to which side should win. Since the birth of Magna Charta—one of law's leading citizens—whenever internal dissension or revolution arises in the territory of evidence, to determine which contending faction shall be entitled to the jewel truth, she calls in, as sole arbiter to settle the dispute, the jury, who under law's irrevocable appointment shall settle, in every nook and corner of law's protectorate—the domain of facts—all issues, great and small. The wisdom of all men most enlightened, the experience of those most familiar with the practice, the innate sense of justice, all concur in the opinion that disputes between such varying and variable characters as visit and inhabit the domain of facts cannot be satisfactorily adjusted and finally determined by any umpire more absolutely reliable and just than the jury.

In the very beginning of its official existence this court desires to place itself on record as standing for the exclusive right of the jury to determine every issue of fact in the trial of every case in Georgia. And we so willingly and cordially follow the decisions of the Supreme Court in 63 Ga. 85, and 89 Ga. 571, 16 S. E. 116, that we quote from them, not only as an expression of our views, but also, if possible, to emphasize them as a proper construction and analysis of the separate functions of our judicial system. It is true that the rulings quoted related to grants of new trial, where the jury had passed upon the evidence, while in the present case the complaint is that the court made the verdict instead of the jury; but the principle is the same. In *Central R. R. Co. v. Ferguson*, 63 Ga. 85, Judge Bleckley says: "The evidence is not conclusive. It pushes the mind into that great pitfall called 'doubt,' and there leaves it. The jury are the best doctors of doubt that we know of." In *Richmond & Danville R. Co. v. Allison*, 89 Ga. 571, 16 S. E. 116, Judge Gober, delivering the opinion, says: "These dicta could be multiplied indefinitely from the hundreds of cases wherein this point has been considered. This much is offered, not that it is new, but it is profitable. There is no safety, except in standing on the rule. \* \* \* The jury has passed upon the case as presented, and their conclusion is embodied in this verdict. The argument that a verdict is the result of prejudice and bias is one that is easily made. It is the baldest of platitudes, and can be offered

in the face of almost any state of facts. It is no concern of the appellate court what verdict is rendered, where such finding is proper and fair from the evidence. The prevailing party who gets a verdict has a property right in it. The court that sets it aside without some sufficient reason forgets the Constitution, which declares that the right of trial by jury shall remain inviolate.

\* \* \* The appellate court, as the expositor of the law, must obey the law. It is bound by the law, as other courts are bound by it. It must follow precedent, as other courts follow it. \* \* \* Courts must take the verdict of juries, when proper from the evidence, as a right conclusion as to what is the truth of a case. \* \* \* Whoever has had any experience with juries must concede that they endeavor to do right. They take questions of fact in a practical way, unimpeded by the legal fetters that restrain a professional mind. They may not find sometimes as a court would find. The reply is: The law has left this work to them. If they do their work fairly under the rules, courts ought not to disturb their verdicts. In 'Trial by Jury,' by Forsyth, he says: 'It was said of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth; and of the civil jury it may be also said that it is an institution which draws down the knowledge of the laws to the level of popular comprehension.' From this standpoint, in a practical way, by practical men, verdicts are made. \* \* \* When we reflect that the ultimate object of all our laws is to put 12 upright and intelligent men in the jury box, before whom the humblest citizen may demand redress for any invasion of his rights, the matter is seen as it is and assumes its true importance."

No principle is better settled in Georgia than that a verdict should not be directed, unless there is no issue of fact, or unless the proved facts, viewed from every possible legal point of view, can sustain no other finding than that directed. In this case the plaintiff swore that the defendant agreed, in a certain contingency, to pay back certain money. The defendant swore just as unequivocally and positively that she made no such promise. It only adds force to the statement to say that both parties were corroborated. In such situations, as remarked by Judge Bleckley, the jury is the only doctor our law will permit to prescribe. "Where the evidence on the controlling issue in a case is conflicting, it is error for the judge to direct a verdict in favor of one of the parties." *Colson v. Meyers*, 80 Ga. 499, 5 S. E. 504. The paramount right of the jury to decide any issue of fact in every case, in Georgia, is absolutely exclusive of any such prerogative on the part of the judge. The exercise of this power by the jury, unless waived by the parties, is an

indispensable requisite of a legal trial in this state, and an invasion of this right (as has been held by our Supreme Court times without number) demands the grant of another trial. It is true that the Code now authorizes verdicts to be directed. "Where there is no conflict in the evidence and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto." *Civ. Code* 1895, § 5331. To the mind of the writer the fact that this section was ingrafted upon the Code by the codifiers, by modification of language used in *Hooks v. Frick*, 75 Ga. 715 (a case that was itself submitted to a jury, and that after argument by counsel and charge by the court), and not codified (as is usual) from a statute passed by the General Assembly, is quite significant. When, however, the seal of legislative enactment was placed on the entire Code, it became the law.

Speaking for myself, I think that the opinion rendered by Chief Justice Jackson in *Manning v. Mitchell*, 73 Ga. 665, when he said: "On what principle the case was decided by the court below, we cannot see. Indeed, unless it is a case which is so plain that it would be useless to send it back, it would be done because the court directed the verdict, which, under Georgia practice, it had no power to do"—is in keeping with the principles of our Constitution. And I can hardly believe that this great judge ever expected that his decision on the precise question of directing verdicts, quoted above, would be overturned by his own language, used when the question being discussed was the right of the judge, under "the dumb act," to intimate an opinion on the evidence, and when the court was holding that a judge may, in his charge, assume and assert the existence of any fact proved and not controverted. The doctrine of permitting a judge to direct a verdict originated in affirmances of verdicts in cases where the finding was so absolutely required, under the facts in those particular cases, that for this reason the Supreme Court held the error harmless. One of the stages of this gradual evolution can be seen in *Hobby v. Alford*, 73 Ga. 791. First considered an error, but not reversible if harmless to the losing party, after many evolutions it finally received legislative sanction in order to economize time. But, if section 5331 be analyzed, the word "may" imports no command. It is merely permissive, and is weighted with the implication that the power is to be most carefully and cautiously exercised in those cases—and those only—in which there is no possibility of doubt or dispute as to the evidence. And the words "no conflict" are so sweeping and full of meaning as to withdraw the permission if there be even the slightest conflict in the testimony. When each proved fact has

been subjected to every possible analysis, and there is only one solution which will fuse them into homogeneity; when the light has been thrown on the evidence from every direction, and it presents but one view; when it is certain that no other verdict than that directed could be found or stand—then a court may direct a verdict. And this because the case has resolved itself into a question of law.

Having noted the birth and descent of section 5331, we will say that we shall follow this section (sprung from the union of judicial construction and legislative acquiescence, ushered into our legal world by the midwife of codification, and its paternity only admitted because it finds itself in the household of the Code) as the law, where we are bound to do so, but not a step further. In view of the fact that we hold that the directing of a verdict in the case was such error as demanded a new trial, it becomes unnecessary to consider the various other assignments of error. If error was committed as to any of these, the learned trial judge will no doubt correct it on the next hearing.

Judgment reversed.

(1 Ga. App. 244)

**LESTER-WHITNEY SHOE CO. v. OLIVER CO. (No. 73.)**

(Court of Appeals of Georgia. Feb. 20, 1907.)

**1. BILLS AND NOTES—PRESENTMENT FOR PAYMENT—EFFECT OF DELAY.**

In order to hold the payee of a check liable for failure to present it, in the event of the failure of the bank on which it is drawn, the maker of the check must have in bank, subject to the payment thereof at any and all times after the drawing of the check, either funds of his own subject to the check, or some positive agreement or understanding with the bank which will guarantee the payment of the check at such time as it may suit the pleasure, convenience, or interest of the holder to present it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1045.]

**2. SAME.**

Before the payee of a check can be held liable for damages in not presenting the check, it must appear, either directly or from the circumstances of the transaction, that he has accepted the check from the drawer, or that he is under some obligation to do so.

**3. SAME—CHECK—CONTRACT OF MAKER.**

The issuance of a check includes two guarantees on the part of the maker—that the bank on which the check is drawn is solvent, and that his check will be paid on presentation.

**4. SAME.**

If the maker of a check has on deposit in a bank money sufficient to pay the same, and the owner fails to present it for payment within a reasonable time, during which time it would have been paid if presented, and the bank fails between the time of drawing and the presentation thereof, the drawer is discharged from liability to the extent of the injury he may have sustained by reason of such failure. The requirement of presentation within a reasonable time on the part of the holder of the check is coupled with the requirement, as to the maker,

that the check shall certainly be paid when it is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1045.]

**5. SAME.**

If the drawer has no effects in the hands of the drawee, and there is no positive agreement to pay by the drawee, the making of the check will be considered fraud on the part of the drawer, and presentation and notice will be excused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1042.]

**6. EVIDENCE—DOCUMENTARY—BOOKS OF ACCOUNT—PAYMENT BY CHECK.**

The admission of the book of which complaint is made in the fifth ground of the amended motion for a new trial was error. It was not sufficiently identified as one of the books of the bank, nor was it shown who kept it or that it was correctly kept. *Talbotton R. Co. v. Gibson*, 32 S. E. 151, 106 Ga. 236. But the error was harmless, because, when the defendant attempted to set up his damages accruing by reason of nonpresentation of his check against the claim of the plaintiff, it devolved upon him to show affirmatively that the funds were on hand to meet the check throughout the entire period from the making of the check to the failure of the bank. If the defendant failed in this, he was not entitled to a credit, because a check is not payment until itself paid; and it devolves upon the maker, in the event of its nonpayment, to show why it should be treated as a payment for his benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1628; vol. 39, Payment, § 87.]

**7. ACCOUNT, ACTION ON.**

Consequently the correctness of that portion of plaintiff's account which was covered by the check and equal thereto in amount being admitted, and defendant failing to show damage by the nonpresentation of his check, a verdict for the plaintiff was demanded.

(Syllabus by the Court.)

Error from City Court of Macon; Hodges, Judge.

Action by the Oliver Company against the Lester-Whitney Shoe Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman & Jones and E. P. Johnston, for plaintiff in error. John P. Ross and Erwin & Callaway, for defendant in error.

**RUSSELL, J.** The plaintiff (now defendant in error) sued the defendant (who brings this writ of error as plaintiff in error) on an account in the city court of Macon. To part of the account the defendant pleaded failure of consideration, and no complaint is made as to so much of the verdict as relates to that portion of the alleged indebtedness. As to the other portion of plaintiff's account the defendant pleaded plaintiff's failure to present within a reasonable time, and before the failure of the bank on which it was drawn, a check sent by defendant in payment of that part of the account; and the assignment of error is addressed to this portion of the account, and based on the refusal of the trial court to award a new trial thereon.

The third ground of the motion for new trial asserts that the verdict is contrary to

law, because "the evidence showed that defendant, on the 9th day of December, 1903, sent by United States mail to Jorolomon Oliver & Co. its check on I. C. Plant's Son Bank for the sum of \$214.10, which said check was duly received by the said Jorolomon Oliver & Co., and accepted by it as a payment on said account. At the time defendant sent said check to said Jorolomon Oliver & Co., it had on deposit with said I. C. Plant's Son Bank, subject to said check, a sufficient sum to pay the same, and continuously since said December 9, 1903, it has on deposit with said bank a sufficient sum to pay said check. But so it is that said check has never been presented to said bank for payment, and on May 16, 1904, the said I. C. Plant's Son, Banker, became insolvent, and he has since been duly adjudged a bankrupt. Wherefore defendant says it has paid upon said account the sum of \$214.10, and defendant is entitled to have said payment credited upon the account sued on; and by reason of the conduct of said Jorolomon Oliver & Co. defendant has been discharged from liability to the plaintiff upon said account to the extent of \$214.10." In the fourth ground it is insisted that the court erred in directing a verdict for the amount of the check. The fifth ground of the motion complains that the court erred in admitting in evidence, over the objection of defendant, certain pages from a book offered in evidence as the ledger of I. C. Plant's Son, Banker—the objection being (1) because the identity of the book had not been established; (2) because it had not been shown to have been correctly kept; (3) because it does not appear who kept it; (4) because the book is not relevant on this hearing, and is the transaction of a third person, whose action and conduct cannot be used to bind the Lester-Whitney Shoe Company in this case; (5) because it does not appear that the Lester-Whitney Shoe Company had anything to do with the keeping of the book. And movant insisted that the admission of this book was distinctly hurtful to the defendant, because, in the absence of said book, there was no evidence to contradict the testimony of L. P. Lester that they had money on deposit to meet the check from the date he gave it until the failure. The sixth ground assigns error in the following charge to the jury: "With reference to the check introduced in evidence, in the opinion of the court as to the law of the case, you will bring in a verdict in any event in favor of the plaintiff in this case for the face value of that check, with interest from the date of it, because in the judgment of the court that is the law of the case, and that will control you in reference to the check. So, whatever your finding may be upon the other branches of the case, you will bring in a verdict in favor of the plaintiff against the defendant for the value of the check with interest from the date of the check." The error, as insisted, is that plaintiff was not entitled to recover the amount of

the check as a matter of law, and the court should either have left to the jury the question whether or not the defendant was guilty of fraud towards plaintiff sufficient to relieve the plaintiff of the duty of presenting the check, and whether or not under the circumstances plaintiff was under any necessity or duty to present the check, or should have instructed the jury as a matter of law, under the undisputed facts, defendant had sustained injury to the amount of the check by the failure of the plaintiff to present it.

It appears from the evidence that the defendant gave the plaintiff an order to manufacture certain shoes according to samples; the plaintiff being a shoe manufacturer, and not carrying the shoes in stock. It was an entire contract. The plaintiff manufactured and shipped the shoes, and they were duly received by the defendant. The defendant sought to accept a portion of the shoes and to reject about one-third of them. The plaintiff refused to consent to the partial rescission of the contract, and the defendant retained all of the shoes, but refused to pay for any of them unless the plaintiff would credit the purchase price with the contract price of the shoes the defendant had sought to reject. It appears from the evidence in the record that, "after much controversial correspondence, on December 9, 1903, the parties being still at issue as to the debt due, the defendant tendered the plaintiff its check for \$214.10, and the shoes which the defendant desired to reject, and the return of which the plaintiff had refused, in settlement of the matter." The material part of the letter accompanying the check (after again complaining of the shoes) is as follows: "We again tender you a settlement of the matter. We inclose our check on I. C. Plant's Son Bank for \$214.10, to pay for the portion of the bill we accepted. Remainder of the goods, to the amount of \$101.40, are here subject to your order. They have not been opened since they came in the last time." The plaintiffs had possession of this check from December until May, during which latter month the bank of I. C. Plant's Son, on which the check was drawn, failed. The charge of the court on this subject amounted to the direction of a verdict, and is to be closely scanned. In every case where a verdict is directed, it is at the peril of an invasion of the right of trial by jury. For, as this court held in *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, to direct a verdict was originally always error, and is only sanctioned by the Code where the error is harmless, because, under the evidence in that special case, no other verdict would be right or could legally be found. The whole issue, then, so far as here contested, turns on the questions (1) whether the plaintiff was bound to present the tendered check for payment; and (2) if so, did the defendants suffer such damage by reason of the failure of the plaintiff to present the check as would entitle the defendant to credit for the amount, as though the

check had been presented and paid? It was admitted that, if there was damage at all, the measure of the defendant's damage by the nonpresentation was \$214.10, the amount of the check. Had the plaintiff accepted the tender of settlement, it would have been bound to present the check for payment within a reasonable time, and it would have been liable for any loss occasioned defendant by its failure so to present the check. Had the plaintiff presented the check for payment, such act would have been an acceptance of the tender of settlement, and the plaintiff would have been bound to accept the return of the objectionable shoes in response to the letter above quoted.

The plaintiff promptly notified the defendant that it would not accept the tendered settlement, and that it would not accept the check for \$214.10 and the return of the shoes objected to in settlement of the debt due by defendant, but stated that it would hold the check to give the defendant an opportunity to remit the balance of the debt due. It is manifest that the plaintiff meant to convey to the defendant the information that it would not present the check for payment, or otherwise manifest an acceptance of the tender of settlement made, but would hold the check to await another check to cover the balance the plaintiff claimed to be due on the debt, and would then present both checks for payment. And it is clear that the defendant so understood; for the defendant, on December 19, 1903, in answer to the letter of the plaintiff's agent, giving notice of the rejection of the tendered settlement and the conditional holding of the check, recognized that the plaintiff had rejected the tendered settlement and refused to accept the check, saying, "We offered our check, \* \* \* but the A. H. Oliver Company declined to accept same." Then, did the evidence by any possible construction show that the plaintiff was bound to present the check, or, failing to do so within a reasonable time, thereby entitled defendant to a credit of its amount on plaintiff's account? It is well settled that the failure to make demand within a reasonable time is at the risk of the holder; and some of the authorities go to the length of saying that the onus of showing that the drawer has sustained no loss by the delay lies on the holder. *Daniels v. Kyle*, 1 Ga. 304. And the charge of the trial court on this subject which was then approved, and which was certified to have been given when the case again appeared in 5 Ga. 245, was as follows: "If the defendant had on deposit in said bank money, or any effects of value, at the time of drawing said check, and the owner thereof failed to present the same for payment within reasonable time, and the bank failed between the time of drawing and the presentation thereof, the drawers were discharged from liability to the extent of the injuries they may have sustained by reason of such failure." To the same effect is *Comer v. Dufour*,

95 Ga. 378, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89. This is the rule as to holders; but the antecedent question to be determined is: Was the plaintiff ever, in the sense of the law, a holder, so as to be subject to these well-settled rules? The evidence of both the plaintiff and the defendant, as shown by their letters, demonstrates, without question, that the check was first offered by the defendant in settlement, that it was never accepted by the plaintiff, and that the defendant knew, recognized, and in writing admitted this fact. A check is not payment until itself paid, and, of course, a check declined is not such acceptance as to make the party to whom it is sent, and who expressly refuses to accept it, and who keeps it only while further negotiations are pursued, merely to see if he cannot effect a collection of his entire claim, a holder. If there had been dispute on this proposition, it should have been submitted to the jury. But, as there was none, the charge of the judge directing a verdict as to this portion of plaintiff's claim is not reversible error.

We think it was error to admit the bank ledger in evidence in this case, in the face of the timely objection made; but the burden of showing that there were funds on hand to meet the check was upon the drawer of the check, and if he does not show that there are funds subject to his check at all times after the making of the check, or some other arrangement by which payment of his check is guaranteed at any time the payee may desire to present it, he cannot claim damage against a holder for unreasonable delay in presentation. Leaving out of the case the book erroneously admitted, no proof was adduced on that subject by the defendant, except that he had overdrawn at bank when the check was drawn, and may have overdrawn several times afterwards, instead of proving, as he was bound to do, by something more than mere inference, that it was the duty of the bank to pay this check whenever presented, either out of his money or by express contract to allow an overdraft. We understand the rule in *Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. 147, just as, no doubt, the learned judge understood it. While the law limits the guaranty of the maker of the check as to the solvency of the bank to a reasonable time, it is perfectly plain that the law does intend that the holder shall find enough money there at any time he may present his check, and all of the time until the bank becomes insolvent, to pay it. "If at the time the check was delivered to the payee the bank was solvent, and held funds of the drawer sufficient to meet it, it would be a fraud for the drawer, after giving a check upon them, to withdraw the amount which should pay it; and as he could not rightfully withdraw the amount, it would be unjust to require that, however long the check holder might permit it to remain, it should be at the drawer's risk." So that we think that there was no error in



directing the verdict, because no other verdict could have lawfully been found.

Judgment affirmed.

(1 Ga. App. 139)

**STRICKLIN & CO. v. CRAWLEY. (No. 9.)**

(Court of Appeals of Georgia. Jan. 11, 1907.)

**1. APPEAL—REVIEW—ERRORS OF FACT.**

By the terms of the constitutional amendment creating the Court of Appeals, it is a court for correction of errors in law and in equity only. It has no jurisdiction whatever to consider errors of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3893.]

**2. SAME.**

Where the issues of fact in a case have been fairly submitted, and the jury—the only proper tribunal—has found a verdict on those facts, and no error of law is disclosed, and the trial judge has approved the verdict, the judgment of the court below must stand affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

**3. PARTNERSHIP—PLEADING—DENIAL.**

It is unnecessary to prove a partnership, unless it be specifically denied on oath.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 409.]

(Syllabus by the Court.)

Error from City Court of Waycross; Myers, Judge.

Action by E. H. Crawley against Stricklin & Co. D. C. Stricklin only was served. Judgment for plaintiff. Defendants bring error. Affirmed.

J. H. Tipton and J. L. Sweat, for plaintiffs in error. W. F. Crawley, J. L. Crawley, and Leon A. Wilson, for defendant in error.

RUSSELL, J. Crawley brought a suit in the city court of Waycross against Stricklin & Co. (D. C. Stricklin & Co.) on the following draft:

"\$1000.00. Micanopy, Fla., 12, 8, 1899.

"At sight, pay to the order of E. H. Crawley one thousand dollars, value received, and charge the same to the account of

"Stricklin & Company.

"To the Downing Company, Brunswick, Ga."

Upon the above the following indorsement appears:

"Noted and protested for nonpayment, December 11, 1899.

"E. D. Walters,

"Notary Public, Glynn Co., Ga."

Only D. C. Stricklin was served. Upon the trial the jury rendered a verdict in favor of the plaintiff for the amount sued for. A motion for new trial, based upon the statutory grounds, was filed by the defendant. It was overruled, and thereupon a writ of error was sued out, assigning error upon the overruling of the motion.

The defendants, in their answer to the petition, denied indebtedness, and denied that D. C. Stricklin was a member of the firm of

Stricklin & Co. They further pleaded a total failure of consideration, though they admitted the execution of the draft in question and their refusal to pay the same. The answer was not sworn to. The defendants assumed the burden of proof. It was uncontradicted in the evidence, therefore, that the defendants made and delivered the draft sued upon, and there was no dispute that it was given in part payment of some interest, or supposed interest, in a certain tract of land, the appurtenances thereto belonging, the live stock, and commissary, or stock of merchandise, etc., known as the "Coleman Place." There was conflict as to who were to be included as partners in the purchase, and also as to whether any written transfer of the plaintiff's interests was executed and delivered to the purchasers. There was also conflict as to whether the plaintiff had any interest to convey. But upon every disputed point in the case, except as to partnership, and as to whether D. C. Stricklin was a member of the firm of Stricklin & Co. (the signers of the draft), the plaintiff's case was supported by substantial testimony which fully authorized the verdict. Having held, in *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, that it is the exclusive province of the jury to determine all disputed issues of fact, there are really only two questions suggested which require any determination on our part. In the first place, was the loss of the "option" sufficiently shown to authorize the introduction of parol evidence as to its contents? And, secondly, was the membership of D. C. Stricklin in the partnership of Stricklin & Co. sufficiently shown?

With reference to the first question it appeared from the evidence that Crawley & Ellington had taken an option, in writing, on the Coleman property. The option was in the possession of Ellington and in his safe. Crawley testified that he made a written transfer of his two-thirds interest to Stricklin & Ellington and turned the paper over to Ellington. Ellington testified that he put it in his safe, that it was in writing, that it was transferred to himself and Stricklin in writing, and was placed in his safe in his private drawer some seven years ago. He further testified that he had made search for it, and it was not to be found. This showing was made to the court, who thereafter allowed testimony as to the contents of the option or writing to be delivered; and we are not prepared to say that this was error. We think the foundation was sufficiently laid for the admission of parol evidence as to the contents of the lost paper. It is insisted by plaintiff in error that the original option and transfer should have been tendered in evidence, and, if not, a certified copy from the record, and, if it was not recorded, that parol evidence would have been admissible; but the parol evidence must have shown all the essentials of a legal document. This,

plaintiffs insist, it failed to do, as the evidence did not show any right or title in the parties giving the option, or a sufficient description of the property, or any attestation by witnesses. We think the evidence establishes a full description of the property to be conveyed, both realty and personalty, and of the right of Coleman & Wilson to sell; for they are shown to have been in possession, and that the maker of the draft was acquainted with the character and extent of that possession. An option, being merely an agreement (upon compliance with certain conditions) to sell and properly convey the property therein described, does not necessarily require attestation. A bond for title is valid without attestation, though it cannot be recorded unless it be attested as prescribed by law.

The second error insisted upon is that the plaintiff should have been required to prove that D. C. Stricklin was a partner of Stricklin & Co. As we have already stated, the defendant's plea was not under oath. The draft being an unconditional contract in writing, the plea must have been under oath before the burden was shifted. Civ. Code 1895, § 5655. And as to partnership: "Partners suing or being sued in their firm name, the partnership need not be proved unless denied by the defendant, upon oath, on plea in abatement filed." Civ. Code 1895, § 2637; *Henderson Warehouse Co. v. Brand*, 105 Ga. 221, 31 S. E. 551. Under the above-recited section of the Code it is not necessary, where partners are sued in their firm name, that the partnership should be proved, unless denied on oath by a plea in abatement. "In the absence of such, it is too late after the verdict for him to complain, and the verdict cannot be set aside on this ground." Under the ruling in *Martin v. Lamb*, 77 Ga. 252, 3 S. E. 10 (3), it was the duty of the defendant, D. C. Stricklin, to show, if he could, that he was not a member of the firm of Stricklin & Co. and that his wife was. On the contrary, we think several circumstances shown by the evidence would have fully authorized the jury to believe that he was a partner. The evidence showed that he drew the draft, that it was drawn as from Micanopy, Fla., and that he stated to Ellington that he had two places in Florida, etc. But, however this may be, it was incumbent upon the defendant in the court below to have established the fact of the partnership, inasmuch as his plea was not verified as provided by law. The plea in this case was not verified at all, and certainly, therefore, could be in no better condition than one verified to the best of one's knowledge and belief; and in 77 Ga. 252, 3 S. E. 10, above cited, it was held that "a plea of nonpartnership, sworn to by the defendant to the best of his knowledge and belief, does not cast the onus upon the plaintiffs, but only entitles the defendant to go to the jury and establish his defense."

Upon the subject of consideration the tes-

timony was conflicting, but it does not appear that plaintiff in error did not have an opportunity of getting all that he bargained for. It is undisputed that the plaintiff in error and one Ellington had an option on the Coleman turpentine place originally for 30 days, which then had more than 20 days to run, at the price of \$23,000; that they paid \$100 for their option. Stricklin agreed to buy a half interest in the place at \$28,000 as the price for the whole. If the jury believed the testimony of Crawley, Ellington, and Sharpe, the property to be conveyed was fully described, and included the land making up the Coleman turpentine place on the Satilla river, in Ware county. It included the leases, and the horses and mules, wagons and harness, and commissary stock. And, as the contents of the option were admitted by the defendant in the court below to be known to him, the jury were fully authorized in finding that, had he complied with the terms of the purchase, he could have obtained the property he contracted for. All these issues of fact having been fairly submitted to the jury, who are the only chemists in a case of facts, the court, being satisfied with the verdict, was right in refusing to invade their province by granting a new trial. The judge, as a juror might or might not have found a different verdict; and so might this court in some cases, if impaneled as jurors, have refused to find some verdicts which we are not empowered to set aside. The operation of a jury trial may be likened to that of a weighing, sorting, mixing, and registering machine, so delicately adjusted that it attracts every molecule of evidence and is responsive to every pulsation of the truth, while in turn it is responsible to the law to separate fact from fiction, and correctly registers its verdict on the dial. By the terms of its creation the Court of Appeals is a court for the correction of errors in law and in equity only. It has no jurisdiction whatever to consider errors of fact.

Judgment affirmed.

(1 Ga. App. 673.)

#### HASTINGS & CO. v. CHRISTOPHER. (No. 285.)

(Court of Appeals of Georgia. April 25, 1907.)

#### 1. WRIT OF ERROR—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

The settlement of issues of fact is the exclusive prerogative of the jury. The Court of Appeals, by the express terms of its creation, was established for the correction of errors of law and in equity only.

#### 2. SAME.

When enough legal evidence is submitted by both plaintiff and defendant to create a manifest issue as to the material contention of each, or to raise a doubt as to the veracity of any witness in such case, the settlement of such issue of fact, as well as the solution of such doubt, is exclusively within the province of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3928.]

## 3. SAME.

A verdict of a jury, approved by the trial judge, will not be disturbed by this court when it appears (no matter in how many various forms the question may be presented) that the motion for new trial is urged solely on the ground that the verdict is contrary to evidence, unless it be made to appear that the verdict is totally unsupported by the evidence. If there is no evidence to support a verdict, such verdict is, for that reason, contrary to law; and in such case to refuse a new trial would be such error of law on the part of the lower court as that this court could constitutionally correct it, and should do so.

[Ed. Note.—For cases in point, see Cent. Dig. vl. 3, Appeal and Error, §§ 3943, 3950.]

## 4. SAME.

The Court of Appeals is without jurisdiction to consider an assignment of error addressed solely to the finding of the jury upon issuable facts.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by one Christopher against Hastings & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

E. M. & G. F. Mitchell, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman and A. H. Thompson, for defendant in error.

RUSSELL, J. Christopher sued Hastings & Co. in the city court of Atlanta for damages resulting to him from a breach of contract entered into between the parties with reference to the sale of a large quantity of cotton seed, which Hastings & Co. agreed to buy, but which they declined to accept, on the ground that the seed did not come up to the sample by which they were sold. It is insisted with great earnestness by counsel for the plaintiffs in error that Christopher filed no replication denying their plea that the sale was by sample, and that Christopher did not, as a witness, deny that the sale was by sample until after both sides had finished their direct testimony, "when he went upon the stand and testified that the trade was that 'due allowance should be made for defects appearing in a crop lot'; and counsel argue that if Christopher "had not testified, in rebuttal, to a different sort of a contract from the one on which the case had heretofore been tried, he would have been without evidence to sustain his case," and that "the jury could only have rendered the verdict they did by accepting Christopher's testimony to a different sort of a contract, when he went on the witness stand a second time."

No matter at what stage of the testimony the evidence was introduced, the question of its credibility was solely for the jury. The argument addressed to us could be considered by the jury, but it comes too late when presented here. The only question we can consider in regard to the evidence is that of its legal sufficiency or insufficiency to support the finding reached by the jury. The constitutional amendment creating the

Court of Appeals, in its express terms, restricted it to the correction of errors of law and in equity only. If a verdict is without evidence to support it, it is, for that reason, contrary to law, and this court can correct that error; but if the verdict is the settlement by the jury of disputed issues of fact, and if there is any evidence to authorize the finding, this court is without jurisdiction. It is the exclusive prerogative of the jury to settle every issue of fact to be determined; and, where there is an issue of fact, that power of the jury is paramount and exclusive. The trial judge has discretion conferred upon him to review the evidence upon the motion for new trial. This court has no such discretion. We can only determine from the evidence in a case, where there is no evidence to support a verdict which has been approved by the trial judge, that for that reason such verdict is contrary to law. The subject has been fully treated by this court in *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, *Stricklin v. Crawley*, 1 Ga. App. 139, 58 S. E. 215, and other cases. It is useless to expend argument, labor, or money in prosecuting writs of error directed solely to the fact that the witnesses of the defendant in error were believed in preference to those of the plaintiff in error. Nor will it alter the case when skillful counsel present the matter in varied and various forms. It can be said once for all that this court has neither the power nor the disposition to assume the duty of the jury in determining the credibility of witnesses.

While the plaintiffs in error sustained by their testimony the contention that the cotton seed in question were bought by sample, and that the seed were not up to the sample, still, by a review of the testimony for the defendant in error, it is placed beyond any question that the defendant in error (plaintiff in the court below) was fully entitled to the verdict awarded him by the jury, in case the jury, as they had a perfect right to do, preferred to believe the testimony he submitted. The evidence disclosed that Hastings & Co. are seedmen, dealing in garden and farm seed of all descriptions, and doing a large business in cotton seed. In the summer or early fall of 1904 Christopher was approached at his home in La Grange, Ga., by an agent of Hastings & Co., and asked if he had any of his seed for sale. Christopher replied that he had none of his own growth, but that he controlled a crop lot, which was grown from the Christopher seed. The agent asked him to get him a sample of the seed and take it to Atlanta, and said that, no doubt, he and Mr. Hastings could make a trade about it. The seed that Christopher had in view was the crop for 1904 and 1905, grown by W. F. Hinds, a farmer in Troup county. Christopher thereupon got a sample of seed from Mr. Hinds, took out some of it to take with him to Atlanta, and kept the remainder of the sample

at La Grange. He came to Atlanta to see Mr. Hastings, and after a considerable discussion made a trade with Mr. Hastings, as a result of which Hastings agreed to pay him 70 cents per bushel for the entire crop grown on the plantation of Mr. Hinds, to run up somewhere about 3,000 bushels. Hastings had been making very large preparations for the coming season, and for that reason desired credit extended him, which was agreeable to Christopher. It was agreed that one-half the purchase price should be paid the next February, and the balance a little later. There was a dispute between Hastings and Christopher as to the exact terms of the contract. Hastings was to send sacks to sack the seed. Hastings claimed that he bought the seed strictly according to sample. Christopher testified that, while the quality of the seed was evidenced by a sample, it was agreed between the parties that due allowance should be made for a crop lot. It was understood, however, that the seed were not to be picked seed, but were to be as coming from the ginnings. Hastings' contention was that the sample shown him by Christopher was the finest he had ever seen, practically free from faulty seed, and that he was entitled to seed of substantially the same character. Christopher contended that, while they sat talking together, Hastings, either consciously or unconsciously, picked out the faulty seed in the sample he brought to Atlanta and threw them away.

As the season advanced the seed business showed signs of great depression. Cotton went down, and there was not near the demand for cotton seed that Hastings & Co. had expected. They therefore did not ask for delivery. Christopher began calling on Hastings & Co. to give instructions with reference to the seed, and to send some one down to receive them. Hastings & Co. began then writing letters explaining the hard times in their business, and that the seed would probably have to be dumped into an oil mill, and suggesting that Christopher give this direction to the seed, and that they would give their notes, payable at some time off, for the difference between the contract price and the price obtained from the oil mill. This was not satisfactory to Christopher, and finally, on his repeated demands that Hastings & Co. send somebody down to inspect and receive the seed, Hastings & Co. sent a Mr. Holder for that purpose. He went in alone where the seed were, and, after having been in the house 15 or 20 minutes, came out with a small sack of cotton seed, which he undertook to compare with what he claimed to be the sample given him by Hastings & Co. as the sample upon which the trade was based. Holder claimed that the sample seed were better than the seed he had himself taken out of the sacks. Christopher and Hinds claimed that the seed were substantially the same. Holder re-

turned to Atlanta, making the statement to Christopher that the seed were too good to be dumped into an oil mill, and that he was going to endeavor to get Hastings & Co. to hold the seed for the next crop. Upon his return to Atlanta, Hastings wrote a letter rejecting the seed on the ground that they were not up to sample.

On the trial of the case four samples of seed were offered in evidence and considered by the jury: The sample that Hastings claimed was the trade sample, but from which Christopher claims Hastings had picked out the faulty, leaving only the best, seed; a sample that Christopher claimed was part of the sample that he brought with him to Atlanta, but which appeared to have in it a few more faulty seed than the sample Hastings produced in court; the sample that Hastings claimed had been brought to him by Holder, and which seemed to contain a few more faulty seed than any of the other samples; and a sample which was produced by Christopher as a sample taken out of the seed which had been rejected. All of these samples were allowed to go out with the jury, and the evidence showed that all of them were the same general character of seed; some of the witnesses testifying that they looked substantially the same, and some of the defendants' witnesses testifying that what Hastings called his "trade sample" had fewer faulty seed than any of the others, and that the sample which was rejected contained more faulty seed than any of the others. The evidence made it clear that a sample of cotton seed could be manipulated, either by picking out the faulty seed and thus improving the appearance of the sample, or by picking out the good seed and thus injuring the appearance of the sample. The evidence for the plaintiff showed that the seeds tendered were up to sample, and that the trade sample offered by Hastings & Co. had the evidence of having been picked; and Christopher swore that Hastings had picked the faulty seed out of it. The evidence further showed that Hastings stood to lose a considerable sum on account of this contract, and that, when it became evident that he was endeavoring to get out of the contract, it was too late for Christopher to make any other disposition of his seed. The strong preponderance of the evidence was in favor of the plaintiff's contention in the cause. The jury evidently took into consideration all of the circumstances that developed, and properly returned a verdict for the plaintiff.

Judgment affirmed.

(1 Ga. App. 219)

CHARLES v. BROOKER. (No. 99.)

(Court of Appeals of Georgia. Feb. 14, 1907.)

APPEAL—REVIEW.

No error of law appearing, this court will not disturb the verdict of a jury, where there

is evidence to support their finding. The right of the jury to settle disputed issues of fact is supreme and exclusive. *Davis v. Kirkland*, 58 S. E. 209, 1 Ga. App. 5. This court was created for the correction of errors of law and in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3928.]

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; Flite, Judge.

Action by one Brooker against one Charles. Judgment for plaintiff before a justice. From an order overruling the certiorari, plaintiff brings error. Affirmed.

J. M. Rudolph and Sam. P. Maddox, for plaintiff in error. George G. Glenn, for defendant in error.

**RUSSELL, J.** This was a suit on a note in the justice's court, with a verdict by the jury in favor of the defendant. The plaintiff carried the case to the superior court, where his certiorari was dismissed; and this order overruling the certiorari was the only error assigned.

The only portions of the record specified and sent up are the assignments of error stated in the petition for certiorari, the answer of the magistrate, and the order overruling the certiorari and refusing a new trial. It is complained in the petition for certiorari that the justice erred in allowing introduced an extract from a former certiorari, setting out the evidence of the witness Martin Warren; that it should have been excluded, because it was immaterial, irrelevant, and not evidence. As the extract complained of was not specified as material, and therefore was not transmitted to this court, we are, of course, unable to determine whether the evidence objected to was immaterial and irrelevant, or not. And it would be unnecessary for a court to consider that portion of the objection; for, if the words "not evidence" can be considered to have been used instead of the word "inadmissible," then it is autoptical that an extract from a petition for certiorari purporting to set forth the testimony of a witness on a former trial would be inadmissible, in any view of the case, as evidence of any fact stated therein. In the language of the assignment of error, it is "not evidence." But the justice, in his answer, says this statement of error is untrue. And as the magistrate's answer, untraversed, is controlling in determining what actually occurred on the trial, his positive statement that the extract was never admitted or read to the jury sweeps away the only legal hope of the plaintiff to get another trial. Nothing else is left in the case; for the evidence of the defendant, if believed by the jury, fully authorized their verdict.

It appears, from the evidence in the record, that the plaintiff sold the defendant \$85 worth of hay belonging to a tenant, in order to collect a \$75 debt, and, although the tenant was present at the bargain, neither disclosed to

the buyer the truth as to the ownership. The plaintiff was very anxious to sell, in order to get defendant's note, instead of his claim on his tenant debtor or the hay which he volunteered to help him sell. The tenant wanted to sell the hay so as to pay his debt. The defendant knew nothing of these deals between the plaintiff and his debtor. He testified: "I bought the hay from Mr. Charles, and if Dukes (the tenant) had anything to do with it I did not know it." He was not willing to buy the hay unless it could remain where it was until later, when he could move it. He would never consider the question of buying until the plaintiff stated that it could stay there, and assured him (according to the testimony of defendant) that it would be safe, and that nothing would damage it, except fire. The defendant paid, in lumber, \$17.91, a cow taken at \$20, and cash \$25, on the note. The defendant left the hay where he purchased it, and the answer proceeds: "After I had gone, somebody turned some cattle in the field where the hay was, and they ate and ruined all the peavine hay, and did some damage to the rough hay. The whole damage was \$30, or more." It appeared, from the evidence of the plaintiff himself, that the cattle were turned in the field where the hay was, by an arrangement with the very tenant whose hay had been sold to enable plaintiff to transform his debt into the note against the defendant.

This court cannot review the findings of juries on issues of fact, unless, as a matter of law, a verdict has no evidence to support it. Therefore we can only say that the assignment of error that "the verdict is contrary to evidence and the law of the case" is not sustained. We heartily indorse the general principle urged by the diligent counsel for plaintiff in error with reference to the maintenance of right, regardless of the number of trials. If it appeared to this court that any material error of law had deprived plaintiff in error of any legal right, it would be a matter not to be considered by us that the case had been twice tried in the justice's court and passed upon by jury, and twice taken to the superior court by certiorari. No number of wrongs make a right. Our decision is based upon the record of the one trial under review, and upon what is legally disclosed by that record, and nothing else. Judged by the record, we are not at liberty under the law, to order another trial in this case merely to give either party another chance. There must be somewhere and somehow an end to litigation. And though the amount involved, no matter how small, shall, we hope, never even incline us to shrink from or neglect the most careful and conscientious scrutiny of every error alleged and sought to be corrected, yet when we find no error, we can but note a comparison between the labor and the reward. With a difference between the parties of little more than \$20, we think this case is one of which

it can well be said that it is "a humming bird with all the plumage of a peacock."  
Judgment affirmed.

(1 Ga. App. 480)

**HAINES v. CHAPPELL. (No. 126.)**

(Court of Appeals of Georgia. March 22, 1907.)

**1. LANDLORD AND TENANT—DISTRESS—PROCEDURE.**

When the counter affidavit to a distress warrant is dismissed, there is no case before the court. The dismissal of the counter affidavit carries with it the replevy bond. There can be no judgment entered; for the distress warrant, without the counter affidavit, is already a judgment and *fi. fa.*

**2. BAILMENT—CONVERSION BY BAILEE.**

Where a check is deposited in aid of a bond and to strengthen the security, the transaction is a bailment. The application of the check to any other purpose than that for which it was deposited is a conversion on the part of the bailee, and entitles the bailor to recover by trover the check, or the value thereof, with interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 64, 65.]

**3. SAME—DUTIES OF BAILEE.**

The bailee is such an agent of the bailor as that he is required, not only to use the property for the special object only for which he was intrusted with it, and in conformity with the purposes of the trust, but to act in good faith where the interests of his principal are concerned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 33.]

(Syllabus by the Court.)

Error from City Court of Dublin; Burch, Judge.

Action between one Haines and one Chappell, as administrator. From the judgment, Haines brings error. Reversed.

William Faircloth and Hines & Jordan, for plaintiff in error. George W. Williams and Ira S. Chappell, for defendant in error.

RUSSELL, J. Haines brought an action in trover against Chambers to recover a check for \$82.50. Chambers defended by denying all the allegations of the plaintiff's petition. On the trial the jury found in favor of the defendant. The plaintiff moved for a new trial on the statutory grounds, the motion was overruled, and by writ of error we are asked to review the judgment on the motion for new trial.

It appears, from the evidence, that one Dent swore out a distress warrant against one Guyton, and that Haines (the plaintiff in this case) signed a replevy bond as security for said Guyton, who had been distrained for \$82.50. The defendant in trover was the bailiff who levied the distress warrant. It appears that, some question having arisen as to the solvency of the replevy bond, Haines, in order to strengthen the security, gave the check which is the subject-matter of this suit. The understanding between Haines and the bailiff (now defendant) was that the latter was to hold the check, with the bond, as a bond, until the final determination of

the distress warrant between Dent and Guyton, and, if Guyton lost on his defense, then he was to use the check in settlement of the distress warrant. The property levied upon, at the time that plaintiff gave the replevy bond and the check, consisted of 333 bundles of fodder, 25 bushels of corn, and 573 pounds of seed cotton, and also one mouse-colored mule. This property was released when Haines went security on the bond and gave his check. It appeared, further, from the evidence, that there had been a former levy of the distress warrant upon two bales of cotton, one weighing 470 pounds and the other 502 pounds, which levy had not been dismissed. It further appeared that in his counter affidavit to the distress warrant, which was produced in evidence, Guyton denied the indebtedness, and claimed that the same had been fully paid off. Upon the trial of the distress warrant the counter affidavit was dismissed. Guyton certiorari'd the case, and in the superior court the certiorari was overruled. Counsel for Dent thereupon brought a rule against Chambers, as constable, alleging that he had had placed in his hands a distress warrant in favor of B. J. Dent against Bill Guyton on September 16, 1902, with instructions to make the money, \$82.50, by levy and sale of two bales of lint cotton made on the premises of the plaintiff in the distress warrant, and the property of the defendant, Guyton; that said Chambers, constable, failed and refused to levy the distress warrant on said cotton, but, on the contrary, without authority from plaintiff, sold said cotton to J. R. Dent, taking a check upon a bank, payable October 11, 1902, which check was not paid, but payment of same refused upon its presentation by Chambers; that Chambers has never made said money, and thereby petitioner is damaged \$82.50. The defendant constable answered: It is true that he had the distress warrant placed in his hands, and now has it. He does not admit or deny that the two bales of cotton were pointed out to him, or were raised on plaintiff's premises by Bill Guyton, but admits that plaintiff pointed out certain property for him to levy upon. He denies that he refused to levy the distress warrant. He admits that he accepted the check for \$76.16, of which payment was refused. He further says that he levied the distress warrant on certain mules as the property of Bill Guyton, and Bill Guyton made affidavit before J. T. Chambers, the justice of the peace having jurisdiction, denying that he owed plaintiff on rent any amount for 1902, and then and there tendered him (the constable) bond in manner and form prescribed by law, and deposited with him \$82.50, the amount of said distress warrant, to be paid to plaintiff in the event he (plaintiff) won his cause; that he (the constable) went with plaintiff to seize said property, being two bales of cotton, and take it

to his house, when plaintiff refused to allow him to seize it, stating that he preferred that he would take bond for it, and J. R. Dent claimed then to have purchased it for value before he had notice of plaintiff's lien, and defendant then accepted the check from J. R. Dent aforesaid, payment of which was afterwards refused; that he was informed and believed that J. R. Dent had so purchased the cotton in good faith, and that the same was not subject to distress warrant. He further answered that said case before the aforesaid justice of the peace was decided adversely to Guyton, who certiorated the cause to the superior court, where the same is now pending, and that he (the constable) has in his hands the said sum of \$82.50, and is ready to pay the same over under order of court. Upon this evidence the jury found in favor of the defendant, and the judge refused a new trial.

We think that the plaintiff is entitled to a new trial, and that the overruling of his motion, under the evidence submitted, was error. This court stands unequivocally committed to the doctrine that the jury are arbiters of all issues of fact. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209. But where there is no evidence which, when applied to the law pertinent to the cause, will support the verdict, this lack of evidence constitutes an error of law. Under the undisputed evidence it cannot be questioned that the check of Haines was deposited with the bailiff as a bailment. "A bailment is a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee, or both, and upon a contract, express or implied, to carry out this object and dispose of the property in conformity with the purpose of the trust." Civ. Code 1895, § 2894. The bailee becomes, therefore, such an agent of the bailor as that he is required not only to use the property for the special object only for which he was intrusted with it, and in conformity with the purpose of the trust, but also to act in good faith with the bailor and his interests. The written receipt, as well as the testimony of the defendant himself, showed that the check was deposited as a bond for replevin in the matter of *B. J. Dent v. Bill Guyton*, distress for rent. This was the special object for which the check was intrusted to the constable, and yet, in his answer to the rule, the constable answered that he had in his hands the sum of \$82.50, without informing the court that the counter affidavit, the bond, and consequently the check deposited, according to the terms of the receipt, as a bond, had all been dismissed. Certainly, if either this plaintiff or the constable should suffer, it should be the constable. Furthermore, the rule which the officer was called upon to answer required him to show cause why he had not levied upon two certain bales of cotton, or why, having levied upon the cotton, he had not made

the money out of it; and it appears that he had levied upon it and sold it, without authority of law, for a worthless check; and it appears plainly to us that after this action he determined to save himself by converting the plaintiff's check to his own use, for, in disposing of the check in a manner not authorized by the terms of the agreement under which he received it, this disposition amounted to a conversion, which at once terminated the bailment and the defendant's right of possession, and entitled the plaintiff, by trover, to recover his check or the value thereof.

The defendant insists, however, that the certified check was not deposited with him as a bond, nor as strengthening a bond, but as a conditional payment of the distress warrant in the event that the case went in favor of the plaintiff in the distress warrant. We find no such evidence in the record. The receipt taken at the time, as shown by the brief of evidence, stated that the check was deposited as a bond for the replevin in the matter of *B. J. Dent v. Bill Guyton*, distress for rent, and that, if Bill Guyton finally lost the case, A. B. Chambers would have the check to indemnify him and apply it to the payment of claim for rent. This receipt, being in writing, afforded, under a well-known rule, the best evidence of contract of bailment; but, to place the matter beyond any dispute, the record gives the testimony of the defendant himself, as follows: "I agreed [to release the property], thinking that money would be a legal bond." There was, therefore, no evidence on the part of either this plaintiff or the defendant to contradict the purpose of the bailment, as contended for by the plaintiff, that it was to take the place of the replevin bond. When the counter affidavit was dismissed, the plaintiff had no case, and a judgment for the plaintiff for the amount of rent claimed could not be rendered. So that if, as insisted by counsel for defendant, the check was deposited as a conditional payment of the rent, the position of the constable would be no better than if it is assumed (as is shown by the evidence) that it was deposited to strengthen the replevin bond; for constables, like other citizens, are presumed to know the law, and if this constable had acted with the good faith imposed by law upon him as regards his bailor, and had answered, in response to the rule against him, that he had deposited in his hands a check for \$82.50, and had attached thereto a copy of the receipt which he was required to sign before he received plaintiff's certified check, instead of answering that he had \$82.50 in his hands (though it was more than three months before he collected the check), we hardly think that upon this statement of the facts any judgment would have been entered up against him for \$82.50, though there might have been a judgment entered up against him for the value of the two bales of cotton, which he levied upon, as appears by the record, on Sep-

tember 16, 1902, more than two months before the levy which is the occasion of this suit, and which, if the constable had not, without any authority of law, sold for a check which was worthless, might have fully paid the claim of the plaintiff in the distress warrant. In collecting the check and paying the money therefrom, not on the bond which the plaintiff in error had signed, and to further secure which he had given his certified check (for this bond had been dismissed with the counter affidavit), but applying the check to relieve himself from a rule brought for an apparent dereliction of duty, more than two months before the bailment of the plaintiff in error, the defendant in error was clearly guilty of a conversion; and for this conversion the plaintiff was entitled to recover his check or the value thereof, with hire.

If there was any question of conflict in the evidence as to any issue which could lawfully be presented, the verdict of the jury would remain undisturbed. But we are unable to overrule the well-settled principle that, when a counter affidavit is out of court, the entire case goes out with it (*Anders v. Blount*, 67 Ga. 41; *Habersham v. Eppinger*, 61 Ga. 199; *McCulloch v. Good*, 63 Ga. 519), and cannot repeal section 2894 of the Civil Code of 1895, nor find in the record any evidence in conflict with that of the defendant in error himself as to his understanding that he agreed to release the property, thinking that the money would be a legal bond, and yet (though an agent of the plaintiff in error) applied it to relieve himself from a rule involving a different levy. We must, therefore, reverse the judgment of the court below and order a new trial.

Judgment reversed.

(1 Ga. App. 363)

**CRANKSHAW v. SCHWEIZER MFG. CO.**  
(No. 33.)

(Court of Appeals of Georgia. Jan. 24, 1907.)

**1. WRIT OF ERROR—REVIEW—QUESTIONS OF FACT—VERDICT ON CONFLICTING EVIDENCE.**

The verdict was warranted by the evidence. Where the error assigned is that the verdict was without evidence to support it, and there is any evidence to support it, the verdict should not be interfered with, unless there is further complaint that (a) some ruling of the court improperly withheld evidence from the jury, or (b) illegally permitted the jury to consider evidence which should not have been submitted to them, or (c) that the court's instructions, when applied to the evidence, were erroneous, incapable, or misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3935.]

**2. SAME.**

In this case the proper issue was submitted to the jury, there was conflict in the evidence, and the verdict as to the issues of fact was fully authorized.

**3. TRIAL—COURSE AND CONDUCT—RIGHT TO OPEN AND CLOSE.**

In order to entitle the defendant, in an action arising ex contractu, to the opening and conclusion of the argument, the defendant must, before the introduction of any evidence, admit

facts authorizing a verdict in favor of the plaintiff for the amount claimed in the petition, without imposing upon the plaintiff necessity for proof of any kind. The admissions of the defendant in this case did not concede a prima facie case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 50.]

**4. SAME.**

Compliance with the warranties in this case was essential to a recovery, and to allege a breach of this material part of the plaintiff's contract destroys the admission of plaintiff's prima facie case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 50.]

**5. EVIDENCE—OPINION EVIDENCE—SUBJECT OF.**

There was no error in admitting the testimony of which complaint is made in the second ground. The witness had the right to express an opinion, after having stated the facts from which he deduced it, and also to give his opinion as an expert, as appears from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2343, 2349.]

**6. SALES—ACTIONS—BREACH OF WARRANTY—EVIDENCE—ADMISSIBILITY.**

The court did not err in refusing to allow the questions set forth in the third and fourth grounds. The questions asked referred to the operation of jewelry cases in Field's store, and had no relation to the similarity in appearance between the jewelry cases involved and the Field cases.

**7. EVIDENCE—ADMISSIONS—BY AGENT—PAROL EVIDENCE—CONTRADICTION OF WRITTEN CONTRACT.**

There was no error in rejecting testimony as to the alleged statements as set forth in grounds 5 and 6, nor in rejecting the letters referred to in the seventh ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 898, 2030, 2035.]

**8. WRIT OF ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The question and answer of which complaint is made in the eighth ground are objectionable for irrelevancy, but neither could have been harmful to the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

**9. EVIDENCE—ADMISSIONS—BY AGENTS.**

There was no error in excluding the testimony quoted in the ninth ground; it not appearing from the evidence that that person whose declarations were sought to be proved was an agent of the defendant, authorized to speak, as to these things, in his behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 887-892.]

**10. SAME.**

The court properly excluded the questions referred to in the tenth ground; the evidence not showing that the alleged declarant was an agent of the defendant, authorized to bind the defendant by his statements. And there was no error in rejecting the letter written by the defendant after the arrival of the jewelry cases. If the letter was admissible on the theory of notice, its exclusion did no harm in this case—because it was conceded that the defendant always claimed that there were certain defects in the cases he bought.

**11. TRIAL—INSTRUCTIONS—SUFFICIENCY.**

The charge of the court gave the defendant the benefit of every contention which he was legally entitled to have considered by the jury. It could, perhaps, have been more full and specific with relation to some matters therein presented; but the defendant cannot complain that an abstract principle of law pertinent to the issue was not given in charge, when the



court in the charge made clear the specific application of the principle by enumerating all defenses set up by him, and stated to the jury that they should find for the defendant on any of them which was proved to their satisfaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 582.]

## 12. SALES—WARRANTY—IMPLIED FITNESS FOR PURPOSE INTENDED.

That the plaintiff knew the purpose for which the articles purchased by the defendant were to be used was immaterial in this case. "If an order be given to a manufacturer or dealer for a specific article of a known and recognized kind and description, and if the defined and described thing be actually supplied, there is no implied warranty that it will answer the purpose for which it is intended to be used. The only implied warranty or condition of the contract is that it will conform to the description and be of good workmanship and material."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 772-776.]

(Syllabus by the Court.)

Error from City Court of Atlanta; Calhoun, Judge.

Action by the Schweizer Manufacturing Company against one Crankshaw. Judgment for plaintiff, and defendant brings error. Affirmed.

The suit was for a balance alleged to be due upon a contract for installing certain wall showcases in the defendant's storehouse. The defense, as stated in the plea, was "that it was made a stipulation and warranty, attached to and growing out of said contract, that the said cases were to work perfectly smooth and without friction; that said cases were to be so made and installed as to support bric-a-brac, clocks, and heavy articles of sale of various natures; that the doors were to be arranged hung with bicycle chains, weights, and pulleys, weights to slide in pockets in back of the case, work to be finished in best style and workmanship to match sample of store-finish work furnished by defendant, and the said cases to be installed without injury or damage to or disfigurement of defendant's cases; \* \* \* that the said wall cases were not installed in the manner stipulated in said contract; that said cases did not work smoothly and free from friction; that great injury and disfigurement were done to the defendant's cases in the installment of said cases; that some of the sashes of said cases warp from side to side and stick; that the side and top rails of said sashes were rubbed in many places; that the doors were not arranged to slide up, hung with bicycle chains, weights, and pulleys, weights to slide in pockets in back of the cases, but, on the contrary, were hung with ordinary trunk rollers, and in such manner as with great difficulty to be moved up and down; that the shelves were so heavy and brackets so light as to be incapable of supporting articles of any weight or breakable articles of any character with safety; that the sashes were warped and ill-fitted to the cases, and various and other defects exist in said cases and in the installment thereof;

\* \* \* that great expense and trouble has been occasioned by virtue of the necessity of calling, at inconvenient times, defendant's employes from their ordinary and regular pursuits to assist in moving the sashes in said cases up and down, great inconvenience caused customers in inspecting and examining articles exhibited in said cases, and great loss sustained in the inability of the defendant to display in said cases his heavy articles and many delicate articles of breakable character, because the cases were and are so illy constructed and installed as to be incapable of supporting articles of weight or articles easily broken"; and that by reason of the failure of the plaintiff to comply with the contract, "and to carry out the stipulations thereof and the warranties connected therewith, defendant has been injured and damaged in the sum of \$1,000, besides the sum of \$720.41 alleged by [the plaintiff] to be due on said contract." Under the evidence and the charge, the jury found for the plaintiff the amount sued for. The defendant excepted to the overruling of his motion for a new trial. For the grounds of the motion and the other material facts, see the opinion.

Payne, Jones & Jones, for plaintiff in error.  
Rosser & Brandon, for defendant in error.

RUSSELL, J. 1, 2. The plaintiff in error assigns the refusal of a new trial, upon his motion and amendments thereto, to be the error which should be corrected. The first three grounds of the motion are in the stereotyped form commonly called the "general grounds," and sometimes known as a "skeleton motion"; but they call for a complete review and weighing of the evidence as it appears in the record, which in this case is by no means brief. We have taken the pains to travel deliberately more than once through the very voluminous record in this case and to examine its contents most critically. We have been enlightened on some of the principles of natural philosophy as applied to cabinetmaking, and have become conversant with some phases of the jewelry business. This court, however, being restricted to the correction of errors of law and in equity, the only legitimate purpose of our journey through the evidence embodied in the record is the discovery of errors of law, and especially to determine, so far as the three original grounds of the motion are concerned, whether the refusal of a new trial is an error of law, because the verdict is without evidence to support it. In considering the three general grounds alone, it may be stated as a general rule that, if the evidence is sufficient to support the verdict, it should not be interfered with, unless (a) some ruling of the court improperly withheld from the consideration of the jury evidence which they should have had, and which might have contributed to a different result; or (b) unless the judge illegally permitted matters to be considered by the jury which were foreign to the true is

sues, and which he should not have allowed them to use in making their verdict; or (c) unless the court's instructions to the jury in the charge were erroneous, inapplicable, or misleading. We use the word "matters" in subhead "b," for the reason that it may include, in some cases, not only testimony of witnesses, matters of proof, but also various matters of fact, such as improper conduct of the court, counsel, parties, officers of court, spectators, or the jury themselves. This statement is not exhaustive, and, of course, has reference peculiarly to motions based on ordinary general grounds. It has no application to motions dependent on refusals to grant continuances on newly discovered testimony, or other extraordinary grounds, nor to a ground based on the denial of a right—such as is insisted on in this case—of opening and concluding. Considering the general grounds first, taken by themselves, it is our opinion that there was no error in refusing a new trial upon either contention of the skeleton motion, or upon all three of them taken as a whole. We therefore proceed to consider the several grounds presented in the amendment. These are 13 in number.

3, 4. In the first the movant insists that he was wrongly deprived of the right to open and conclude the case in the argument before the jury. He was the defendant, and the justness of his claim to the opening and conclusion is to be determined by the extent of his admissions. Did he admit a prima facie case? It cannot be doubted that this question is to be answered by a comparison in this case of the allegations in the petition with the answer thereto. We think the placing of petition and plea in parallel columns demonstrates that a prima facie case was not admitted.

#### Petition.

The plaintiff entered into a contract with the defendant to furnish him four wall cases for the sum of \$2,800. The cases were delivered and installed in the store of the defendant on April 21, 1903. The plaintiff has fully complied with its contract. The defendant has paid \$2,079.59, leaving due \$720.41, besides interest, payment of which has been refused on demand.

#### Plea.

The cases referred to were delivered and installed in the defendant's store; but the petition does not set up the contract between the parties. The real contract is set up in paragraph 5 of the answer. The cases were not duly set up. The plaintiff did not fully comply with its contract, and the defendant is not indebted in any sum. Demand for payment was made, and rightly refused.

And the remainder of the plea mentions many other items in respect to which a contract was not complied with. We do not think that to say "a" contract has been made, but has failed in any material or essential particular, can be construed as an admission that the contract was fully complied with. It is possible for cases to arise, and for the petition to be so skillfully framed, that to admit the plaintiff's case would bring, as an inevitable result, a verdict for the plaintiff; and it is perhaps true in this case. Nevertheless the law requires such an admission of a prima facie case as would entitle plaintiff to re-

covery without proof of any material fact before the defendant can gain the conclusion. *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Reld v. Sewell*, 111 Ga. 880, 36 S. E. 937; *Phoenix Ins. Co. v. Gray*, 113 Ga. 433, 38 S. E. 992. The original petition in this case seeking to recover upon a contract between the parties, before there could be a recovery for the full sum sued for, it must have been either admitted or proved (1) that the contract sued upon was in fact made (2) and that the plaintiff had fully complied with that contract. The plea denies both these defenses. It disputes the contract sued on being the one made, and affirms that it was not complied with. The very essential allegations of the petition are negated. It denies that the contract was ever complied with, and denies that there is any sum due. The admission that "a" contract was made does not meet the requirements, when it is insisted that it was only partly complied with. The main body of the contract cannot be admitted for the purpose of making a prima facie case, and at the same time the plaintiff's case be destroyed by showing a breach of warranties inevitably forming a part of the contract. Every stipulation and warranty is as much a part of the contract as the consideration is, and just as inseparable as the names of the parties. "Often they are the heart and soul of the whole contract, without which neither party could have been induced to contract." We think it clear that defendant was not entitled to the opening and the conclusion. The opening and conclusion in a case on trial before a jury is a very important and substantial right, and its improper refusal is ground for new trial; and in this case to have taken this right away from plaintiff, and to have awarded this advantage to the defendant, would, we think, have afforded the plaintiff just ground of complaint.

5. In the second ground of the amended motion the plaintiff in error insists that the court erred in admitting in evidence, over the objection of the defendant, and in refusing to exclude on motion of the defendant's counsel, the following testimony: "These bent plate glass doors will never work as smoothly as a straight door." And the further testimony: "The friction is more in a bent door than in a straight door. There is no way under heaven to have it otherwise." And the further testimony: "In case it [the sash] is stuck [in moving it up and down] a little, you simply adjust the door to a level, and down it comes. That is the way those doors work, and work beautifully. They could not be made to work better." At the time of the introduction and admission in evidence of said testimony, the defendant moved to exclude it, on the ground that it consisted in the mere conclusion of the witness, and was in effect an abrogation of the functions of the jury. The court overruled said objection. The only objection offered at the time to the in-

roduction of this testimony was that the statements were mere conclusions of the witness. This objection was made to the testimony as a whole. The court did not err in declining to rule all of it out. Part of such testimony is clearly a statement of facts. But, even if it were all a conclusion of the witness, we do not think the court erred in overruling the objection, because the witness giving the testimony was, as appears from the evidence, an expert of skill and long experience in the construction of such jewelry cases, and therefore entitled to give his opinion for whatever the jury might think it worth. Civ. Code 1895, § 2587. And, further, it appears that the witness Johnson had supervised the construction of these cases, and before expressing these opinions had already given all the necessary facts upon which he based his opinion, and upon the statement of facts, even if he was not an expert, he was entitled to express an opinion, the weight of which was to be determined by the jury upon consideration of the facts previously stated. Civ. Code 1895, § 5285. Even if the statement, "They could not be made to work better," be objectionable as being an opinion even beyond the limits of expert knowledge, a casual examination of the very voluminous evidence in this case leads us to the conclusion that the introduction of this evidence could not have influenced the verdict. We think, however, there can be no doubt that the court admitted the evidence on the proof of the witness's expert knowledge, and it is our opinion that there was no error in so holding.

6. The third and fourth grounds of the amended motion for a new trial complained that the court below erred in refusing to permit defendant's counsel to ask the witness Johnson questions with respect to the resemblance or lack of resemblance between certain jewelry cases in Marshall Field & Co.'s store and those placed in the defendant's store in Atlanta. The court had admitted in evidence, as part of the contract, a letter of the defendant, in which it is specifically stated that the cases to be installed in defendant's store were "to look exactly like those we saw in Marshall Field's, with columns and all." It was therefore competent to prove that the cases were to look like Field's with columns and all. The questions to which answers were sought were as follows: (1) "Are there any appearances of friction or biting of the slides or ends when the sash comes down in those cases?" (2) "When the doors were pushed open in those cases, did the doors stop while being pushed up and down?" It is perfectly clear that the second question would have elicited an answer, not as to the appearance of the cases, but as to their operation, or how they worked; and, for reasons hereafter to be stated, we think the action of the cases in use is immaterial, if they were made and set up according to the specifications of the con-

tract, of good material, and constructed in a workmanlike manner. And while the word "appearances" is used in the first question above, it is manifest, by the words that follow, "friction or biting of the slides or ends when the sash comes down," that the word "appearances" only relates to such effects as were caused by the working or operation, and does not refer to their looks or resemblance as originally constructed. Furthermore, it does not appear in the evidence that the desire expressed by the defendant that his cases should look like Marshall Field's was agreed to by the plaintiff, and, unless this had been expressly done, the purpose of defendant that they should look like Field's cases must yield to the plans and specifications signed and agreed upon by both parties, even though under the plans and specifications agreed upon there should result a dissimilarity of appearance. Even granting that by the plaintiff's silence it acquiesced in the stipulation that the cases look like Field's, and that this similarity became an additional obligation of the contract, and that defendant was entitled to similarity in appearance, the two cases might look exactly alike, and yet the doors in one might work smoothly, and the doors in the other might not do so. In other words, to show by their appearance or otherwise that the doors did not work smoothly and accurately would not result in showing dissimilarity in appearance.

7. In the fifth and sixth grounds of his amended motion the defendant insists that the court erred in refusing to allow him to ask the plaintiff's agent the following question: "Did Mr. Swanson tell you that he had any difficulty in installing said cases?" And further: "Did Mr. Swanson make any statement in your presence that, if he knew it was a job like that, he would not have come here [to Atlanta]?" These questions were asked with the purpose, no doubt, of eliciting information with respect to the unworkmanlike construction of the cases, and evidence upon that subject was material and proper; and the statements of an agent while actually engaged in the business of his principal within the scope of his agency are generally admissible. But it must first appear from the evidence that the agent is speaking within the scope of his authority, and authorized to bind the principal by his sayings, before the principal can be held bound thereby; and, so far as the evidence discloses, the cases were in a state of complete manufacture before they were sent to Atlanta. The witness Swanson occupied no official position with the plaintiff company, and his sole duty was to set the cases up in the defendant's store; and the evidence further shows that the witness Johnson (the agent of the company) was not in Atlanta, but in Chicago, during the whole of the installation. But, even if that were not true, Swanson was not an officer of the corporation, but simply its laborer, and his conversation with an of-

ficer of the defendant company after the termination of the contract would not be heard as against the plaintiff's interest; and if the statements of Swanson are a part of the res gestæ, the statements in connection with his work, even when a part of the res gestæ, cannot be heard against his employer, in the absence of any evidence showing that he was so authorized to speak, and acting in such capacity as to bind the employer by his utterances. Nor was there error in excluding from the evidence the letters which defendant sought to introduce. A critical examination of each and all of them demonstrates that the letters which the judge refused to admit in evidence were mere negotiations and counter propositions. All of the prior negotiations were merged in the proposals and specifications of the plaintiff, when accepted by the defendant; and we presume that the trial judge admitted the letter from plaintiff and one from defendant, which went to the jury, mainly for the purpose of showing the transmission and the acceptance of the contract or proposal which was submitted in writing. The letter of the plaintiff says: "We inclose specifications, and will send measurements of the inside of the drawers, etc., as soon as possible. Specification is in duplicate; and if you will sign the original, and return to us, this will constitute a contract." In reply defendant wrote: "I received this morning specifications and contract, and return herewith signed copy." With the specifications signed the contract would have been complete without more; but plaintiff in his letter asked whether the shape of the glass shelves was to follow the curve of the case or be straight on front edge, and also asked which color to follow (it appearing that a mahogany sample sent by defendant had a different color on each side). The defendant, in replying, said nothing about the mahogany, but selected "the shelves curved to go with swelled sash." It is evident, therefore, that there was but one point outside of the specifications which was thereafter agreed to by the parties, to wit, the curved shelves, although the defendant asks the plaintiff to "make these cases to look exactly like those we saw in Marshall Field's," etc. The plaintiff gave the defendant an option in the selection of the shape of the shelves, and was bound to act upon defendant's expressed choice in that respect as to them; but the evidence nowhere discloses that plaintiff ever agreed to make the cases look exactly like those he saw in Marshall Field's, unless consent may be construed from silence. If silence gives consent, the plaintiff added to the original contract the additional stipulations contained in defendant's letter inclosing the signed contract. In any event it is perfectly clear that all of the letters excluded by the trial court merely presented proposals, none of which were agreed to by both parties; that there was no meeting of the minds, nothing bind-

ing upon either party, no definite understanding, no contract.

8. We fail to see the relevancy of the following question, which the court permitted to be asked of the defendant: "Did not you know there were certain physical laws involved by which one glass could not be made to work as easily as two?" We are aware that great latitude is allowable in cross-examination; but it seems to us that the true question is not what the defendant knew of physical laws, nor what was the purpose to which he intended to apply that knowledge, nor what was the purpose to which he intended to put the cases which he proposed to purchase. But the real question was: Did he get what he ordered and what plaintiff contracted to supply? For this reason we think the objection of defendant's counsel was erroneously overruled. But in our view of the case the error is too harmless to work a new trial.

9, 10. The defendant complains in the ninth ground that the court erred in excluding the following question and answer: "Did Mr. Miller make any statement in your presence, or in Mr. Johnson's presence, in regard to said cases?" Answer: "Yes, he would not undertake to fix those cases for less than \$500." Counsel for defendant insists that as the statement of Miller was made in the presence of plaintiff's agent, U. S. Johnson, showing certain defects in the case and in regard to the expense necessary to remedy its defects, the statement constituted an admission on the part of the agent as to the truth of the same, in that plaintiff's agent stood by and did not deny the statement, though it called for an admission or denial, and that he therefore had thereby acquiesced in the same; and, further, that Miller, who made the statement in examining and overlooking said cases, was acting for and in behalf of the plaintiff, and as such his statements were such admissions as were entitled to go to the jury. There are many circumstances under which the silence of an individual will count against him, but only where the statement made fairly and reasonably called for an answer. It is questionable whether Johnson's silence would have counted against him if he had been the plaintiff, instead of plaintiff's agent, and Miller had said to him that he would not fix the cases for \$500. The headnotes sufficiently cover the further exceptions taken to the exclusion and admission of evidence. These assignments are without substantial merit, if the trial judge entertained a correct view of the law applicable to the really controlling questions in the case.

11, 12. We come, therefore, to determine what is, to our minds, the most difficult question in the case: Whether the doctrine of implied warranty is involved and should have been given in charge to the jury. The twelfth ground of the amended motion is as follows: "Because the court erred in failing,

as movant contends, entirely to charge and put before the jury the main defense relied upon by the defendant, and to sustain which abundant evidence had been introduced, to wit, that the plaintiff company, in undertaking to make for, deliver, and install in the defendant's store the said four cases, impliedly warranted that the same would be reasonably suited for the purposes intended; that is to say, that the same would be jewelry cases, and as such would be reasonably adapted for the display of jewelry, bric-a-brac, silverware, and other articles of like nature, such as are displayed in jewelry stores—it not appearing, as movant contends, from the evidence or the pleadings, that the said implied warranty had been from the nature of the transaction or expressly excepted. The evidence, as movant contends, showed that the said cases had been purchased as jewelry cases, and as such were intended for the display of jewelry, bric-a-brac, silverware, and other like articles in the defendant's jewelry store; and, further, that the plaintiff company, through its agent and authorized representative, the said U. S. Johnson, was fully apprised of the purpose and use for which jewelry cases were to be adapted before the alleged contract for their construction and installation in the defendant's store had been completed and concluded. It was one of the main contentions of the defendant, as disclosed by his pleadings and the evidence introduced thereunder, that the said cases were not reasonably adapted and suited for the purposes intended, to wit, the display of jewelry in the defendant's jewelry store, and more especially in that the said cases did not work smoothly and free from friction; that great injury and disfigurement were done to defendant's cases in the installation of said cases; that the sashes of some of the cases warped from side to side, and stuck; that the sides and top rails of said sashes were rubbed in many places; that the doors were not arranged to slide up and hang with bicycle chains, weights, and pulleys, weights to slide in pockets in back of the cases, but, on the contrary, were hung with ordinary trunk rollers and in such manner as with difficulty to be moved up and down; that the shelves were so heavy and brackets so light as to be incapable of supporting articles of any weight or breakable articles of any character with safety; that the sashes were warped and ill-fitted to the cases; and that various and other defects existed in said cases and in the installment thereof. The court failed, as aforesaid, to charge said jury upon the law of implied warranty, covering one of the main issues upon which the defendant's case was predicated, and, as movant contends, the court erred in failing to so charge upon the grounds and for the reasons as aforesaid. Nor was the failure of the court to charge the jury upon the law of implied warranty, governing this substantial issue, cured or

remedied, as movant contends, by the general charge of the court to the effect that the cases must be constructed and installed in the defendant's store in a workmanlike and reasonably skillful manner, and that the defendant would be entitled to recover any damages for the failure to so construct and install them. Such a charge had the effect of confining the consideration of the jury to the determination of the sole issue whether the cases were constructed and installed in a reasonably skillful and workmanlike manner, and absolutely eliminated and removed from the scope of the jury's consideration the entire contention of the defendant, and the evidence produced to prove the same, that the cases must not only be constructed and installed in a reasonably skillful and workmanlike manner, but that they must be reasonably adapted to the purposes for which they were installed." And the thirteenth ground, relating to latent defects undisclosed, will be considered with the twelfth, for the reason that the warranty that the seller knows of no latent defects undisclosed is one of those which may be implied, if the case be such that any warranty can be implied. The plaintiff in error insists that the sashes in the cases frequently stuck and could not be moved without very great effort; that his evidence further shows that plaintiff's agent was aware of a means for working the sashes properly, or of causing the same to work, and yet he failed to make known the same to the defendant, or to take any steps whatever to remedy said defects. And plaintiff in error insists, in this ground of the motion, that "the failure of the court to charge or put before the jury this implied warranty of the plaintiff, that he knew of no latent defects undisclosed, removed from the consideration of the jury the contention and evidence of the defendant to the prejudice of his defense."

Not infrequently a mere shade of difference determines whether the issue calls for the application of the doctrine of implied warranty or excludes it. In many cases in our experience the line of demarcation was very dim, and we think there can be cases in which as to different portions of even the same transaction the law of express warranty will control, so far as there has been express warranty, without excluding the application of an implied warranty to other portions of the contract. We are aware that this statement seems contradictory and is not in accord with the general view; for in *Johnson v. Latimer*, 71 Ga. 470, it was held that "It is only in the absence of an express warranty that resort can be had to implied warranty, and where there was an express warranty the court could refuse to charge on the subject of implied warranty." In that case the court not only refused to charge "that, if the machine sold defendant by plaintiffs was not reasonably suited for the use intended, the plaintiffs could not re-

cover unless there was a special contract as to size," but, on the contrary, charged, as to the wheat separator in question, "that the warranty which the law required the plaintiffs to make was that the article sold was a separator—that is to say, that it would separate the grain from the chaff—but he did not warrant that it was suitable for transportation over the roads in the country, or that it was such a machine as could be pulled by defendant's team." This is an express holding that there can be no implied warranty if there is an express warranty. We yield to it as binding authority and no doubt it influenced the trial judge in his charge to the jury. Civ. Code 1895, § 3555, raises an implied warranty for the protection of those purchasers who have not preferred to try to protect themselves by an express covenant of warranty, or where, from the nature of the transaction, there can be no warranty in the absence of an expressed warranty. Section 3555 is a provision for the protection of purchasers, but not extended to "all" purchasers. "If there is no express covenant of warranty, the purchaser must exercise caution in detecting defects. The seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants (1) that he has a valid title and right to sell; (2) that the article sold is merchantable, and reasonably suited to the use intended; (3) that he knows of no latent defects undisclosed." It excepts the purchaser who prefers to safeguard himself by an express covenant of warranty, him who fails to use that degree of caution which would easily detect patent defects, and him whose transaction is such that by its very nature no warranty can be expected to arise or be implied. If the plaintiff in error properly belongs in either of these classes, he can derive no benefit from the law of implied warranty. It affords him no protection; and the refusal of the court to charge as set out in the twelfth and thirteenth grounds of the motion was proper. An inspection of the charge of the court, as transmitted in the record, shows, however, that the complaint can only be a qualified one; for, while the judge did not expressly refer to section 3555, he explicitly stated all of the defects insisted upon by the defendant in his plea, and thereafter three times instructed the jury, in substance, as follows: "If, on the contrary, according to the defendant's plea, the contract was not complied with, and the work was not done according to contract, then you give the defendant such damages as you think he is entitled to recover by reason of the failure of plaintiff to comply with its contract."

The only complaint that plaintiff in error can make is that the court did not charge the jury that the company impliedly warranted that the manufactured cases would be suitable to the purposes for which he in-

tended them. The judge did not so charge. In our opinion he was right in not charging as the plaintiff in error insists that he should, for the reason that by the very nature of the transaction there could be no implied warranty. From the nature of the contract there could be no implied warranty of suitability of purpose. Crankshaw did not go to the manufacturing company and purchase jewelry cases relying on its judgment. If he had done so, an implied warranty would have arisen. On the contrary, he employed the manufacturing company to make cases according to plans and specifications of his own; and when these jewelry cases were made according to Crankshaw's plans and specifications, with good workmanship and proper materials, the company had complied with its contract, whether the cases did or did not meet the purposes of Crankshaw. If the company, by reason of its experience had known that the specifications furnished by Crankshaw would not make a good jewelry case, it could not have altered his plans and made a different jewelry case. This would have been a violation of its contract, and Crankshaw could well have replied, to the suggestion of superior knowledge and consequent action in pursuance therewith, that this was none of its concern. If the cases were made according to contract and his own plans, Crankshaw got what he bargained for, and whether the cases thereafter did not suit his purposes was wholly immaterial. To hold a manufacturer responsible for defects which he may know will arise from peculiarities of proportion or construction, because he knows the use for which the manufactured article is intended, and yet is powerless to prevent the defects, because he cannot alter the plan, would be indeed a harsh rule. The distinction is aptly drawn by Prof. Parsons (1 Pars. Con. 586, 587): "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a special thing is ordered, although this be intended for a special purpose." In Leake on Contracts, 404, the rule is thus aptly stated: "If an order be given for the manufacture or supply of an article to satisfy a required purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. But if an order be given for a specific article of a recognized kind or description, \* \* \* and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so."

If Crankshaw had applied to the manu-

facturer for manufactured jewelry cases, and had depended upon the judgment of the manufacturing company to furnish him cases such as he needed, then the warranty of suitability of purpose would have at once arisen. Inasmuch, however, as he did not rely upon the judgment of the manufacturing company to furnish him the jewelry cases, but ordered certain cases to be made by certain plans and specifications, then no such warranty arises, and Crankshaw would be bound to pay for the cases, whether they in fact suited his purpose or not. The questions whether such cases met the contract, and were properly made out of good material, were the only issues that could have arisen between Crankshaw and the manufacturing company. This case is somewhat similar to that of *Goulds v. Brophy*, 43 N. W. 834, 42 Minn. 109, 6 L. R. A. 392, where the defendant ordered a 15-inch auger to make a 20-inch hole, and the plaintiff sent him the machine. In that case the Supreme Court of Minnesota held that "if an order be given to a manufacturing company or dealer for a specific article of a known and recognized kind and description, and if the defined and described thing be actually supplied, there is no implied warranty that it will answer the purpose for which it is intended to be used. The only implied warranty or condition of the contract is that it will conform to the description and be of good workmanship and material." The same rule was announced and applied in *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359. There the defendant ordered a specific article of a known description, which was manufactured by the plaintiff. "There was an implied warranty, or, more correctly speaking, condition of the contract, that it should conform to the description, and be of good material and workmanship according to that description, but none that it would answer the purpose described or supposed." The manufacturer only warrants the workmanship and material.

One of the issues in this case was whether the workmanship and material were the best quality, and the charge of the court shows that that issue was clearly and fairly submitted to the jury. As authority for the principle herein ruled, see *Seltz v. Brewer's Ref. Co.*, 141 U. S. 518, 12 Sup. Ct. 46, 35 L. Ed. 837; 2 Benj. Sales, §§ 987, 988; *Addison on Contracts*, \*977; *Milwaukee Boller Co. v. Duncan*, 58 N. W. 234, 87 Wis. 120, 41 Am. St. Rep. 33, and citations; *Ollivant v. Bayley*, 5 Q. B. 288; *Dist. of Columbia v. Clephane*, 110 U. S. 212, 3 Sup. Ct. 568, 28 L. Ed. 122; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 106, 3 Sup. Ct. 537, 28 L. Ed. 86; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Deming v. Foster*, 42 N. H. 165. If these jewelry cases were made according to Crankshaw's design, of good workmanship and good material (and this does not seem to be questioned in the evidence), it would not matter

whether there were defects, latent or patent; for "according to the principle of decided cases, and upon clear grounds of justice, the fundamental inquiry must be always whether, under the circumstances of the particular case, the buyer had the right to rely and did rely upon the judgment of the seller and not upon his own." No matter how he reached his conclusion, the design of these jewelry cases was Mr. Crankshaw's. He furnished his own plans and specifications; and if, as the jury found, under the charge of the court, the workmanship was good and the material good, no one is responsible for defects in their operation or unsuitableness to his purpose except the defendant himself. We agree with the proposition that, in the absence of an express warranty, the implied warranty that the article is reasonably suited to the use intended will apply, unless clearly excepted; but we have no hesitation in holding that the trial judge was right in his view that the nature of this transaction excepted this contract of sale.

The decision in *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939, cited by plaintiff in error, is not in point. The holding there was merely that there was no express warranty in that case, and that the so-called "warranties" or agreements to replace articles that were unsatisfactory, and those not selling readily, with new articles of like kind, was no express warranty as to the character, quality or title of the goods. And for like reasons it was held in *National Computing Scale Co. v. Eaves*, 116 Ga. 511, 42 S. E. 783, that there was "no express warranty in the contract." The case of *Malsby v. Young*, 104 Ga. 212, 30 S. E. 854, is also cited. This case is certainly not in point. The judgment of the lower court was reversed because the law of implied warranty was incorrectly charged, and the Supreme Court in the decision reaffirmed the opinion in *Johnson v. Latimer*, 71 Ga. 470. The case of *McNeel v. Smith*, 106 Ga. 215, 32 S. E. 119, was one where the parties to the contract expressly excepted implied warranties as to the health, life, and soundness of certain mules. And in the case of *Floyd v. Woods*, 110 Ga. 850, 36 S. E. 225, the judgment against the defendant was sustained because he bought, as we think the defendant in this case did, "entirely upon his own judgment." The guano cases, cited by the very able counsel in his exhaustive brief for the plaintiff in error, in our judgment afford no authority and are not applicable in this case; for the guano is necessarily manufactured according to the formula and process of the seller, while the jewelry cases were to be made, and it appears from the record that they were made, according to the specifications of the buyer. If the workmanship and material were good (as the jury found they were), the designer of the jewelry cases would be responsible for their probable oper-

ation, just as the maker of the guano for its probable results.

The jury having settled the disputed issues of fact, and there being in our judgment no reversible error in either the rulings or the charge of the court, the judgment must be affirmed.

(1 Ga. App. 398)

DAUGHTRY v. SAVANNAH & S. RY. CO.  
(No. 45.)

(Court of Appeals of Georgia. Feb. 14, 1907.)

**1. WRIT OF ERROR—REVIEW—QUESTIONS OF FACT—VERDICT ON CONFLICTING EVIDENCE.**

The settlement of disputed issues of fact is wholly within the province of the jury; and it is not within the power of this court to set aside their verdict, unless it appears that it is without any evidence to support it. Where disputed issues of fact, each supported by a number of witnesses, have been settled by the jury under fair and appropriate instructions by the court, and the verdict has been approved by the trial judge, the judgment of the lower court will not be disturbed, unless grave and material error has been committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935, 3949.]

**2. SAME.**

The error must be such as induced or largely contributed to the erroneous finding, and such an error that, if a new trial is granted, the result should in all probability be different on another trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3949, 3950.]

**3. SAME—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

While it is error to allow a witness to testify that the "deceased appeared to be a careless man; that was my experience with him"—the judgment will not be reversed on that ground, where the record discloses that similar testimony had previously during the trial, without objection thereto, been allowed to be introduced, or where it appears there was proper positive evidence of the same fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4162, 4163.]

(Syllabus by the Court.)

Error from City Court of Statesboro; Branden, Judge.

Action by Queen Daughtry against the Savannah & Statesboro Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Strange, for plaintiff in error. G. S. Johnston, for defendant in error.

RUSSELL, J. Queen Daughtry brought suit against the railway company for \$5,000 for the homicide of her husband. She alleged that he was an employé of the defendant company and was engaged in the performance of his duties as trainhand; that while so engaged and without fault on his part, by the negligence of the defendant, its servants, agents, and employés, and by the use of the defective, rotten, and worn-out wire rope, and by the careless and negligent erection and maintaining of the guard post, and by the negligence and careless

operation of the engine, locomotive, cars, and machinery of the defendant, and by the improper and negligent use of a spur track, and by carelessness and negligence of defendant in employing as conductor of the train a young boy, who was inexperienced and incompetent, her husband was struck, knocked down, and killed; that her husband was in the performance of his duties; that, but for the negligent use of said spur track, guard post, and rotten and defective wire rope, the careless and negligent stopping of the engine, the incompetency and inexperience of defendant's conductor, and the orders of defendant's agents, her husband would not have been killed. The defendant, admitting jurisdiction and that plaintiff was an employé and was killed, denied all other allegations of the petition, and set up as its defense that the deceased was an employé of defendant, and had been in its employment in different capacities for a number of years, and was quite familiar with the track, side tracks, and the stations along the line of the road; that at the time of his death he was perhaps the oldest employé, in point of time, of any of the crew of the train he was then assisting to operate; and that he met his death by his own negligence, and by putting himself unnecessarily in a perilous position which he was cautioned a moment before by the conductor not to assume. The jury found in favor of the defendant. The plaintiff filed a motion for new trial, which included the three general grounds, and was afterwards so amended as to make complaint of the admission of certain evidence introduced on the trial, over her objections.

The evidence in this case was conflicting. It may truthfully be said that a verdict would have been authorized for either party. A large number of witnesses unimpeached (except by the conflict which their testimony created) sustained by their testimony the contentions of each party. We are compelled to leave the finding of the jury undisturbed. The jury had the exclusive right to say what was the truth with reference to the catastrophe in which the plaintiff's husband lost his life—whether his death was caused by the negligence of the railroad company and its servants, or whether by his own carelessness he forfeited his life. From its first decision upon that subject, *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, it has been the unanimous opinion of this court that the verdicts of juries upon the facts (if the conclusion reached is honestly attained and warranted in any view of the evidence) are entitled to even more than the highest respect and consideration of the court; not only this, but that parties who fairly gain such verdicts have a property right therein, of which they should not be deprived; and furthermore, that this court is clothed with no power to set verdicts



aside. The errors for which a new trial should be granted, where there is evidence to support the verdict, have been alluded to in *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222. The error must be such as induced or largely contributed to the erroneous finding, and such an error that, if a new trial is granted, the result should in all probability be different on another trial. In most of the suits for damages we have heretofore considered the verdict was in favor of the plaintiff. In this case the verdict was in favor of the defendant company; but the rules of law are strangers to the character or quality of litigants, and, this court being bound by its obligation to law, we are not able to assume the province of the jury and either measure the credibility of the witnesses or harmonize their conflicting statements. The verdict, therefore, must stand, unless the admission by the trial judge of the evidence of which complaint is made in the amendment to the motion was such error as either induced the verdict, or harmfully contributed to shape the finding, and unless the lower court again erred in refusing to grant a new trial when the previous error was brought before him by the motion.

Civ. Code 1895, § 5478, provides: "The superior courts may grant new trials in all cases where any material evidence may be admitted to, or illegally withheld from, the jury against the demand of the applicant." The evidence admitted in this case as appears from the motion was: "Daughtry appeared to be a careless man. That was my experience with him." And the objection urged by the plaintiff was "that the testimony of acts of carelessness and negligence at other times than at the time of the injury were irrelevant and inadmissible." In the motion it was insisted that the overruling of this objection was error, because this testimony was illegal, irrelevant, and did not show negligence at the time of the injury, and was calculated to prejudice the jury against the plaintiff, and cause them to believe the testimony of the defense when they otherwise would not believe it. We think that the objection urged by the plaintiff should have been sustained; but we have not been shown any reason why the admission of this evidence should have prejudiced plaintiff's case, as stated in the motion for new trial. Considered in connection with evidence previously and subsequently introduced without any objection on the part of the plaintiff, the refusal to rule out this evidence, in our view, is at best harmless error. According to very high authority in this state, the admission of the evidence of which complaint is made was not only not error, but perfectly proper. We are of opinion that the only proof of carelessness or negligence that can be shown against a party to defeat or diminish his recovery for damages

must relate to his acts at the time of the injury, and therefore that the evidence complained of should have been excluded; and the weight of authority certainly tends in that direction, but the trial judge was not without eminent authority, contrary to this view, to support his ruling. In *Enright v. Atlanta*, 78 Ga. 293, one of the exceptions taken was that the court admitted, over objection, testimony to prove that the plaintiff had been intoxicated on several occasions prior to the date of the injury, from a witness who knew nothing of his condition at that time. This evidence, as shown by the charge and caution of the trial judge, must have been admitted simply to throw light on the evidence as to whether the acts of plaintiff at the time were or were not negligent; for upon this evidence the trial court charged as follows: "If you believe from the evidence that the plaintiff was intoxicated or so far under the influence of intoxicants as to affect his conduct at the time he was injured, and that for that reason or any other he failed to exercise ordinary care and diligence and was injured as a result of his own negligence, he could not recover. Mere proof, however, of a habit of using liquor, or of instances of its use by plaintiff, to excess, even on the very day of the alleged injury, would not bar his recovery, if the jury believe that its effect did not extend to the time he was injured, or that he was, notwithstanding, in the exercise of ordinary care and diligence." And in the third headnote of the decision (78 Ga. 288) the court held that there was no error in admitting the evidence of repeated drunkenness for some years before the injury; the judge having cautioned the jury that such testimony could not affect plaintiff's case unless he was under the effects of liquor on the night of the injury. In rendering the opinion in that case Chief Justice Jackson says: "There was no error in admitting evidence of repeated drunkenness for some years before this misfortune of plaintiff in error, and even afterwards, for the purpose of throwing light on the issue whether or not he was under the influence of spirituous liquors that night; the judge having cautioned the jury that, unless the plaintiff was under the effects of liquor that night, such testimony could not affect his case." The controlling issue in the *Enright* Case, as in this, was whether or not the negligence of the plaintiff should defeat his recovery. In the *Enright* Case the habit of drunkenness was used to illustrate the plaintiff's negligence; and in this case the trial judge allowed the witness' testimony as to the habit of the plaintiff's husband for carelessness for the same purpose. In concluding the opinion in the *Enright* Case Chief Justice Jackson says: "The way of the transgressor is hard, and frequent drunkenness, and the calaboose as its consequences, are calculated to make character

for rashness and imprudence, which tell disastrously upon the future of life, and with other disasters sometimes causes the loss of a lawsuit"—showing that in that case the evidence may have been very damaging. In this case we think the statement of the witness was of but little effect. In *S. F. & W. Ry. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183, it was held that it was not error to receive evidence showing that an engineer habitually neglected to ring a bell, nor evidence showing the habitual high speed of the same engine when run previously by the same engineer on the same street; this being evidence introduced by the plaintiff. And while Judge Bleckley, in rendering the opinion, says that this testimony is of doubtful admissibility, he cites, as sustaining the opinion of the court, *State v. Boston R. Co.*, 58 N. H. 410; *State v. Manchester R. Co.*, 52 N. H. 528; *Shaber v. St. Paul R. Co.*, 28 Minn. 103, 9 N. W. 575; *Randall v. Tel. Co.*, 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; *Craven v. Cen. Pac. R. Co.*, 72 Cal. 345, 13 Pac. 878; *Henry v. So. Pac. R. Co.*, 50 Cal. 176; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 87 Am. Dec. 155—and says: "Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our Reports holding that doubtful evidence is to be admitted rather than excluded."

Judged by these authorities alone, the trial judge was warranted in his ruling of which the complaint is made. But while believing, as we do, that the objection of the plaintiff should have been sustained, and that the evidence that plaintiff's husband was a careless man, or at least always appeared that way to witness, should have been rejected, was it error prejudicial to the plaintiff, or reversible error? It is well settled that a new trial will not be granted for harmless error in admitting evidence. *Ford v. Kennedy*, 64 Ga. 537 (6); *Mays v. State*, 88 Ga. 399, 14 S. E. 560; *McCrory v. Grandy*, 92 Ga. 319, 18 S. E. 65; *Wolff v. Ga. So. R. Co.*, 94 Ga. 556, 20 S. E. 484; *Harvey v. West*, 87 Ga. 553, 13 S. E. 693. It has also been decided that, where evidence of doubtful admissibility is submitted to the jury, it will not work a new trial where its exclusion would probably not change the result. *Eagle Mfg. Co. v. West*, 61 Ga. 120 (4). We do not think that the admission of the evidence complained of, when taken in connection with the other testimony, could possibly have had any perceptible influence in determining the verdict of the jury, especially in view of the fact that the same thing, to wit, the negligence of the plaintiff, which was sought to be proved by the testimony objected to, was abundantly proved by legal evidence to which no objection could be offered. The conflict in the evidence is to be reconciled by the

jury. In this case it was marked and striking. We cannot say that the jury erred; and we are bound to hold that their solemn finding should not be set aside for an immaterial error of the trial court, especially where it appears from the record that similar testimony to that objected to had been introduced without objection on the part of the plaintiff. It may be that the other witnesses testifying were of lesser weight and humbler character before the jury. Of this we cannot judge. While it is error to allow a witness to testify over proper objection, and in a general way, that the "deceased appeared to be a careless man; that was my experience with him"—the judgment will not be reversed on that ground, where the record discloses that similar testimony had previously during the trial, without objection thereto, been allowed to be introduced, or where it appears there was other positive evidence of the same fact.

Judgment affirmed.

(1 Ga. App. 751)

**MORRIS STORAGE & TRANSFER CO. v. WILKES.** (No. 272.)

(Court of Appeals of Georgia. May 9, 1907.)

**1. BAILMENT—DUTIES OF BAILEE.**

A bailment implies and requires, on the part of the bailee, the utmost good faith as to every matter whereby the rights of his bailor may be affected. This is not the imposition of extraordinary diligence.

**2. SAME—DUTIES OF BAILEE.**

While a bailee or depository for hire is not bound to exercise extraordinary diligence in the care and keeping of his bailment, still he is bound to ordinary diligence, measured by good faith towards his bailor—a golden rule of the law—the same diligence in the preservation of the bailor's property as in the preservation of his own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 45.]

**3. SAME—DEMAND—COLOR OF PROCESS.**

When property in the custody of a bailee for hire is demanded by a third person under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender. If the proceeding is illegal or void, it is the right and duty of the bailee to refuse to surrender the property of the bailor committed to his care. It is his duty to offer such resistance to the taking, and to adopt such measures for reclaiming it, if taken, as a prudent man would if his own property had been demanded and taken under a claim of right without legal process.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by Mrs. Wilkes against the Morris Storage & Transfer Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Mrs. Wilkes sued for \$300 damages on account of the failure of the defendant storage company to deliver to her, on demand, certain household goods that she had intrusted to it for keeping. It appeared that the defendant had suffered the goods to be removed from its warehouse upon the exhibition

by a constable of a paper purporting to be an attachment in favor of the R. S. Crutcher Furniture Company against Mrs. Wilkes. Under the evidence and the court's charge the jury found for the plaintiff \$175, and the defendant excepted to the refusal of a new trial. For the other facts see the opinion.

Arminius Wright, for plaintiff in error.  
R. B. Blackburn, for defendant in error.

RUSSELL, J. The plaintiff in error complains that its motion for new trial was refused, and this is the only assignment of error in the bill of exceptions. The motion was based on the general grounds, and on four grounds which were added to the original motion by amendment. We will first consider the amended grounds, because, under the ruling of this court in *Crankshaw v. Schweizer*, 1 Ga. App. 363, 58 S. E. 222, there is no merit in the general grounds, unless some error produced or contributed to the result and the verdict complained of.

The first ground of the amended motion is that the verdict is contrary to the evidence on the subject of value and not authorized by the evidence. Plaintiff in error insists that in no event could the verdict have been greater than \$100; that the only evidence offered by the plaintiff on the subject of value, delivered by the husband of plaintiff, was to this effect. It is true that the husband of plaintiff testified, on cross-examination, that "they would have brought about one-half of what they cost had they been sold"; but this was not the only evidence on this subject. Not only did the plaintiff's husband swear as above quoted, which was merely his belief of what the goods would bring at a forced sale, but, in further testifying, he said that the furniture in question cost \$200, that it was still not quite a year old, and that he could not have gotten the same furniture at the time it was taken from the storage company for what he bought it for. C. A. Morris, of the defendant company, testifying in its behalf, it is true, placed the value at \$50, \$75, or \$100; but on cross-examination he admitted that at a forced sale household goods, such as the personal property in question, very seldom brings what it is worth, and gave his opinion, as an expert, that if he had household furniture that answered his purpose, and which originally cost \$200, and which it would take \$200 to replace, the furniture taken away from him would be equal in value to the new furniture. We think that the jury had the right, under the evidence, to fix the value of the property at the amount of their finding, under the proper charge of the court upon the subject of value: "The question of value is one of fact, which you will decide for yourself. You are not bound by the opinion of a witness as to value. You are not required to take opinions as representing the value of the articles mentioned. You will take into consideration all the evidence that will illustrate

the question to you; take into consideration the opinion of witnesses as given to you; take into consideration what it cost to purchase the goods, if the evidence discloses it; take into consideration what it would cost to replace the goods, if the evidence discloses it, and all the evidence on the subject that will illustrate the subject—and then yourself decide what sum would represent a reasonable and proper value of the articles involved; and that sum, if the plaintiff recovers, should represent the amount of her recovery." Under the evidence above referred to, the jury would have been authorized to base their finding on the testimony in favor of the plaintiff, on this subject, in preference to that of the bailiff, who is denominated an expert, or the witness who did the multifarious service of swearing out the attachment, going security on the bond, and separating and seizing the property in question, and finally giving expert testimony in behalf of the corporation.

The second ground of the amended motion complains that the court refused to allow the defendant to show that Mrs. Wilkes was indebted to one Crutcher for the property for which she was suing, and upon which the attachment was levied for the purpose of recovering the purchase money of the same. There was no error in this ruling. The reply of the trial judge, in rejecting the evidence offered on this subject, was exhaustive, when he said, "You cannot take her goods and pay Crutcher's debt."

In the fourth ground of the amendment to the motion the plaintiff in error complains that the verdict is contrary to the charge of the court, quoted above. This ground, for the reason stated above, is not well taken.

The last ground of the amended motion asks for a new trial on the ground of newly discovered evidence. The evidence discovered after the trial and verdict purports to be a certain conditional bill of sale, signed by the plaintiff, and in favor of R. S. Crutcher Furniture Company, describing the goods sued for in this case, by which title to the goods was reserved in the furniture company, and it was provided that in default of payments therein stipulated the furniture company should have the right to take possession of the property "without any legal process." We think the court rightly refused to grant a new trial on this newly discovered evidence, because the most ordinary diligence, under the circumstances of the case, would have disclosed the existence of the document in question before the trial. The Morris Transfer & Storage Company did not deal with the R. S. Crutcher Furniture Company as with strangers afar off. The record does not disclose the exact distance which separates their respective places of business, but it does disclose the fact that they are both in the city of Atlanta, and upon terms of comity, if not of amity, by reason of which any inquiry addressed by the one to the other

would have received a truthful response; for the evidence disclosed that the storage company actually allowed the agent of the Crutcher Company to go into the storage company's warehouse, take out the property that they identified, and move it to the Crutcher Company's place of business before any attachment was levied. The goods were carried away in Mr. Crutcher's wagon. The bailiff testified that "Mr. Poole [an employé of the Crutcher Company] was at the storage company's; that Mr. Crutcher telephoned me to meet him there; and when he did come there, the goods had been taken out of the storage, and were ready to be loaded up." Every circumstance of the delivery shows that if the storage company had been only as anxious, in good faith, to protect and care for the property of its bailor (in the same manner as it would if the property in question had been its own) as it was to accommodate Crutcher, even the slightest degree of diligence would have caused it to inquire whether Mr. Poole, as agent for Crutcher, did not have, as his conduct would have indicated, title to the goods in question.

Motions for new trials upon the ground of newly discovered evidence are not favored by the law, and should not be. They are tolerated where it is apparent that grave injustice would result unless the newly discovered evidence is admitted on another trial, and only then when it is clear that ordinary diligence could not have discovered the evidence sought to be adduced, and that a different result in view of the discovery ought to obtain. As said before, we think that ordinary diligence would have discovered the additional bill of sale; and therefore there was no abuse of discretion on the part of the trial judge in overruling this ground of the motion for new trial. And we are not clear that, even if it could not have been discovered and a new trial ordered, the result of the trial should be different. The only province of this conditional bill of sale would be to show that under certain conditions the R. S. Crutcher Furniture Company had the right to take possession, without legal process, of the property described in the bill of sale. This might be a good contract between Mrs. Wilkes and the furniture company; but the effect of its being authority to the bailee to deliver the goods on mere demand would be to make him the judge and jury to determine whether or not the contract had been fully complied with and all payments made, whether the property in his possession was the same as that originally sold by the Crutcher Company, and whether the instrument offered was in fact ever executed by Mrs. Wilkes. As he would occupy his position as court and jury at his own risk, this ground of the motion is imperfect, and was rightly overruled by the trial judge, unless the ground of newly discovered evidence had been supplemented by proof showing that the pay-

ments had not been made. As the purported bill of sale is dated November 21, 1899, and the payments are provided to be at \$10 a month, if they had been promptly met, all payments would have been fully made and the contract discharged long before 1902, which was the date of the storage; and the very provision for repossession of the property upon default of any of the payments might give rise to the presumption either that the payments had been met or that the stipulation with reference to taking possession of the property without legal process had been waived. In our judgment the verdict was right, and the trial judge was right in overruling the motion for new trial upon all of the grounds therein stated.

It is undisputed, from the evidence, that the plaintiff stored her household furniture with the defendant for safe-keeping upon agreed valuable consideration. The defendant became thereby a bailee for hire. Under Civ. Code 1895, § 2830, a warehouseman is a depository for hire, and is bound even for ordinary diligence; and failure to deliver the goods on demand makes it incumbent on him to exercise ordinary diligence. And under Civ. Code 1895, § 2896: "In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence." Under the facts disclosed by the record, the defendant in error showed the bailment, the proof of loss, and established demand upon the bailee. This should be a prima facie case. Did the plaintiff in error shift the burden? Its defense was it delivered the property to an officer of the law under legal process. It was bound by law to ordinary diligence in caring for and keeping it. Civ. Code 1895, § 2898, says: "Ordinary diligence is that care which every prudent man takes of his own property of similar nature." As was held by this court in *Haines v. Chappell*, 1 Ga. App. 480, 58 S. E. 220, the bailee is not only bound for ordinary diligence, but he must exercise good faith in his relations with the bailor. This good faith is measured by a golden rule of the law: The same diligence by the bailee for the bailor's property as for his own; doing for the bailor as he would do for himself. Measured by this rule, it would have taken a wide stretch of the imagination on the part of the jury to conceive that the defendant would have acted as to property it believed to be its own as it did act with reference to the delivery of the bailor's property in this case. Could the jury have reasonably believed that if the Crutcher Company had laid claim to property of the storage company of similar nature, the storage company would, without let or hindrance, have allowed an agent of the furniture company to go into its warehouse and select for the furniture company such property as he claimed belonged to it, and would have delivered it to him and taken his receipt therefor, and allowed him to carry it to the side-

walk, receiving directions from a bailiff who was acting under process absolutely void, and have made no inquiry or protest in the premises?

The very able counsel for plaintiff in error, of course does not and cannot deny that the attachment was void. The affidavit did not state that the property was in the possession of the defendant, or in possession of any other person who held it for the benefit of the debtor in fraud of the attaching creditor; and no valid bond was given, because the affiant to the affidavit to obtain the attachment was the surety on the bond, and the agent who separated and moved the goods. But the plaintiff in error contends that he should not be held liable for the delivery to the constable of the goods described. Waiving the facts that the receipt in the record show that the goods were delivered to Crutcher, and not to the constable, and admitting for the sake of argument that delivery was made to the constable, we do not think that the position assumed by plaintiff in error, that he delivered the goods because he thought he was compelled to deliver them to the constable, affords him any defense. A knowledge of the law is presumed. The bailee, like every other citizen, is presumed to know the law; and, if he did not, he is presumed to inquire as to it before he would allow his property taken from him. So he should inquire before allowing property intrusted to his care to be taken therefrom; and, if he misjudges, it is at his own risk. Such a requirement is not, as contended by counsel for plaintiff in error, an imposition of extraordinary diligence, but is the application of ordinary diligence in the spirit of good faith required on the part of a bailee. He must protect the bailor's property and regard the bailor's rights with the same care that he would his own. To sustain the contention of the plaintiff in error that it was not its business to inquire into the apparent defects in the attachment proceedings, but simply to surrender the property of the bailor, under the circumstances disclosed, without any liability to account therefor, would be to abrogate the fundamental principles recognized as governing bailment for hire. It would be to say that if a stranger knocked at the bailee's door, and claimed to be an officer of the law, and claimed to have a process from a court, it was his duty to surrender the property held by him in trust, without even going to the trouble of investigating the genuineness of the paper, as to its legality, or the right of the holder to carry away the property. To state such a position is to decline to receive it seriously.

The plaintiff in error contends, further, that he exhausted the requirement as to ordinary diligence by notifying one Mr. Johnson of the levy. The ordinary diligence required by the bailee is to be ascertained in every case, as a question of fact, by the partic-

ular circumstances of the case. Negligence and diligence are peculiarly questions of fact for the jury. If the evidence had shown that Johnson was the agent of the bailor, the jury would have been authorized to find that the storage company exercised ordinary diligence in bringing knowledge of existing conditions to the bailor through her agent. She could then have protected herself. But the burden of proving the agency, as the bailee had parted with the property, was upon the bailee, who failed to show that Mr. Johnson was in any respect the agent of the bailor for any purpose whatever; the evidence being undisputed that Mr. Johnson only introduced the agent of the bailor to the bailee, and thus provided it with a customer. The right upon this subject was clearly presented to the jury by the trial judge, and their finding that Johnson was not the agent of Mrs. Wilkes was demanded by the evidence.

It being admitted in argument before this court that the attachment levied upon the goods in question was void, counsel insists that the rule of ordinary diligence did not require the bailee, at expense to himself and at the risk of a forcible entrance of his warehouse by an officer, to take steps to resist the process, although void. We fail to find any case in which the exact question has been determined in this state. But in view of what we have stated above as to the good faith required of the bailee, in the exercise of ordinary diligence, where the rights of the bailor are affected, and especially in view of the definition contained in Civ. Code 1895, § 2898, we think the ruling in *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 25 N. E. 204, 9 L. R. A. 438, 20 Am. St. Rep. 718, is persuasive authority upon the point involved. That case was an action to recover damages for the alleged negligence of the defendant as a bailee for hire. The Stuyvesant Company, like the defendant in this case, was a corporation receiving property on deposit, as bailee, for safe-keeping and storage. The plaintiff, as in this case, was a woman. The process to be enforced was a search warrant being served by an officer, but the process was invalid. The defendant's officers protested against the seizure of the bailor's property, but they furnished the levying officer with the means to identify its whereabouts, and he thereupon made the seizure. The facts of the two cases are similar, except that the Morris Storage Company did not even protest against the levying of the attachment. In the New York case, as in this, the levy or seizure was made after the bailee had pointed out the property and surrendered its possession. The trial court held that the defendant performed its duty with reference to the property which it held as bailee; but the Court of Appeals reversed that judgment, and held, as we hold here, that the defendant neglected to exercise that degree of diligence and fidelity to which it was bound in the care and keeping of the

property which the plaintiff had confided to its charge. In rendering the opinion the court says: "The persons who took the property had no process that authorized them to do so; and hence the defendant had the right to make such resistance to it as they would have had if the same parties attempted to take it without any process whatever, and, if overcome by superior force, they could pursue and reclaim it by legal proceedings or otherwise in the same manner as if the search warrant had not been procured. When property in the hands of the bailee for hire is demanded under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and, if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was. A person who would allow his own property to be taken away from him under like circumstances, and without doing more to prevent such a result, or to repossess himself of it when taken, could scarcely be called a prudent man."

Judgment affirmed.

(1 Ga. 504)

**STUBBS v. STATE. (No. 227.)**

(Court of Appeals of Georgia. March 22, 1907.)

**1. CRIMINAL LAW — APPEAL — DIMINUTION OF RECORD.**

Under Civ. Code 1895, § 5526, the court may look to any part of the record to enable it to clearly understand the error complained of; and, it appearing in this case that the substance of the affidavit asked to be sent up is identical with what the plaintiff in error contended it to be, it is unnecessary to have the affidavit itself transmitted.

**2. SAME — EVIDENCE.**

The verdict was authorized by the evidence.

(Syllabus by the Court.)

Error from City Court of Blakely; Jordan, Judge.

One Stubbs was convicted of crime, and brings error. Affirmed.

R. H. Sheffield, for plaintiff in error. W. G. Park, Sol., for the State.

**RUSSELL, J.** The plaintiff in error suggests a diminution of the record, and asks that the affidavit of the prosecutor, on which the accusation was based, be ordered transmitted to this court as part of the record. We think it unnecessary to order the affidavit sent up, because, even if its contents can be considered on review of a motion for new trial, the truth of the contention of the plaintiff in error that the affidavit upon which the

accusation issued was for a misdemeanor is already apparent from the record. But if the affidavit is a part of the accusation, and for any reason is defective, the objection should have been urged by demurrer, motion to quash, or, even after conviction, by motion in arrest of judgment. Neither on a motion for new trial, nor by a writ of error whose only assignment of error is the overruling of a motion for a new trial, can advantage be taken of the defects of the accusation. This brings us to the merits of the motion. It appears that there was evidence which would have authorized either an acquittal or a conviction, and that the jury, in the exercise of their prerogative, gave the preference to the witnesses for the state. The verdict, under the decision in *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, should not be disturbed. Judgment affirmed.

(1 Ga. App. 527)

**ROGERS v. STATE. (No. 226.)**

(Court of Appeals of Georgia. March 28, 1907.)

**1. CRIMINAL LAW — DEMURRER — ARREST OF JUDGMENT — NEW TRIAL.**

An objection to an accusation, on the ground that it was based on a defective affidavit, must be made by demurrer or motion in arrest of judgment. Such objection furnishes no reason for granting a new trial. *Rucker v. State*, 39 S. E. 902, 114 Ga. 13; *Boswell v. State*, 39 S. E. 897, 114 Ga. 40.

**2. SAME — DIMINUTION OF RECORD.**

As the defect urged against the accusation is apparent from the record, the motion suggesting diminution of the record in order to have the affidavit sent up will not be granted. *Stubbs v. State*, supra, 1 Ga. App. 504.

**3. SAME — REVIEW.**

The evidence authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Blakely; Jordan, Judge.

One Rogers was convicted of crime, and brings error. Affirmed.

R. H. Sheffield, for plaintiff in error. Walter G. Park, Sol., for the State.

**HILL, C. J.** Judgment affirmed.

(1 Ga. App. 203)

**GEORGIA S. & F. RY. CO. v. BARFIELD. (No. 70.)**

(Court of Appeals of Georgia. Feb. 14, 1907.)

**1. JUSTICES OF THE PEACE — PROCESS — REQUISITES — STATUTORY PROVISIONS.**

The terms of Civ. Code 1895, § 4116, requiring a copy of the cause of action sued on to be attached to the summons in a justice's court, do not necessitate a specific allegation of negligence, or a detailed relation of the acts from which negligence may be inferred, or by which it is to be proved, or that the plaintiff set out a statement of the facts which constitute the alleged negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 253.]

**2. SAME.**

Hence a summons, in a suit in a justice's court against a carrier for damage to goods shipped, which alleges that the plaintiff claims the

difference between a named amount which his goods were worth when sound, previous to the injury, and a stated sum for which he sold the goods after they had been damaged, and alleges damage in a certain amount, due to the negligence of defendant and without fault of plaintiff, is not demurrable, under the ruling in *Louieville & Nashville R. Co. v. Cody*, 46 S. E. 429, 119 Ga. 371. The requirement as to summons and copy in a justice's court is an exception to the general rules of pleading. The form of the action is not changed by appeal to the superior court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 253.]

### 3. CARRIERS—CARRIAGE OF FREIGHT—ACTIONS—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—EXPRESSION OF OPINION.

It was not error to allow evidence as to the condition of the car, thus enabling the jury to determine whether the car was or (as alleged by the plaintiff) was not a safe car, and whether the injury (if any) was caused by the act of God or by the negligence of the carrier. There was no error in the charge of the court to which exception is taken.

### 4. SAME—PLEADING—VARIANCE.

A variance between the allegata and probata, which arose merely from the introduction in evidence by the defendant of a waybill in which the initials of the consignee's name were different from those of the plaintiff (though the surname was the same), was not necessarily material or fatal. When it appears that such waybill was prepared and issued without the direction and knowledge of the plaintiff, and in his absence, and the evidence of variance presented by the one party is fully met by evidence on the part of the other, showing the true consignee and owner, and it is further shown that the carrier treated such party (whose initials do not correspond with those in the waybill) as the owner, delivering to him the freight and accepting from him the charges for its carriage, it is not a question of variance between the allegations and the proof, so far as the plaintiff's case is concerned, but instead raises squarely an issue of fact for determination by the jury. A variance between the allegations and the proof, to be material or fatal, must be apparent and uncontradicted.

### 5. SAME—ACT OF GOD.

No injury can be said to be the act of God which can, under any fair view, be attributed to the negligence of man.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 525.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; Felton, Judge.

Action by H. L. Barfield against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman & Jones, for plaintiff in error.  
M. G. Bayne, for defendant in error.

RUSSELL, J. H. L. Barfield brought an action against the Georgia Southern & Florida Railway Company in a justice's court, and obtained judgment for \$57.89. The defendant company appealed to a jury in the superior court of Bibb county, where a verdict was rendered by the jury for the same amount as that of the judgment of the justice. The defendant moved for a new trial. The judge of the superior court overruled the motion, and thereupon the writ of error,

which brings the case to our consideration, was sued out.

The action was begun by issuance and service of the following summons from the justice's court: "Office of J. H. L. Gerdine, N. P. & Ex Officio J. P. State of Georgia, Bibb County. 564th district, G. M. To Any Lawful Sheriff, Deputy Sheriff, or Constable of Said County—Greeting: The defendant, Georgia Southern & Florida Railway Company, is hereby required to be and appear at the next justice's court to be held in and for said district, at the Masonic Temple, 518 Mulberry street, Macon, Georgia, on the first Saturday of May next, by 10 o'clock a. m., to answer the complaint of H. L. Barfield for damages to property as set out below, and is annexed to this summons, or, in default, the court will proceed as to justice shall appertain. Hereof fail not. Given under my hand and seal this 20th day of April, 1905. J. H. L. Gerdine, N. P. & Ex Officio J. P. [Seal.]

"(Copy.) For that on Jan. 1st, 1905, said plaintiff caused to be loaded on a car furnished by said defendant as a safe car, at Hahira, Ga., 128½ bushels of sweet potatoes, to be shipped to him at Macon, Ga., in good condition; and by negligence of said defendant said potatoes were injured and damaged in the sum of \$57.89, by being allowed to freeze while in possession of said company, said potatoes being of the value of \$128.50 delivered to said defendant, and when delivered were only worth \$70.61—all of said damage being by the fault and negligence of said defendant, and without fault of the plaintiff. M. G. Bayne, Plaintiff's Attorney."

This was afterwards amended as follows: "And now comes plaintiff and amends his itemized statement, and says that the said potatoes were shipped on Jan. 25th, 1905, instead of Jan. 1st, 1905."

In the justice's court, and also before the trial of the appeal in the superior court, a demurrer was filed, asking that the suit be dismissed for the reason that the summons set forth no cause of action against the defendant, and also especially because "there is no allegation of negligence against the defendant that would authorize plaintiff to recover." This demurrer was overruled by the judge of the superior court, and exceptions pendente lite were filed to this ruling. In its motion for new trial the defendant complained: (1) That the verdict was directly contrary to the evidence and without evidence to support it. (2) Because the allegata and probata failed to correspond, and there was a fatal variance between the allegations and proof; the summons alleging shipment to H. L. Barfield, and the proof showing shipment to J. F. Barfield. (3) Because the verdict is contrary to law and to the principles of justice and equity, and especially to the following principles of law: A common carrier is not liable for goods in his care where the injury is occasioned by the act of God, unmixed with the carrier's negligence. "Movant con-

tends that the evidence in this case showed, without contradiction, that the goods in question were frozen while in the carrier's possession, and that the weather was so extreme as that they would have frozen in the best protected cars; hence no act or default of the carrier contributed to the said injury."

(4) Because the court erred in permitting H. L. Barfield, the plaintiff, to testify: "I found that the car was an old car, and there was a board off the end of it, right at the corner. The board or opening was possibly six inches wide at the top and come to a point about half way the car; and the door, in addition, was not in good condition. It had been opened and shut, and nailed and fastened, in the way the freight cars open and shut, so often that you could not fasten it closely, although it would have answered any purpose for ordinary purposes, but it did not exclude the air at all; and the fact that the door not being in good shape and the hole in the end of the car, I called Toole's attention to it, and told him at the time I did not believe the potatoes would have frozen if that had been a real good box car at that time." To the introduction of said testimony defendant objected because there was no notice of any such defect or negligence in the summons; and the court overruled the objection and admitted the evidence. (5) Because the court erred in charging the jury as follows, to wit: "They may do that by showing that they have exercised that degree of diligence which the law requires of them, in the particular character of cars subject to investigation and under investigation at the time, and with reference to freight the rule is that no loss or damage which is inflicted upon freight while under their control is one that they are not liable for; that is to say, no excuse avails the carrier, unless the loss was occasioned by the act of God or the public enemies of the state. In order for the carrier to avail himself of the act of God as excuse, he must establish, not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto." Defendant's objection to this charge is that it excluded any and all defenses, and was an expression of opinion that defendant was liable, and not excused by the act of God or of public enemies.

Upon the hearing, the judge overruled the motion for new trial. In his bill of exceptions the defendant (now plaintiff in error) excepted to the order overruling the demurrer, and to the order refusing a new trial; and therefore the questions we are to determine are: (1) Was it error to overrule the demurrers? (2) Should a new trial have been granted upon the grounds stated?

We think there was no error in overruling the demurrer. Probably, under the doctrine laid down in *Louisville & Nashville R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429, the demurrer might have been good if the cause had originated in some court other than the

justice's court; but in the justice's court no formal pleadings are required. "The law does not enjoin upon the plaintiff the obligation to fully and distinctly set forth his cause of action with the same minuteness and clearness that is required in pleadings in courts of record. The suit is brought simply by the issuing of summons, attached to which is usually a statement giving some indication of the nature of the debt sought to be recovered. This is sufficient, if enough stated to put the defendant on notice \* \* \* as to the character of the claim sought to be enforced." *Jones v. Dodd*, 108 Ga. 516, 34 S. E. 169. The act of September 21, 1881, which is now embodied in Civ. Code 1895, § 4116, is a remedial statute, and, as was well said by Chief Justice Fish, delivering the opinion in *Southern Ry. Co. v. Collins*, 118 Ga. 413, 45 S. E. 308: "Before its passage \* \* \* the plaintiff in an action in a justice's court was not required to put the defendant upon notice of the nature of the demand upon which he was sued. Defendants were, therefore, often placed at a disadvantage in defending suits instituted in justice's courts. To remedy the defect in the law the statute of 1881 was passed. The general rule is that remedial statutes are to be liberally construed, and in construing them the old law, the mischief, and the remedy are to be taken into consideration. The rule of liberal construction applies with peculiar force to a statute relating to pleadings in a justice's court, where the same degree of strictness and precision in pleading is not required as in the higher courts. \* \* \* The object of the law requiring a copy of the cause of action to be attached to the summons being that the defendant shall be informed of the nature of the plaintiff's demand against him, it is immaterial whether the statement of the cause of action is contained in the body of the summons or is actually attached to the summons." The present case, like *Southern Ry. Co. v. Collins*, falls within the provision of Civ. Code 1895, § 4994, which declares that "no technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded: provided, there is legal cause of action set forth as required by this Code." As bearing upon the same principle, see *Howell v. Field*, 70 Ga. 592; *Southern Ry. Co. v. Varn*, 102 Ga. 764, 29 S. E. 822; *Davis v. County of Bibb*, 116 Ga. 26, 42 S. E. 403. We do not find that the case of *Harrison v. Southern Ry. Co.*, 120 Ga. 1054, 48 S. E. 408 (cited by plaintiff in error, and which was a suit in the superior court), has any bearing upon the question now before us. The court was right in overruling the demurrer.

We come, then, to the second assignment of error, based upon the overruling of de-



fendant's motion on the ground therein stated. The evidence shows that the plaintiff was the owner of the potatoes which he alleged had been damaged, and that he was so treated by the defendant, who delivered them to him and accepted from him the freight for their carriage. There was no evidence that he was not the owner. It is true that the bill of lading which was introduced was in these words: "Received by the Georgia Southern & Florida Railway Company at Hahira, Ga., Station, 1/25/1906, from H. L. Barfield, the property described below, in apparent good order, marked, consigned, and destined as indicated below, which said carrier agrees to carry to said destination," etc. "Consignee, J. F. Barfield, Place, Macon, Ga. Articles, 60 sacks S. potatoes; weight, 7071; freight, collect; car, Sou. 200279. [Signed] J. M. Johnson, Agent." Now, in view of the fact that the plaintiff swore he was the owner and should have been the consignee, and in view of the further fact that there was no evidence that he was at Hahira at the time the bill of lading was issued, or had any knowledge of its contents, or was in any way responsible for its wording, the fact that the name of the consignee was written as J. F., instead of "H. L.," Barfield, could have well been treated as being a clerical mistake of the company. But, if that contention of the defendant in error be not sound, the bill of lading was introduced by the defendant, and at best would but raise the issue as to who was the owner; and the jury, having the testimony of the plaintiff that he was the owner, would have the right to determine that issue of fact, finding as they might determine the truth to be from the conflicting evidence. Variance between the allegata and probata as to the ownership would be fatal (as insisted by the counsel for plaintiff in error) if the evidence did not show that H. L. Barfield was the owner, or if by any rule he was estopped by the contents of the bill of lading from asserting his ownership. But, in view of his testimony that he was the owner, there was no variance, so far as plaintiff's case was concerned, between the allegation and the proof. In view of the fact that the plaintiff could not take the goods from the depot without paying the freight, and that it was his duty in case of partial damage to do (as he did) everything within his power to lessen the damage devolving upon the company, and in view of the further fact that he was treated by them as the owner, we see nothing to prevent him from maintaining an action in the form in which he proceeded. The conduct of the railroad company estops it from relying upon its bill of lading, at least so far as the individuality of the consignor and consignee are concerned.

The next contention of the plaintiff in error is that the verdict is contrary to law, especially because a common carrier is not

liable for injury occasioned by the act of God, unmixed with the carrier's negligence. He contends that the evidence shows "that the goods in question were frozen while in the carrier's possession, and that the weather was so extreme that they would have frozen in the best protected cars; hence no act or default of the carrier contributed to the said injury." And we may consider the fourth and fifth grounds of the motion together with the foregoing (which is the third), because they are so closely connected that it is impossible to separate them; the fourth having reference to the evidence, and the fifth to the charge of the court bearing upon this subject. The evidence objected to was: "I found that the car was an old car, and there was a board off the end of it, right at the corner. The board or opening was possibly six inches wide at the top and came to a point about half way the car; and the door, in addition, was not in good condition. It had been opened and shut, and nailed and fastened, in the way the freight cars open and shut, so often that you could not fasten it closely, although it would have answered any purpose for ordinary purposes, but it did not exclude the air at all; and the fact that the door not being in good shape and the hole in the end of the car, I called Toole's attention to it, and I told him at the time I did not believe the potatoes would have frozen if that had been a real good box car at that time." As to the portion of the charge to which objection is made, it appears that (after having stated proper rules with reference to the burden assumed by the plaintiff, and the amount of evidence necessary to enable him to shift that burden, and after having stated the presumption arising against the company and the burden thereby placed on them to show nonliability) the court continued as follows: "They may do that by showing that they have exercised that degree of diligence which the law requires of them, in the particular character of cars subject to investigation and under investigation at the time, and with reference to freight the rule is that no loss or damage which is inflicted upon the freight while under their control is one that they are not liable for; that is to say, no excuse avails the carrier, unless the loss was occasioned by the act of God or the public enemies of the state. In order for the carrier to avail himself of the act of God as an excuse, he must establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto."

The objection urged in the fourth ground of the motion was that the evidence to which the defendant company objected was not specified in the summons; and, as we have said above, we think this subject is fully settled by the decisions relative to summons in justices' courts, which we have cited. The complaint of the charge excepted

to was that it was an expression of opinion that the defendant was liable, and was not excused by the act of God or of public enemies. We think that the portion of the charge excepted to, especially taken in connection with the context of the charge, is without error. The testimony to which objection is made was not objectionable upon the ground made, and was pertinent to the plaintiff's case. The charge, so far from being an expression of opinion that the defendant was liable, clearly left it open for the jury to determine whether the freezing of the potatoes was occasioned on account of the unusual severity of the weather to which some of the witnesses had testified, to which no act of negligence on the part of the company contributed, or whether the character of the car was such that the negligence of the company did contribute to the injury. An interesting question is presented by the brief for plaintiff's counsel as to whether a carrier is liable for injury to a shipment from cold, where the evidence shows that the goods would have been frozen, whether in or out of the carrier's possession. It is not necessary for us to decide this question or multiply words in its discussion, because in our opinion injury and loss can never be attributed to the act of God if, in any fair view of the evidence, it can be held to be due to the act of man; and a review of the evidence shows that there was ample proof to authorize the jury to conclude in this case that, if the car had been a safe and suitable car, the potatoes would not have frozen. Witness Flournoy swore that he had had experience in shipping potatoes and fruit on cars, and that, if cars were loaded on a warm day at Savannah, they would be 10 degrees warmer inside the car than outside when the car reached Macon; and, if there was an opening such as had been described by witnesses, he would say that all the warmth would have escaped. He further testified that a crack at the door would affect the temperature. He further testified that in the summer time, after you get in a box car, you would almost fall from heat; and that in cars coming from Atlanta, loaded on a cold day, if, upon their arrival at Macon, one went in there on a warm day, it would be colder than the outside, etc. He further swore that on January 26, 1905, the weather was cold, but on the 25th it was very warm; and if the potatoes had been put in a close car and taken out the next day, soon after they arrived (as they were), they would not have frozen. All of this testimony was submitted without objection, and could have well induced the belief in the minds of the jury, from the evidence of one who had years experience in the use of box cars, that the freezing of the potatoes was due to the defective condition of the car. The jury had the right to base their verdict on the testimony of this witness, rather than on that of another, which did not accord with

his. It was an issue of fact for their exclusive determination. They evidently found that the defendant was negligent in not providing a safe car; and, as there is evidence to authorize their findings, we are not called upon to decide whether, if perishable articles should freeze and it was uncontradicted that the carrier used all diligence, the freezing would be called the act of God. We need only say that in this case the charge to the jury is substantially the same as section 2264 of the Civil Code of 1895, which says that "in cases of loss the presumption of the law is against him [the common carrier] and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state." It may be that if goods freeze in transit which are loaded under such circumstances that the consignee could know as well as the carrier that they were likely to freeze, and the carrier used every known precaution to protect them against the cold, and they nevertheless froze and were damaged, the shipper would be estopped from collecting the claim for damages; but that is not the uncontradicted evidence in this case. Before the jury each case must stand upon its own facts. It is a question, in all such cases, of the negligence of the carrier; and negligence, as well as diligence, is a question of fact for determination in each case by the jury. In this case, in our opinion, the charge clearly presented the legal principles involved, and a finding in favor of either party would have been authorized; and the verdict of the jury, having been approved by the trial judge, should not be disturbed.

Judgment affirmed.

(1 Ga. App. 527)

**SCRIBNER'S SONS v. MUTUAL BLDG. CO. (No. 280.)**

(Court of Appeals of Georgia. March 28, 1907.)

**1. APPEAL—REVIEW—VERDICT OF JURY.**

Where the question in a case is one of fact, every presumption is in favor of the verdict of the jury, that they found what was the truth about the matter; and the record must affirmatively show that the verdict was contrary to law before it can be set aside. *Maddox v. Cross*, 4 S. E. 680, 80 Ga. 105.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

**2. NEW TRIAL—INSUFFICIENCY OF VERDICT.**

Where two verdicts have been rendered in favor of the same party on substantially the same issues of fact, and two new trials have been granted by the presiding judge, the rule of discretion applicable to the first grant of a new trial has no application; and if the evidence on the last trial, although conflicting, supported the second verdict, it should not be set aside.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; Pendleton, Judge.

Action by Scribner's Sons against the Mutual Building Company. Verdict for plaintiff. From an order granting a new trial, plaintiffs bring error. Reversed.

Thomas L. Bishop, for plaintiffs in error.  
Etheridge & Etheridge, for defendant in error.

RUSSELL, J. It appears from the record that the plaintiffs sued the defendant for damages to certain books stored in the defendant's building, and recovered a verdict for \$50 and costs. The case was carried to the superior court by certiorari, and a new trial ordered. It further appears that this is the third trial awarded the defendant on the same state of facts, and that no error of law contributed to these verdicts. It is not only true that a party has a property right in a verdict, but it is also true that it is one of the prime objects of the law that there shall be somehow and somewhere an end to litigation. If this were a case of a first verdict, even though the evidence fully authorizes the finding of the jury, we should not interfere with the discretion vested in the judge of the superior court. But due regard to the prerogative of the jury to decide issues of fact, as well as to the adjudications of our Supreme Court, places the second grant of a new trial on a different footing from the first grant. And we may say that the force of the argument is increased where, as in this case, the third grant of a new trial upon the same issues of fact is involved. The practical effect of it is to suggest, if not, indeed, to dictate, to the jury on the next trial that they shall believe the witnesses which the preceding juries have not preferred, and shall disregard those witnesses whom their predecessors have preferred, to credit. It is well settled that, "where a second verdict has been rendered on substantially the same issues of fact in favor of the same party, the rule of discretion applicable to the first grant of a new trial does not apply, and if at the last trial there was nothing objectionable in the rulings of the presiding judge, and the evidence, though conflicting, supported the second verdict, it should not be set aside." *Lewis v. Equitable Mortgage Co.*, 99 Ga. 336, 25 S. E. 728; *Veal v. Robinson*, 76 Ga. 838. In *Dethrage v. Rome*, 125 Ga. 806, 54 S. E. 666, the Supreme Court says: "The liberality of indulgences by this court in favor of the discretion of the trial court in the first grant of a new trial will not be extended to a second. In the first instance the discretion will be sustained, when questions of evidence are involved, almost as a matter of course; but not so with subsequent trials. There must be an end to litigation; and after the first grant of a new trial, if the matter in controversy be one of fact for the jury, and for a second time in passing upon the same facts the verdict upon the question at issue be concurrent with the first, the mere discretion of the court can play but little part in the second motion for a new trial." And it may be remarked that this is especially true where the subject-matter of that discretion

is a verdict being passed upon by the judge of the superior court as a reviewing court, and where the witnesses were not subject to his sight or hearing, as in trials in his own court. We could cite a longer array of authorities sustaining this proposition, but deem it unnecessary. As was held in *Cook v. Western & Atlantic Railroad*, 72 Ga. 48: "The discretion of the presiding judge in granting a first new trial had been exhausted in the case, and the grant of another was error."

It is insisted by counsel for the defendant that the plaintiffs could not recover because the evidence showed that there was no defect in the pipe which burst, or that, if there was such a defect, it was not known or could not have been known either to the plaintiffs or the defendant; that the cause of the bursting of the pipe was an act of God. Whether these contentions were well sustained was a question for the jury. The jury had just as good reason for believing that the pipe which discharged the water that damaged the plaintiff's books was improperly installed and negligently maintained in the building by the landlord as that the leakage was caused by divine intervention; for, while there was some testimony that the pipe was in perfect condition and the rain was unprecedented, there was testimony for the plaintiffs that the water pipe was defective, and certainly defectively constructed—not that the pipe burst, but, as testified by one of the plaintiffs' witnesses, "the pipe was hanging down, the joint pulled out, and the hanger hooks pulled out of the wall." To our mind this would indicate defective plumbing, if not defective piping, for both of which the landlord was responsible. The jury may have taken this view of the case, and, in any event, with causes of the damage testified to, they are the proper judges as to which was the true cause. As has heretofore been held by this court in *Georgia So. Ry. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236: "No injury can be said to be the act of God which can, under any fair view, be attributed to the negligence of man." The jury seems to have taken the defendant's view as to any damages resulting to the plaintiffs' books which were stored in the hallway; for, while the plaintiffs sued for \$98, the verdict was only for \$50. and, while the defendant claimed that the plaintiffs had the only key to the room in which the plaintiffs' books were stored, the evidence is ample to show that the defendant's building was a large office structure with a complete janitor service, and that access could have been had to the room. This phase of the evidence, however, relates to the removal of the books from the room after it was flooded; and whether the plaintiffs' books were removed or not, or whether it was the duty of the defendant's janitor to remove them or not, if they were deluged by a defectively constructed pipe unquestionably maintained by

the landlord for the benefit of the entire building, and which some of the evidence shows was defective and defectively constructed, the plaintiffs would be entitled to recover the damages entailed upon them, whether the books were removed or not. The cases cited by defendant are not in point.

Judgment reversed.

(1 Ga. App. 79)

**ASKEW & CO. v. SOUTHERN RY. CO.**  
(No. 37.)

(Court of Appeals of Georgia. Jan. 24, 1907.  
Rehearing Denied March 2, 1907.)

**1. CARRIERS—TRANSFER OF BILL OF LADING—ACTION BY ASSIGNEE.**

The transferee of a bill of lading may maintain an action *ex contractu* against the carrier for failure to deliver to him all or any portion of the goods specified in the bill of lading; and this is true, whether the loss of the goods or the shortage occurred before or after he acquired title to the bill of lading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 170.]

**2. VENUE—ACTION ON BILL OF LADING.**

A railroad company, which in its bill of lading has agreed to deliver goods to a connecting carrier and which does deliver a portion of the goods to the connecting carrier, the remainder of the goods being lost, may be sued for the shortage, as a breach of the contract of carriage, in the county in which it undertook to deliver to the connecting carrier.

**3. APPEAL—DECISION—DIRECTIONS ON REMAND.**

Owing to imperfections in the pleadings, special directions are given in connection with the reversal of the judgment.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by Askew & Co. against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

W. C. Wright and J. F. Gollightly, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

**POWELL, J.** It appears from the petition that Askew & Co., the plaintiffs, ordered from Horne & Goans, of Chattanooga, Tenn., a car load of corn. Horne & Goans shipped the corn via Southern Railway, from Chattanooga, Tenn., consigned to themselves at Newnan, Ga., "order notify Askew & Co.," and drew and sent through bank a draft on Askew & Co., with bill of lading attached, in accordance with our Civ. Code 1895, § 3554. After the arrival of the corn at Newnan, the plaintiffs paid the draft and received the duly indorsed bill of lading, and the car of corn was delivered to them, but it was found that 22,306 pounds of the corn had been lost in transit. The contract rate of freight was 14 cents per hundredweight, and the railway company demanded and collected 16 cents per hundredweight, an overcharge of 2 cents per hundredweight, both

as to the corn delivered and as to that which was short. The delivery at Newnan was made through another carrier, the Atlanta & West Point Railroad Company. The plaintiff sued for the value of the lost corn and the overcharge in freight. The petition was dismissed on oral motion, upon the ground that it set forth no cause of action.

1. The specific point urged as to why the petition sets forth no cause of action is that, the corn having become lost before the plaintiff became the owner thereof by securing the bill of lading, the right of action is in the consignor, and not in the consignee. Viewed solely as a tort, this might be correct. However, the failure to deliver the corn in accordance with the contract of carriage may be treated simply as a breach of the contract of carriage. Under Civ. Code 1895, § 3072, "personality to which the owner has a right of possession in the future, or a right of immediate possession, wrongfully withheld, is termed by the law a chose in action." Under Civ. Code 1895, § 3077, "all choses in action arising upon contract may be assigned so as to vest the title in the assignee." Since a cause of action arising in tort is not usually assignable, and since, at common law, ordinarily, causes of action originating *ex contractu* were not, many decisions in other states and text-book citations may be found to the effect that only the consignor may sue where the goods are lost by the carrier before the consignee's title or substantial interest in the subject-matter of the shipment arises. Under the sections of the Code cited above, we think that upon the transfer to the plaintiffs of the bill of lading calling for the full quantity of corn, there was assigned to them the right of action for the defendant's loss or conversion of a part of it. When Askew & Co. became the owners of the bill of lading, they became the owners of all the corn wherever it might be, whether in the car or out of the car (*Joiner v. Stallings*, 127 Ga. 203, 56 S. E. 304); and if the defendant retained possession, custody, or control over a portion of it, by failing to deliver it on demand, or if the defendant broke its contract of carriage, as embodied in the bill of lading, by failing to deliver the corn to them or to the connecting carrier for them, the right to sue was complete in them. *Reed v. Janes*, 84 Ga. 390, 11 S. E. 401.

Chief Justice Simmons, in the case of *American Nat. Bk. v. Georgia R. Co.*, 96 Ga. 668, 23 S. E. 898, 51 Am. St. Rep. 155, says: "A very large proportion of the business of the country is founded upon transfers of bills of lading; and if the transferee were required at his peril to ascertain from the carrier whether the representations made in the bill of lading are true or not, it would practically put an end to this class of transactions."

In the same case he also quotes approvingly from the case of *McNeill v. Hill*, Woolw. 96, Fed. Cas. No. 8,914, as follows: "A more

modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use and trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale.

\* \* \* If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict his statement which he has made in the receipt, so as to injure a party who has been misled by it." The plaintiffs' action is good, whether it be regarded as a suit by them as transferees of the cause of action *ex contractu* which would have inured to the original shippers, or by them as the actual owners on an implied assumpsit arising from the defendant's conversion by not delivering the goods to them on demand after they acquired the title through the bill of lading. "Even an action of tort may be maintained by the purchaser of personal property not in the possession of the seller at the time of the sale." *Reed v. Janes*, 84 Ga. 390, 11 S. E. 401. "The unlawful taking or conversion of personal property gives the wrongdoer no title. The title remains in the original owner or his assigns until judgment or satisfaction for the tort." *Hall v. Robinson*, 2 Comst. (N. Y.) 293. In *Robinson v. Weeks*, 6 How. Prac. (N. Y.) 161, it is held that the right of action for a chattel wrongfully converted may be assigned. We are not to be understood as holding that a right of action arising on account of a tort to property may or may not be assigned. That question is not before us.

2. It was insisted by the defendant in error that the case should have been dismissed in the court below, because no jurisdiction was shown, and because the suit should have been brought in Coweta county, in which the city of Newnan is located. The allegations of the petition are very indefinite and meager in this respect. The petition does allege enough, however, to show that the car of corn was not delivered by the defendant at Newnan, but that they effected this delivery through the Atlanta & West Point Railroad Company as connecting carrier. Following the precedent of *Watson v. R. & D. R. Co.*, 91 Ga. 226, 18 S. E. 306, we take judicial cognizance of the fact that the Southern Railway Company is a foreign railway corporation operating lines partly in this state and partly in other states, and that it has a line extending from Chattanooga, Tenn., to Atlanta, Ga., but not to Newnan, Ga.; also that the Atlanta & West Point Railroad Company has a line of railway between Atlanta and Newnan, and that it has no other

point of contact with the Southern Railway, except in Atlanta, or in Fulton county, in which Atlanta is situated. Under the bill of lading the defendant undertook to deliver to the connecting carrier all the corn specified, and therefore, since Atlanta is the place where that duty was to be performed, the breach of the contract is to be regarded as occurring in that city. *Friedman v. Seaboard Air Line Railway*, 124 Ga. 472, 52 S. E. 763. The courts of Fulton county, therefore, had jurisdiction of the action. *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 48 S. E. 372.

3. In what we have said above we have given the plaintiff the benefit of the theory that he was proceeding as upon a cause of action *ex contractu*. We do this because in some of its phases the petition is subject to such a construction, and the motion to dismiss was general and went to the whole petition. The court did not pass upon the special demurrers. The petition is, however, to use an expression from Chief Justice Bleckley (91 Ga. 226, 18 S. E. 306), "in many respects lamentably meager and deficient." It sets up in the same count inconsistent statements of fact, and declares upon the same cause of action as a tort as well as a contract, and is otherwise vague, indefinite, and uncertain. Since we are sustaining the action only so far as it sounds in contract, it follows that all allegations appropriate only to a suit in tort are mere surplusage and should be stricken. It is not in the interest of justice, nor in keeping with public policy, that plaintiffs should be allowed to proceed to trial with the pleadings in such shape as they are in this case. Fearing that the defendant may be regarded as having waived the special demurrers filed in the case, exercising the powers conferred on this court by Civ. Code 1895, § 5498 (2), we direct that the trial judge require the plaintiff to strike from his petition the allegations germane only to an action in tort, and that it be otherwise amended so as to make it appear that the plaintiff is proceeding either as transferee for Horne & Goans for a breach of the contract of shipment, or in his own right as owner of the goods upon the implied assumpsit arising from the defendant's keeping the remainder of the corn and not delivering it on demand, or in both of these capacities, if the petition be divided into separate counts for that purpose, and that upon the plaintiff's failing or refusing to do this his action be dismissed, without prejudice. The allegations as to the overcharge of freight show no cause of action originating in Fulton county. In fact, we infer from the petition that the overcharge was collected by the Atlanta & West Point Railroad Company, and not by the defendant, since the transaction occurred at Newnan; hence we direct that the allegations as to the overcharge of freight be stricken also.

Judgment reversed, with direction.

1 Ga. App. 734)

**SOUTHERN RY. CO. v. OLIVER & MORROW. (No. 90.)**

(Court of Appeals of Georgia. May 9, 1907.)

**1. JUSTICES OF THE PEACE—PLEADING—COMPLAINT.**

A statement of complaint for damages, attached to a summons in justice's court, itemizing the damages to certain buggies, giving the nature and amount of damage claimed as to each, and stating that "all the damages aforesaid were caused by the careless, negligent handling, keeping, and hauling of said buggies while in the care of said company as common carrier in the transportation of said buggies over its line of railway," was sufficient for the purposes of such an action for damages in a justice's court; and the demurrers thereto were properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 321.]

**2. SAME—PLEADING.**

In justices' courts it is neither possible, practicable, nor requisite to indulge in the niceties of pleading. All that is required is that there should be attached to the summons a copy of the "cause of action sued on." "The requirement of Civ. Code 1895, § 4116, as to summons and copy in a justice's court, is an exception to the general rules of pleading."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 307, 308.]

**3. APPEAL—HARMLESS ERROR.**

A new trial will not be granted for immaterial and harmless errors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4029.]

**4. SAME.**

Nor will a new trial be granted for an error not manifestly prejudicial to the party complaining thereof, but injurious, if at all, to the opposite party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4052.]

**5. TRIAL—VERDICT.**

The presumptions are in favor of the validity of the verdict of a jury. A verdict must be given a reasonable intendment, and the maxim "Id certum est quod certum reddi potest" is to be applied. Expression is to be given to the true meaning of the jury's finding upon the issues submitted to them only, and matters immaterial, and not involved in the controversy, or beyond the legitimate province of the jury, may be disregarded as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3755.]

**6. SAME—SURPLUSAGE.**

A verdict finding for the plaintiff, as damages, a certain sum, including the costs, is not void for uncertainty. It is without the province of the jury to determine the amount of costs to be paid or the party liable therefor. The amount of costs is fixed by law, and liability therefor, though dependent upon the verdict, is determined by law. Where a jury attempts to award costs, that portion of the verdict will be rejected as surplusage, and will not affect the residue of a verdict properly sustained. "Utile per inutile non vitiatur."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 789.]

(Syllabus by the Court.)

Error from Superior Court, Hall County; Kimsey, Judge.

Action by Oliver & Morrow against the Southern Railway Company. Judgment for plaintiff before a justice, and from a judgment overruling a certiorari, defendant brings error. Affirmed.

John J. Strickland, Ed. Quillian, and C. R. Faulkner, for plaintiff in error. Wilford B. Sloan, for defendant in error.

RUSSELL, J. Oliver & Morrow brought suit in a justice's court of Hall county against the Southern Railway Company for alleged damage to three certain "Chickamauga buggies." The declaration or petition to that court, with the summons attached, was served on the agent of the Southern Railway Company at Gainesville, in that county, and the defendant company answered, denying the allegations of plaintiff's declaration or petition, and moved to dismiss the suit on the ground that there was no cause of action set out in the declaration or summons. The court overruled the motion, and the case was submitted, resulting in a judgment in favor of the defendant for costs. Plaintiff appealed the case to a jury in that court, and on the call for trial by a jury the defendant moved to dismiss, upon the same grounds urged on the former trial. The court refused to hear the motion, and overruled it, on the ground that it had been passed on at the former trial; and the case was submitted to a jury. The evidence introduced on the trial by both plaintiff and defendant disclosed the fact that the buggies alleged to have been damaged were shipped by the Chickamauga Buggy Company, of Chattanooga, Tenn., to itself at Oakwood, Ga., and the bill of lading, with sight draft on Oliver & Morrow attached, was sent to the bank at Flowery Branch, Ga., and the buggies delivered to the plaintiff on payment of the sight draft and presentation of the bill of lading to the agent of the defendant at Oakwood. The jury returned a verdict in favor of plaintiff for \$15, including costs. The defendant carried the case to the superior court by certiorari, the certiorari was overruled, and defendant excepts to this judgment.

The plaintiff in error's case rests upon seven assignments of error, contained in its petition for certiorari. It alleges that the justice's court erred (1) in refusing to sustain the petitioner's demurrer, and overruling the motion to dismiss, at the first trial; (2) in refusing to hear and sustain the demurrer and motion to dismiss, at the second trial; (3) in overruling the motion of the defendant to rule out the testimony of Hugh Morrow, upon the grounds stated in the petition; (4) in stating in the presence and hearing of the jury, in ruling upon the waybill introduced by the defendant, that "the court cannot see the relevancy of the waybill, or that it has anything to do with the case, but will let it go in for what it is worth"; (5) in admitting the letter purporting to be signed by C. B. Millikin; (6) in making the remark, in the presence and hearing of the jury, that "the court will let the letter go along in with the waybill you introduced awhile ago," in making his ruling as to the letter of C. B. Millikin. (7) Petition-

or further alleges that the verdict of the jury is error, first, because there is not evidence sufficient to sustain it, and it is contrary to the evidence introduced; and, second, because the verdict is not a lawful one.

The first two assignments will be considered together; for, although the reason of the justice for his second ruling may be wrong, the ruling itself both on the first trial and the second is the same. In each instance the court refused to sustain the demurrer and dismiss the suit. We do not think there was any error in refusing to sustain the demurrer. Under the rulings in *Ga. So. & F. R. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236, and cases therein cited, the petition was full enough to put the defendant on notice and to enable it to prepare its defense; and, as it is attached to a proper summons, it is immaterial whether the summons precedes the petition, or follows it. In a justice's court it is not only impossible, but impracticable, to indulge in the niceties of pleading.

In the third assignment of error complaint is made that the court refused to rule out the testimony of Hugh Morrow, as being indefinite and irrelevant. The witness seems to have known nothing of the case, and his testimony appears to be immaterial; but for that very reason the ruling of the court was not hurtful to the defendant, and it is well settled that new trials are not granted for immaterial evidence.

As to the fourth exception and the sixth, we are of the opinion that the remarks of the court afford no ground of complaint to the plaintiff in error. In so far as they are improper and harmful they tended to be hurtful to the plaintiff below, now defendant in error. Both the waybill and letter of which the justice of the peace was speaking were introduced by the plaintiff, and the remark "that the court cannot see the relevancy of the waybill or that it has anything to do with the case," which tended to belittle that paper, when followed by the remark, with reference to the letter, that "the court will let the letter go along in with the waybill you introduced awhile ago," put the letter in the same disparaged class. Under the rulings in *Askew v. Southern Ry. Co.*, 1 Ga. App. 79, 58 S. E. 242, the holder of a bill of lading attached to a draft, possession of which has been legally secured by payment of the draft, has the right to maintain an action as a consignee *pro hac vice*. It appeared in this case that the original bill of lading was lost, and the waybill is circumstantial evidence of the fact that there had been a bill of lading. For these reasons, both the waybill and the letter of Millkin (notifying Oliver & Morrow that the Bank of Flowery Branch held a sight draft with bill of lading attached) were material to the plaintiff's case.

The seventh exception is divided into two

parts. The first alleges that the verdict of the jury is contrary to the evidence and there is not sufficient evidence to sustain it. The second objects to the form of the verdict, and alleges that the verdict rendered is not a lawful one. In regard to the first exception to the verdict, it is only necessary to say that by repeated rulings of this court the verdict of a jury is sufficiently sustained if there is any evidence to support it; and in this case it appears that the consignors shipped certain buggies to themselves as consignees and drew a draft, through the Bank of Flowery Branch, for the purchase price, with the bill of lading attached. The plaintiffs paid the draft, and the bill of lading was delivered to them, and under the decision in the *Askew Case*, *supra*, they became, for the purposes of the case, the consignees. According to the testimony, two of these buggies were damaged—one of them, according to the evidence more than \$5, and the other \$12.50. The petition set forth the items of damage as follows: January 30th, by injury to one Chickamauga buggy, by tearing lining, back, and top, \$5; January 30th, by tearing cushion and scratching back, \$7.50; April 24th, damages to straps, shaft, and top, \$12.50—making a total of \$25. There was no evidence as to the amount of the damage done to the buggy on January 30th by tearing the cushion and scratching the back, so that the \$7.50 item must be eliminated; but the first witness for the plaintiff testified as follows: "I know something about the injury to the three buggies sued for. The lining, back, and top of one was torn so bad we could hardly sell the buggy. We were really damaged more than we have sued for." We think that this is sufficient evidence, if believed by the jury, to fix the amount of the item of damage to the first buggy, as stated in the petition, and as contained in the notice of damage given the company. This witness and others swore that the damage to the buggy, received on April 24th was \$12.50; so that the jury had evidence which would have authorized a finding of \$17.50.

We come, therefore, to the assignment alleging that the verdict, "We, the jury, find for the plaintiffs, Oliver & Morrow, \$15.00, fifteen dollars, including costs of suit," is not a lawful one. The plaintiff in error makes the point that the verdict is illegal and void for uncertainty. The verdict adds to its finding for the plaintiff the words, "including costs." We were inclined at first to attach considerable importance to the point; but upon more careful investigation, and upon consideration of the principle that the verdicts of juries are to be given a reasonable intentment, we are clear that the verdict is good, and the words, "including costs," may either be treated as surplusage, or the word "including" be interpreted as meaning "and," which was more probably the intent of the

jury. It is well settled that surplusage may be rejected from a verdict otherwise proper and sustained by evidence. The doctrine is, "Utile per inutile non vitiatur." In passing upon the costs, the jury did a useless thing; for the costs are fixed by law, and by law follow and are carried by the verdict. The identical question as to costs has not been decided in this state, so far as we are able to discover, but has been passed upon in a number of other jurisdictions. In the case of *State v. Knight*, 46 Mo. 83, where a circuit judge refused to receive a verdict: "We, the jury, find a verdict for defendants, they to pay the costs of this suit"—the Supreme Court of Missouri, by mandamus, ordered the verdict received, and held that "the jury found for the defendant. The verdict was good and complete. The matter of costs was not in issue, and was not submitted to them. That part of their verdict, therefore, was merely void, and should have been disregarded as surplusage." And, while the question of costs has not been decided in this state, much more important matters have been treated as surplusage in order to maintain the general principle that expression should be given to the true meaning of the jury's finding. In *Knapp v. Harris*, 60 Ga. 404, the jury found for the defendant one-fifth of certain real estate subject to dower, and this was one of the assignments of error insisted upon. The Supreme Court affirmed the judgment, and held that "it was irregular of the jury to notice the right of dower, that right being wholly dehors the case on trial, but the verdict as a whole is not vitiated by this reference to irregular matter, nor by any misdirection of the court touching that matter. What is said of dower in the verdict is mere surplusage, and is to be so treated." In *Hudson v. Hawkins*, 79 Ga. 274, 4 S. E. 682, the jury, often finding upon the exceptions to an auditor's report *seriatim*, went further and found an aggregate sum for the plaintiff, which was excepted to as not being true and legal. The trial court, in making its judgment, disregarded the aggregate sum found by the jury and treated it as surplusage. This was approved; the Supreme Court holding that the court was right in treating the illegal portion of the verdict as surplusage. The case of *North & South Railroad Co. v. Crayton*, 86 Ga. 499, 12 S. E. 877, was, like the present case, an action for damages. A motion in arrest of judgment was made upon the ground of uncertainty in the verdict. The case went to the Supreme Court, and Bleckley, C. J., delivering the opinion, ruled as follows: "The motion in arrest of judgment was properly overruled. The verdict was in these words, 'We, the jury, find for plaintiff \$800, less amount of freight, with interest,' etc. The words, 'less amount of freight,' are surplusage. There was no freight involved in the issue on trial. The verdict is for \$800 less nothing, and this is equivalent to \$800 simply. The jury having

found no amount by which it is to be diminished, it cannot be diminished at all." "When a jury find, not only the issues submitted to them, but embrace in their verdict the determination of matters not involved in the controversy, these redundant matters are denominated 'surplusage.' The maxim, 'Utile per inutile non vitiatur,' is applicable, and such portion of the verdict as lies beyond the legitimate province of the jury may be disregarded or rejected." 29 Am. & Eng. Enc. L. (2d Ed.) 1026.

It is, of course, a generally recognized rule of practice that a verdict for damages, whether liquidated or unliquidated, if found for the plaintiff, expressly states the amount to which the jury think the plaintiff is entitled; but it is evident to our minds that the jury intended to add the costs to their finding of \$15, and simply used the word "including" inaptly, instead of the proper word "and," meaning thereby that they included, with the \$15 in their verdict, whatever might be costs. The maxim, 'Id certum est quod certum reddi potest,' is applicable to verdicts. In other words, they intended to include the costs, not in the \$15, but in the verdict. The only complaint that can be made of this verdict is that it may be uncertain, because the amount of the costs may not be known and may not have been known to the jury. A substantial certainty to a common and reasonable intent is all that is essential to a valid verdict. Courts are inclined to favor the validity of a verdict, and, no matter what requisite may be apparently lacking, it will be supported if from the terms of the finding and the contents of the record it can be maintained. The case at bar is not like the case of *Sellers v. Mann*, 113 Ga. 643, 39 S. E. 11, where the finding of the jury was expressed in the words: "We, the jury, find for the plaintiff nominal damages." That was held not to be a legal verdict, because it named no amount. That strictness of construction has been greatly relaxed, so as to give effect to the reasonable meaning of a verdict, rather than to its exact words, is shown by the fact that in *Jackson v. Jackson*, 40 Ga. 153, the verdict was held to be void, because the jury found for the plaintiff principal, interest, and costs, without any reference in their finding to a disputed credit on the note in question; but the same question being presented in the same case, in 47 Ga. 117, the Supreme Court overruled the former decision, upon the authority of *Mitchell v. Addison*, 20 Ga. 50. The holding of the court, being "Id certum est quod certum reddi potest," is too trite a maxim to need elaboration. The finding is, therefore, sufficiently certain. See, also, *Phillips v. Behn*, 19 Ga. 298; *Mitchell v. Addison*, 20 Ga. 54; *Giles v. Spinks*, 64 Ga. 205 (3). In the latter case the Supreme Court held that a verdict finding that the plaintiff was damaged two certain principal sums on two notes, and interest at a certain per cent. on each, even



though the interest was at different rates, and although the verdict was too large, was not illegal for uncertainty, and ordered that the verdict be reduced to \$100 and stand for that sum as damages, with costs of suit. And accordingly the court reversed a judgment arresting the judgment on this verdict. "In *Williams & Co. v. Brown, Sheriff*, 57 Ga. 304, this court held that 'where a verdict may be by a reasonable construction be understood, and a legal judgment entered thereon, it is sufficient.'" *Seifert v. Holt*, 82 Ga. 761, 9 S. E. 843; *Cleghorn v. Love*, 24 Ga. 591 (7). In *Massey v. Duren*, 7 S. C. 310, it was held: "In the case at bar the verdict, without the words which 'cumber' it, was certain as to the intention of the jury, and valid as their expression on the very issues on which they were to pass. To set it aside because of additional words which do not really qualify the judgment of the jury on the material issues involved, and thus permit a second trial, would be without any sufficient cause." In *Hancock v. Buckley*, 18 Mo. App. 459, the verdict was for the plaintiff, dividing the costs between the parties. It was held that this latter part of the verdict, being wholly outside of the issues submitted to the jury, was to be treated as surplusage and should not arrest judgment, for "utile per inutile non vitiatur." If the jury, in rendering a verdict, decides the whole issue, and then adds other immaterial things, the verdict is not thereby vitiated. *Wallis v. Bazet*, 34 La. Ann. 131. In *Windham v. Williams*, 27 Miss. 318, it is declared that, if more is found by the jury than is necessary, it may be disregarded as surplusage. It does not vitiate that which is necessary and well found. To the same effect is *Worthan v. Brewster*, 30 Ga. 115.

Judgment affirmed.

(1 Ga. App. 731)

**SOUTHERN RY. CO. v. CHESTNUT MOUNTAIN MERCHANDISE CO. (No. 89.)**

(Court of Appeals of Georgia. May 9, 1907.)

**1. JUSTICES OF THE PEACE—CERTIORARI TO VERDICT—FINAL JUDGMENT.**

Certiorari to the superior court will lie from the verdict of the jury in a justice's court, without regard to the judgment. Civ. Code 1895, § 4149. And, where such a verdict has been rendered, it is not necessary that either the petition for certiorari or the answer of the magistrate should show the final judgment. It is the verdict, and not the formal judgment, following that verdict as matter of course, which must be attacked. Section 4149, *supra*, affords an exception to the general rule that a final judgment must be shown. It is based upon the reason that justice's courts have no power to grant new trials; and the party injured by a verdict of the jury in a justice's court must go to the superior court, or the verdict will stand.

**2. SAME—ANSWER OF JUSTICE.**

But while, in a case where there has been an appeal to a jury in a justice's court, "the certiorari is to correct the verdict," the answer of the magistrate must show that there was a verdict, and what verdict, if any, was rendered.

**3. SAME.**

Consequently, where the answer of the magistrate did not verify the allegations of the petition for certiorari as to the rendition of a verdict by the jury, and no exceptions were taken, to require an answer more explicit, there was no error on the part of the judge of the superior court in overruling the certiorari. Assignments of error in a petition for certiorari, which are not verified by the answer of the original trial court, present nothing for determination by the superior court or the Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 794.]

(Syllabus by the Court.)

Error from Superior Court, Hall County; *Kimsey*, Judge.

Action by the Chestnut Mountain Merchandise Company, for use of, etc., against the Southern Railway Company. From an order of the justice refusing to sustain a demurrer, the railroad applied for writ of certiorari; and from a judgment overruling the writ, it brings error. Affirmed.

John J. Strickland, Ed. Quillian and C. R. Faulkner, for plaintiff in error. Wilford B. Sloan, for defendant in error.

**RUSSELL, J.** The plaintiff in error filed a petition for certiorari, making assignments of error as to refusal to sustain a demurrer, and as to the admitting in evidence of the receipt of its agent for the freight on certain buggies, and the allowance of an amendment making Oliver & Morrow uses of the Chestnut Mountain Merchandise Company. The petition further alleged that the verdict was erroneous, for lack of evidence. The certiorari was overruled by the judge of the superior court, and exception is taken to his judgment.

We cannot reverse the judgment overruling the certiorari. The judge of the superior court must get the truth of the case from the answer. The certiorari would not lie until the final determination of the case in the justice's court, and the answer of the justice did not show, either that the case had been finally decided by verdict, or, if so, what was the finding of the jury. Ordinarily it must appear that there has been a final judgment, and the answer of the justice must verify the judgment alleged as being the judgment which was rendered. By the terms of Civ. Code of 1895, § 4149, where a case is appealed to a jury in a justice's court, the verdict, instead of the judgment, must be excepted to. This is for the reason, as stated by Chief Justice Jackson in *Boroughs v. White*, 69 Ga. 844, in discussing that section (then section 4157) of the Code, that "the purpose of this enactment is to provide for a new trial, where the facts and law demand it. No power exists in the justice court to award a new trial in any case. To obtain it, the injured party must go to the superior court by writ of certiorari, or the verdict of the five men who try the appeal in the justice court will stand forever, no matter how unjust it may be." But, while it was not nec-

essary that the answer of the justice in this case should show a final judgment, which would follow as a matter of course upon the rendition of the verdict, it was necessary that the answer of the justice should verify the fact that the trial before the jury had resulted in a verdict, or else the certiorari would have been prematurely brought, and that it should show that the verdict complained of in the petition was in reality the verdict rendered, or else nothing was presented for the determination of the court. As the justice in this case answered merely that the case "was tried before a jury, as set forth in the petition," there was nothing before the judge of the superior court for determination, and the certiorari was properly overruled; and his decision, under the express ruling in *Manning v. Gainesville*, 125 Ga. 239, 53 S. E. 1002, and cases therein cited, must be affirmed.

We do this the more willingly because, under the decisions of this court in *G. S. & F. R. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236, *Askew v. Southern Ry. Co.*, 1 Ga. App. 79, 58 S. E. 242, and *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209, there is no merit in the other assignment of error. The opinion in *Brown v. Bonds*, 125 Ga. 841, 842, 844, 54 S. E. 933, cited by learned counsel for the defendant in error as authority for his contention that, even where certiorari is taken from the result of a trial on appeal in a justice's court, a final judgment must appear, is not in conflict with what we have ruled above. Nor was the question now before us involved in the case of *Brown v. Bonds*. For that reason it is not applicable to this case. The decision in *W. & A. R. R. v. Carson*, 70 Ga. 389 (2), is controlling. It distinctly and properly construes section 4149 of the Civil Code of 1895, and expressly holds that it is the verdict of the jury, and not the judgment thereon, which is to be corrected by certiorari.

Judgment affirmed.

(1 Ga. App. 118)

#### DUNCAN v. STATE. (No. 171.)

(Court of Appeals of Georgia. Jan. 31, 1907.)

#### 1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

Where a defendant is on trial for assault with intent to murder, the intention to kill must be proved, and is a question of fact, the determination of which is the exclusive province of the jury. To charge the jury in such a case that if they believed defendant committed an assault as charged in the bill of indictment, and that the offense would have been murder if death had resulted as a consequence, then the jury would be authorized to find the defendant guilty of the offense of assault with intent to murder, is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 601.]

#### 2. CRIMINAL LAW—INSTRUCTIONS—CURE OF ERROR BY OTHER INSTRUCTION.

Nor is the error cured by a limitation upon that portion of the charge, by reference to the indictment, in these words: "Committed an as-

sault upon A. T. Daniel, as charged in the bill of indictment."

#### 3. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

The charge requested: "If you believe that, if the defendant had killed Daniel under the circumstances proven in this case, he would not have been guilty of the offense of murder, then I charge you that you cannot convict the defendant of the offense of assault with intent to murder"—was a correct statement of a principle of law applicable in this case, the benefit of which the defendant was entitled to receive. It was, however, not reversible error to refuse to give it in charge to the jury, in view of the charge given upon this subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 597.]

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; Martin, Judge.

Bill Duncan was convicted of assault with intent to kill, and brings error. Reversed.

John R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. The defendant was indicted for the offense of assault with intent to murder, and on the trial was convicted. He assigns error on a portion of the charge of the trial judge, and on the refusal of the court to give in charge a written request presented by his counsel.

1. The charge of which complaint is made is in these words: "Now, if you should believe beyond a reasonable doubt, from the law given you in charge and the evidence introduced and admitted during the trial of the case, that the defendant, Bill Duncan, committed an assault upon A. T. Daniel, as charged in the bill of indictment, and that it would have been murder if death had resulted in consequence of such an assault, then you would be authorized to find the defendant guilty of the offense of assault with intent to murder. If you do not so believe, you would not be authorized to find him guilty of this offense." It is evident that this charge deprived the jury of their right to determine one of the essential elements of the crime with which the defendant stood charged; i. e., to determine it from the evidence. The intention to kill is an absolutely essential ingredient of the offense of assault with intent to murder, and must always be proved. It cannot be presumed or deduced, as stated by the learned trial judge who presided in this case. Discussion of this proposition is useless, because it has been so frequently decided as to require no elaboration. *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; *Lanier v. State*, 106 Ga. 368, 32 S. E. 335. See, also, *Patterson v. State*, 85 Ga. 133, 11 S. E. 620, 21 Am. St. Rep. 152. "The law will impute the intention to kill where there is killing, but not where there is none. \* \* \* That an effect not produced, and which, if produced, would have constituted a different offense from that actually committed, was

intended, is surely for determination by the jury as a matter of fact." It will be noticed that there has been no restriction in the later cases of the doctrine thus announced by Justice Blandford in the Patterson Case.

2. But it is insisted by counsel for defendant in error that the indictment charges all the essential elements of the crime of assault with intent to murder, and that therefore it was not erroneous for the court to charge that if the jury found that defendant "committed the assault on Daniel, as charged in the bill of indictment," etc., they would be authorized to find him guilty of assault with intent to murder; and we are referred to *Jackson v. State*, 125 Ga. 101, 53 S. E. 607, as authority. No opinion was rendered in that case; but, from reading the headnotes, we see a board distinction between the charge dealt with there and the one now under consideration. The wording of the charge in the *Jackson Case* is quite different from that in the present case, and the portion of the charge there complained of, directly and specifically, refers the jury to proper instructions which had been given and were to be given on the subject of intention; and with all this the Supreme Court placed its decision solely on the ground that the error was not harmful under the particular facts of that case. In the case at bar we are not prepared to say as much. The error in the charge in the *Jackson Case* could well have been harmless, for the first statement of the judge quoted in the headnotes was (after referring to the rules above mentioned): "If you believe \* \* \* that the defendant was guilty of making an assault with intent to murder," etc.; not "an assault," as in this case. In the *Jackson Case* the judge had already given the jury the proper rules for determining whether the offense was assault with intent to murder, and then proceeded to add to the words, "If you believe that the defendant was guilty of making an assault with intent to murder," other language, some of which was erroneous, but which, even then, was qualified by the words, "under the circumstances"; and the reviewing court held that, in view of what preceded, the language used was not necessarily harmful. In the present case the trial judge charges that, if the jury believe that "the defendant committed an assault upon Daniel," it may become an assault with intent to murder, by reason of a certain presumption—a presumption which arises in cases of homicide, but which is never implied where death does not ensue. As was tersely said by Judge Lumpkin, in the *Napper Case*, 123 Ga. 573, 51 S. E. 593: "Where death does not result, the intent to kill is not matter of legal presumption, but is a matter to be found by the jury." We are clear that the defendant is entitled to have more specific instructions given to the jury on the vital question of intention than a mere passing reference to the indictment, which contains

the words, "with intent then and there to kill," etc.; more especially as the jury were told immediately, after the mere mention of the indictment in the very next succeeding words, that, if they believed it would have been murder if death had resulted, then they would be authorized to find defendant guilty of assault with intent to murder.

3. The defendant, at the proper time, presented a written request to the court to charge as follows: "Gentlemen of the jury, if you believe that, if the defendant had killed Daniel under the circumstances proven in this case, he would not have been guilty of the offense of murder, then I charge you that you cannot convict the defendant of the offense of assault with intent to murder." This request is the converse of the charge which has been held to be erroneous; and for that reason it might be thought to be inappropriate. But in *Napper v. State*, supra, Lumpkin, J., very clearly shows that any supposed inconsistency is only apparent, but not real; and a request, in substantially the same words as that now before us, was approved. 123 Ga. 574, 51 S. E. 592. In the *Napper Case*, however, no such charge as that of which complaint is made in this case was given, and a new trial was refused because the court was satisfied, upon an examination of the entire charge, that it covered the principle included in the request. And in this case, after a critical review of the entire charge, we would hold the same thing, and affirm the judgment, were this refusal to charge the only error assigned. But, in view of that portion of the charge which is the ground of the first complaint above stated (and which has been held erroneous, in several cases subsequent to those we cite), it would have been better to have presented the request to the jury in its own verbiage. The concluding words of the particular charge of which complaint is made do not afford a substantial compliance with the request; for, when the judge added, "If you do not so believe, you would not be authorized to find him guilty of this offense," the language was so general that the jury might have well been left in doubt as to whether he referred to the assault or to the intent—both of which had just been mentioned in the same connection.

We are compelled to grant a new trial, although we might be reluctant to do so on account of the evidence as it appears in the record. Our sense of obligation to the law leaves no alternative.

Judgment reversed.

(1 Ga. App. 259)

SOUTHERN COTTON OIL CO. v. GLADMAN. (No. 83.)

(Court of Appeals of Georgia. Feb. 20, 1907.)

1. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK.

The master is under absolute duty to his servant, not only to furnish him a safe place

in which to work, but also to warn him of any unusual or newly developed dangers which arise in the course of the employment and which are likely to escape an ordinarily prudent servant's knowledge under the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174, 297-310.]

## 2. SAME.

The servant may, without creating an imputation of negligence against himself, rely upon the master's performance of these duties until such time as he shall discover, or in the exercise of ordinary diligence should discover, that there has been a failure in this respect upon the master's part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547-549, 675-677.]

## 3. SAME—ASSUMPTION OF RISKS—WHAT RISKS ASSUMED.

The assumption by the servant of the known ordinary risks, even of a dangerous employment, does not carry with it the assumption of an unknown supervening extraordinary hazard occasioned by the master's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547-549.]

## 4. SAME.

A master is negligent and responsible to the servant for injuries resulting proximately therefrom, if by his order he causes the servant to do an act which exposes him to a danger known to the master, but unknown to the servant. \*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 290-296.]

## 5. SAME.

The direct order of the master to do an act in the performance of which the servant is injured may be shown by the servant as a circumstance tending to excuse him from the exercise of that degree of caution which would lawfully be expected of him in the absence of such command.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 778-788.]

## 6. SAME.

Even the direct and immediate order of the master will not justify a servant in rashly exposing himself to a known and obvious danger; and if, in compliance with the command in such cases, the servant be injured, he cannot recover of the master therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 778-788.]

## 7. SAME.

Although the servant, at the time of the injury, may be performing a duty so dangerous as to involve the element of rashness, yet if this rash conduct is not a natural, proximate, or contributory cause of his being hurt, and the injuries are received by reason of an independent act of negligence on the master's part, the mere fact of his being engaged in the rash conduct mentioned will not preclude his right of recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 795-800.]

## 8. NEGLIGENCE — ACTIONS — QUESTION FOR JURY.

Questions of diligence and of negligence, including contributory negligence, address themselves peculiarly to the jury, and a court properly declines to solve them by decision on demurrer, except in plain, indisputable cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 277-288.]

(Syllabus by the Court.)

Error from City Court of Washington; Hardeman, Judge.

Action by one Gladman against the Southern Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lamar & Callaway, for plaintiff in error. F. H. Colley and R. C. Norman, for defendant in error.

POWELL, J. The exception in this case is to the overruling of a demurrer. Gladman sued the Southern Cotton Oil Company for personal injuries sustained by him pending the relation of master and servant. The parts of the petition material to an understanding of the points decided may be summarized as follows: Plaintiff was a member of the night crew at defendant's plant at Washington, Ga., and among other duties there devolved upon him the oiling of the bearings upon a certain piece of machinery. In order to perform this duty it was necessary for him to mount a ladder, as during the course of his employment he had frequently done with safety; there being no obstruction or object of danger to be encountered in his so doing. The locality in which this service was performed had been, until about two weeks prior to the date of the injury, illuminated by an electric light; and during the period while the light was present the plaintiff had so thoroughly familiarized himself with the location of objects that he was able, "with perfect safety and without peril," to perform this duty even in the dark. One night, about two weeks after the light had been removed, the plaintiff, relying upon a continuance of previously existing conditions, went up this ladder to oil the machinery. During that day, without notice to the plaintiff, the defendant had caused a metal pulley to be attached to a rapidly revolving shaft, and to be located just above the ladder, and in such close proximity thereto that to have attempted to mount the ladder and oil the machinery in a bright day would have been perilous, and at night almost impossible, without grave danger to life and limb. The plaintiff was ignorant of this new condition, and was given no warning thereof, but, on the contrary, was mounting the ladder in obedience to an expressed command from his master to go up and oil the bearings. Under these circumstances he was struck by the pulley and injured. The petition also contains the ordinary allegations as to the master's knowledge of this danger and of the plaintiff's lack of knowledge, either actual or constructive. The defendant filed a general demurrer, and amplified the grounds by contentions that it appears from the petition that the injuries were the result of the plaintiff's own negligence; that plaintiff by the exercise of ordinary care could have avoided the injury; that the defendant was without negligence contributing to the injury; that plaintiff's own negligence in going into a place known by

him to be dangerous, without a light, amounted to rashness; that the plaintiff's means of knowledge or of discovering the dangers incident to the position in which he was placed was equal to that of defendant; that the plaintiff ventured, in the dark, without a light, into close and dangerous proximity to and into the midst of dangerous machinery while in motion, which was such a self-evidently dangerous performance that the plaintiff thereby assumed the risk and dangers thereof. The trial court overruled the demurrer.

1. That it is an actionable wrong for the master to so change the arrangement of his plant as to place such a dangerous instrumentality as a rapidly revolving metal pulley in close and perilous proximity to a ladder which it is the duty of a servant to mount in the dark, and to send the servant up the ladder without notice or warning, is too axiomatic to admit of discussion or the citation of authority. As Labatt says, in his *Master & Servant*, § 240: "A master is *prima facie* bound to instruct the servant as to all risks which are abnormal or extraordinary, and are at the same time of such a kind that the servant cannot be held chargeable with adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself. The presumption is that all risks which belong to this category are not known to the servant. Hence the question whether the servant should have been warned is always for the jury, where the evidence is fairly susceptible of the construction that the peril to which his injury was due was one of this description, and there is no positive evidence tending to charge him with actual or constructive knowledge of that peril. This principle is equally applicable where the risks in question existed at the time when the servant commenced the performance of his contract, or were afterwards created by some material change in the intrinsic condition or relative arrangements of the instrumentalities by which the work was being done, or of the substances which the injured person or his coemployees were required to handle."

2, 3. "As a general rule, a servant is under no obligation to inspect the appliances about which he works, or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation." He may rely upon the presumption that the master will perform the duties required of him as to the safety of the plant and of the instrumentalities by which the work is to be performed. *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788 (2); *Duke v. Bibb Mfg. Co.*, 120 Ga. 1074, 48 S. E. 408. Of course, if as a matter of fact a servant knows of the creation or of the existence of the abnormally dangerous condition, or in the exercise of ordinary dili-

gence should know of it, his relation to it is similar to what it would be if the hazard were a normal one. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *Stubbs v. Atlanta Cotton Mills*, 92 Ga. 495, 17 S. E. 746; *Skipper v. Southern Cotton Oil Co.*, 120 Ga. 942, 48 S. E. 359; *Steele v. Georgia Iron Co.*, 121 Ga. 460, 49 S. E. 291. The ordinary and usual risks of the employment, though there be great dangers attendant thereon, are assumed by the servant. He does not assume the risk of additional, unknown dangers imposed by the master's negligence; nor is he bound to anticipate such dangers. Such supervening negligence of the master creates an extraordinary hazard, upon which a recovery of damages may be predicated. *Southern Cotton Oil Co. v. Dukes*, *supra*; *Blount Carriage Co. v. Ware*, 125 Ga. 571, 54 S. E. 637.

4. Among the absolute, continuous, and nondelegable duties of the master to the servant is the duty "to refrain from giving orders which will require a servant to put himself in such position that he will be subjected to the risks of injuries from a dangerous instrumentality." Labatt, *M. & S.* § 114; *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839. Some courts have characterized a breach of this duty as being almost criminal. *Herdler v. Buck's Stove & Range Co.*, 136 Mo. 17, 37 S. W. 115.

5. Since the servant is authorized to act upon the belief that the master will properly perform all his duties growing out of the relation, he is also justifiable in taking for granted that the master will not give him an order which will expose him to unusual danger and to risks not already assumed by him. As Justice Cobb says, in the case of *Moore v. Dublin Cotton Mills*, *supra*: "A servant is bound to obey the order of his master, unless the command includes a violation of the law, or the act required is so obviously dangerous that no person of ordinary prudence would undertake to perform it. Where the master himself gives the order, and the servant obeys it, and is injured as a consequence thereof, of course, the master is liable." We quote again from another portion of this same opinion: "If a servant, although an adult, and fully cognizant of his general duty in reference to the machine, and aware of the dangers ordinarily incident to its operation, obeys a direct order of a servant, authorized by his master to give the direction, in reference to the mode and manner of operating the machine, and injury results, the master is liable, unless the act required to be done is one so obviously dangerous that no reasonably prudent man would undertake to perform it, or the servant was aware of the danger, or could, by the exercise of ordinary care, have discovered it, and the master had equal means with the servant of discovering the danger attendant upon obedience of the order." In discussing the doc-

trine that contributory negligence is usually negatived by evidence that the servant acted upon a direct order, Labatt, M. & S. § 439, says: "Although the circumstances, when abstracted from the facts of the giving of the order, may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to that danger, such a conclusion is, in a large number of instances, not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order. The effect of this doctrine is that, where the servant, in obedience to an order, performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using more than ordinary caution or skill, he may recover, if injured. It will be seen that this rule, when analyzed, amounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence so situated, the court cannot justly declare that the taking of that risk by the servant in obedience to orders was negligence. The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution."

6. Of course, a servant who rashly exposes himself to a known danger, which common prudence ought to show him could not be encountered without probable injury, cannot recover in case he is thereby injured, even though his conduct be sanctioned or commanded by the master.

7. The rash act of the servant, however, in order to preclude his recovery, if his injury result from negligence of the master, must be a natural, proximate, or contributing cause of the injury. This rule is implied in the epithet "contributory," as applied to the servant's alleged negligence, and is sustained by so great an abundance of authority as to preclude the necessity for citations. In the case at bar it may have been rash for the servant to perform the alleged duty of mounting a ladder and oiling the bearings of revolving machinery in the dark. If he had been hurt by falling from the ladder, or by being struck or caught by the machinery in its usual condition, his rashness in undertak-

ing the work would have precluded a recovery. But the quality of his rashness must be measured in accordance with the surroundings as he had known them, and as he had a right to expect still to find them. He was not hurt by the dangers he had undertaken to encounter, but by a new and unexpected thing of danger, attributable directly to his master's negligence.

8. The statement of the eighth headnote is also too well recognized to require elaboration. We announce it merely as basis for the statement that upon the trial the defendant may ask the opinion of the jury as to those matters of negligence and of contributory negligence which it is sought to have the judge solve by demurrer; and if that branch of the court shall decide that the plaintiff was guilty of contributory negligence under the circumstances, they should find for the defendant, and this court will freely yield its acquiescence to their verdict.

Judgment affirmed.

(1 Ga. App. 88)

# KING v. SEABOARD AIR LINE RY.

## SEABOARD AIR LINE RY. v. KING.

(Nos. 28, 29.)

(Court of Appeals of Georgia. Jan. 29, 1907.)

### 1. MASTER AND SERVANT—INJURIES TO SERVANT—PRESUMPTIONS.

In a suit by an employé against a railway company for an injury received in the running of the cars, where the negligent thing complained of existed independently of the acts of the plaintiff or of a fellow servant, a presumption arises, upon proof of the injury having been so received, that the company was negligent, and that the plaintiff was not at fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877-893.]

### 2. SAME—DANGEROUS APPLIANCES.

A servant may recover from his master for an injury occasioned by a dangerous instrumentality negligently maintained by the master, although it appear that the servant was not ignorant of the existence of such dangerous instrumentality, if it is shown that at the time of the injury the servant was rendered oblivious or otherwise incapable of exercising his information as to the existence of the dangerous thing, on account of the engrossing character of the work at hand or other excusing circumstances brought about by proper attention to duty, and not by his own carelessness. The requirement in Civ. Code 1895, § 2612, that "it must \* \* \* appear that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof," is subject to the foregoing limitation.

### 3. SAME.

Where the railway company by which the servant is employed uses the tracks of another railway company for the operation of its trains thereon, the former company is liable to its servant for injuries received by him on account of a negligently constructed low overhead bridge spanning such tracks, without "telltales" or other means of warning.

### 4. PLEADING—AMENDMENT.

An amendment to the petition, which merely varies the acts of negligence, but which does not complain of any different wrong or injury from that set forth in the original petition, is

not subject to the objection that it sets forth a new cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686-700.]

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by one King against the Seaboard Air Line Railway. Judgment of nonsuit. Plaintiff brings error, and defendant assigns cross-error. Judgment on main bill of exceptions reversed; on cross-bill, affirmed.

W. R. Hammond and Andrews & Skeen, for plaintiff. Brown & Randolph, for defendant.

POWELL, J. King brought suit against the railway company for personal injuries received by him pending his employment as a brakeman. He was hurt by being struck by an overhead bridge at Magnolia street crossing in the city of Atlanta. This bridge was located over a part of the tracks of the Western & Atlantic Railroad Company, which were being used by the Seaboard Air Line Railway in reaching its freight depot, in the center of the city, from Howell's Station, three or four miles away. There were no "teltales" or other means of giving warning of approach to the bridge. The train was made up by the crew, including the plaintiff, at a point near the bridge, and among the cars was inserted an unusually high foreign furniture car. It was necessary, in order to prevent injury to the wheels, that as soon as the train was put in motion the brakeman should instantly mount the cars and release the brakes. The conductor having given orders for the train to go, the brakeman transmitted the signal to the engineer, and, as the train started, mounted the cars and began to loosen the brakes, which had been made fast on all the cars. He first turned off the brakes on the car next to the engine, and started to the second car, running as he went; and as he approached the brake at the further end of that car, which was the high furniture car above referred to, he was struck on the back of the head and neck by the bridge and knocked to the ground, where he was further injured by the train. The plaintiff had been in the employment of the defendant company as a brakeman for about 10 months, and had been in the particular employment which required him to pass under this bridge for about 10 days. The plaintiff further stated that in passing under this bridge previously he had ducked his head, and that he had seen the other employes of the company do the same. He had passed under the bridge in coming into the city that day. The injury happened about 10 o'clock in the morning on a fair day.

In explaining why he did not notice the bridge, so as to prevent his being hurt, the plaintiff, who was a witness in his own behalf, said: "I got up on top of the car and

released the brakes. When I got on the second car, I had to make a step up of something like two or three feet. I kept going back until the bridge struck me. My back was towards the bridge all the time. I was in a hurry to get back, and suppose I never looked at the bridge. If I had turned clear around, I would have seen the bridge. I would not have seen it, if I looked to the right or the left. It is a very long bridge. If I had got right down under there, I could have looked to the right or left and seen it. I knew there was a Magnolia street bridge, but I wasn't thinking about it at the time. My mind was on my work, and it was on my mind altogether. I was thinking about what I was doing, and not a thing else. If I had been thinking about the bridge, and hadn't turned my back, and had ducked my head like I had always done, I would have passed under it. \* \* \*

When I started out that morning I was in a hurry to let these brakes off. It was the rule to hurry all the time, the quicker the better. I don't remember that there was any imminent collision with us at the time. It seems that we were in a hurry for something. It was just the rules to always get them off as quick as you can. As well as I remember, it was like it always was. I don't remember anything special. The rule was always to be in a hurry in taking off brakes. It was the same as any other day I suppose. There were no 'teltales' out there on the Western & Atlantic tracks that were used by the Seaboard Air Line, and had not been since I had been working there. \* \* \* After I got up to the train I climbed right up to the side of the car next to the engine. I was in a great hurry, with my mind on my work. It was the usual rule to be in a hurry to take off the brakes, and I took them off as quick as I could. An ordinary freight car is something like from 32 to 36 feet long. I was struck before I let the second brake off. That is right, as near as I can remember. I suppose it took something like five or ten seconds after I left the first brake before I could get to the second. \* \* \* I didn't think about the bridge at all. You asked me yourself if I wasn't nearer the bridge than I thought I was, and I say, 'Yes, sir,' but the bridge never entered my mind. What I meant, by saying that I was nearer the bridge than I thought I was, was this: The space from where I got on the car to the bridge, after going back and looking at it after getting out of the hospital, the first place I went— I went to look at the distance from the switch to the bridge, and it was not as far as I had an idea it was; while I didn't think at the time I was at work, that is how I came to say that. I went down on the bridge and looked from the bridge up to the switch point. While I was in the hospital I got to studying how far it was from there. I found that it was nearer than I thought it was while I was in the hospital. I just looked at it from the bridge. I never thought

about the distance when I was at work. It never entered my mind. I was thinking about my work. I was busy, and never thought about the bridge. After I got out of the hospital I went to look at it, and from the bridge up to the switch point. It appeared to be a great deal nearer than it seemed in thinking it over. I said I knew there was a Magnolia street bridge. I didn't know I was so near to it. I didn't know I was in the neighborhood of it. I thought I was further from it than I was. \* \* \* I am not denying anything. I tell you I didn't think about the bridge. It is true that I walked upon the car, and didn't turn around and look, because the bridge didn't enter my mind. Anybody knows that I would not walk up and let the bridge knock me off, if it had entered my mind. I was thinking about what I was doing. I didn't have my mind on one thing else."

The petition alleged, as ground of negligence, the breach of defendant's duty to plaintiff, in that it failed to see, before allowing the train on which petitioner was employed to pass under the bridge, that the same was a sufficient distance from the track for the body of petitioner, located as he was, to pass thereunder in safety; also, that it failed to see that all proper and sufficient "telltales," guard ropes, or other devices were placed at a safe and sufficient distance from the bridge to put petitioner on notice of the approach thereto, so that petitioner could have protected himself from coming in contact with the bridge. By an amendment the plaintiff alleged the following further ground of negligence: "After the train was made up, and it was starting towards Howell's Station, your petitioner, in the discharge of his duties as brakeman, climbed the front end of the front car, next to the engine, the train being already in motion, and went back, along the top of said car, to let off the brakes. It was necessary for him to make great haste, for the reason that the brakes were on and the train had started to move, and it was not only his duty to release the brakes, but to do it as quickly as possible. For this reason he hurried up the front end of the car, and hurried along the top of the first car, and hurriedly let off the brake on that car, and then made as much haste as he possibly could to pass onto the second car for the purpose of letting off the brake on that car; his intention being to then pass onto the third car, and let off the brake on that one. So urgent was the necessity to let off these brakes quickly that your petitioner's mind was completely engrossed and absorbed with the performance of that duty, and he was hurrying along the top of the second car, with his back towards the engine and the bridge which the train was approaching, when he was knocked off the second car, near the rear end, as set forth in his original declaration. At the time he was knocked off, his mind was intent upon

letting off the brakes on that car, to the exclusion of every thought about the bridge. And your petitioner avers that the car on which he was at the time he came into contact with the bridge was more dangerous than the ordinary freight car, for the reason that it was considerably higher, which increased the danger to your petitioner of being struck by said bridge. And your petitioner avers that neither before climbing upon said train nor while thereon did he receive any warning from the conductor of said train, or from any one else, of the increased danger of going upon the higher car, and that his mind was so engrossed and absorbed by the urgent necessity for releasing the brakes quickly that he did not think about or consider the fact of the increased danger, but was wholly absorbed in the performance of the duties of his position. Under these circumstances your petitioner avers that it was negligent in the defendant not to have warned your petitioner of the increased danger of the high car, and to have inserted said high car in the train without, at the same time, warning your petitioner of the increased danger therefrom. And your petitioner avers that the insertion of said high car in the train, and the failure of the defendant to warn him of the increased danger, was the cause of his being knocked off the same and receiving the injury as set forth in his original petition." To this amendment the defendant filed various grounds of demurrer. However, as counsel for the defendant, in their brief and argument, summarize these demurrers as raising the point "that the amendment set up a new cause of action, which was offered more than two years after the cause of action arose, and if it sets up a new cause of action it [the amendment] should not have been allowed, and one reason therefor would be that the statute of limitations had run," and as we find that this substantially states the matter correctly, we will not set the demurrers forth more elaborately. These demurrers were overruled. At the conclusion of the plaintiff's testimony, upon motion of the defendant, a nonsuit was awarded. This judgment the plaintiff in error in the main bill of exceptions brings up for review. In the cross-bill the defendant assigns error upon the overruling of the demurrers to the amendment.

1. The negligence complained of in this action not being the act of a fellow servant, nor being an act in the performance of which the plaintiff himself was engaged, it was not necessary for him to show affirmatively either that he himself was blameless or that the railway company was negligent, further than to prove the fact of his being injured as stated in the petition, because the proof of such injury immediately raised against the company a presumption of negligence, and the plaintiff thereupon became prima facie entitled to recover, without further proof, unless his testimony established



some defense which would defeat him. *Central R. Co. v. Kelly*, 58 Ga. 107 (5), 113; *Central R. Co. v. Kenney*, 58 Ga. 489; *Savannah Ry. Co. v. Day*, 91 Ga. 676 (2), 679, 17 S. E. 959.

2. It is not impossible, however, for a plaintiff, after casting the burden upon the defendant in such a case, to disprove his case, by showing affirmatively that, despite the presumption to the contrary, he himself was negligent or that the company was not, or by establishing some other defense, such as that the act of negligence was embraced in one of the known risks which, under the employment, he assumed. In determining the ultimate question of liability, recourse must therefore be had to the reciprocal obligations imposed upon the master and the servant by the contract of employment. These are tersely set forth in *Civ. Code* 1895, §§ 2611, 2612. These Code sections are not statutory in origin, but are merely declaratory of the general law as it previously existed, and must be construed accordingly. The fact of their being codified into the written law does not add to them any quality of exhaustiveness, but still leaves them to be construed in accordance with all the various exceptions, qualifications, and extensions to which the principles announced therein were subject before they were placed in the Code. As is shown by Labatt, in the introductory statement to his most excellent work on *Master and Servant*, these doctrines, thus defining the extent of a servant's right to recover damages for injuries received by him in the course of the employment, represent the result of a compromise between the principle that the servant agrees to assume all the risks incident to the work undertaken by him and the principle that the master is answerable for the consequences of any negligent acts which may be committed by himself or his agents. To quote from this same author, as he proceeds further with the subject: "A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties. \* \* \* A second proposition, which is also beyond the reach of controversy, is that every risk which an employment still involves after a master has done everything that he is bound to do for the purpose of securing the safety of his servants is assumed, as a matter of law, by each of those servants. This doctrine prevents recovery unless evidence is introduced which warrants the inference that the injured person was incapable of appreciating the risk from which his injury resulted."

It can hardly be questioned that a jury would be authorized to find that, as to a brakeman whose duties require his presence on the top of the cars, it is an act of negligence for a railway company to maintain across the tracks, without "telltales" or other efficient means of warning, an overhead bridge so low as to strike employes passing thereunder. *Savannah Ry. Co. v. Day*, 91 Ga. 676, 17 S. E. 959 (1); *Stirk v. Central R. Co.*, 79 Ga. 495, 5 S. E. 105. These cases also hold that the question of the plaintiff's contributory negligence in such cases is for the jury, and is not to be resolved in the defendant's favor by a nonsuit. But it is contended that the plaintiff is precluded from recovery in the case, for that the master's negligence in maintaining the low bridge was one of the risks assumed by the servant, because he knew there was such a low bridge and knew where it was located. The theory that the servant's knowledge or ignorance of the dangerous instrumentality by which he is hurt determines the absence or the existence of culpability on the master's part has been the subject of much judicial decision, in each and all of its various phases. With unanimity of accord it is agreed that if the servant knows, at the time of the injury, of the defect and of the danger, and is in mental position to be aware of both, the master is not to be held liable, whether the question be viewed from the juridical aspect of the servant's implied contractual assumption of the risk, or of his contributory negligence. Upon the extension of the rule to the case of a servant, who, although he has been possessed of actual knowledge of the dangerous condition brought about by his master's negligence, is for the time being deprived of the power to exercise that actual knowledge by reason of obliviousness, or by incapacity to appreciate the danger, or by temporary forgetfulness, brought about by the engrossing character of the labor which his duty requires him to be performing at the time he is injured, the courts have taken widely divergent views. Many courts hold, with unwavering rigidity, that the servant's knowledge is fatal to his case, despite the fact that any other reasonable man, with a proper regard for his master's interests, would have been subject to the same injury under the same circumstances. Other courts hold that if the forgetfulness or the incapacity to realize the danger is excusable, and is brought about by reason of proper attention to the master's business, the servant may recover.

In our judgment the state of the servant's knowledge should be considered as of the moment of the injury. We cannot know a thing until our mind is capable of grasping it, and we no longer know it when our mind is incapable of retaining it. The knowledge on the part of the servant which precludes his recovery may be actual or constructive. If he knows of the danger, or if in the due

exercise of his duty toward his master he ought to know it, the rule is the same. If on account of youthfulness or mental weakness the servant's mind is incapable of grasping the knowledge of the danger, though it be before his very eyes, the courts with unanimity hold that he has not assumed the risk; for the law will not put upon the young or weak mind the burden of grasping that which it cannot grasp. It therefore seems reasonable to us to say that the law does not put upon any man's mind the burden of retaining that which it cannot retain. If the failure to retain is through inattention to duty, the servant is at fault; but if it is the result of attention to duty, of doing what he ought to do, the servant is not at fault. It is not more unreasonable to imply a constructive lack of knowledge in favor of the servant when attention to duty brings forgetfulness than it is to imply a constructive knowledge against him when attention to duty would bring such knowledge. Ordinarily an implied assumption runs with the servant's contract of employment that he will obtain and retain knowledge of the risks incident to the employment, and that he will use that knowledge for the purpose of protecting himself. It is fair that a negligent failure on his part either to obtain, to retain, or to use such knowledge should prevent his calling upon the master for indemnity for an injury resulting from his own breach of his contract of employment as to these very things. On the other hand, where the servant has done all that any one coming up to the law's standard of an ordinarily prudent man would have done, under the same circumstances, either to obtain, retain, or use such knowledge, and has not obtained it, or does not retain it, a breach of the contract in this respect is not to be imputed to him; and if the injury results, not from accident, but from negligence of the master, he should be allowed to hold the master liable for the breach of the master's implied obligation in the contract of employment. The practical effect of the cases holding to the contrary is to maintain that the servant is required at his peril to exercise in some cases of this class—especially in just such cases as this of dangerous overhead bridges—a degree of skill and vigilance which, to borrow an illustration from Labatt (M. & S. 159), is equal to, if not greater than, that which was possessed by the pilot described in Mark Twain's "Life on the Mississippi," who, when his turn at the wheel arrived, even when he was aroused at the hour of midnight in the darkest and most tempestuous weather, was expected to comprehend at a glance the exact position of the boat, without any instruction from his predecessor at the post.

Moreover, the position we are now asserting is not without an abundance of able authority to support it. In addition to the Georgia cases of Savannah Ry. Co. v. Day,

and Stirk v. Central R. Co., supra, we cite Kane v. Northern Central Ry. Co., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339 (holding that it was for the jury, where the brakeman's necessary haste in getting to the brakes caused him to forget a known defect in a car); McGovern v. Oil Co., 11 App. Div. (N. Y.) 588, 42 N. Y. Supp. 595 (sustaining verdict where brakeman was injured by an overhead beam of which he had knowledge, his attention being distracted by cries of a person near by); Wallace v. Railroad Co., 138 N. Y. 302, 33 N. E. 1069 (holding that a brakeman on top of a moving train is not, as a matter of law, chargeable with negligence simply because he does not continually bear in mind the precise location of the train relatively to a bridge over the track); Chicago, etc., Ry. Co. v. Goebel, 20 Ill. App. 163, affirmed 119 Ill. 515, 10 N. E. 369 (holding that laborers have the right to become so engrossed in their labor as to become oblivious to the approach of trains, and that such forgetfulness will not preclude recovery); Harker v. Burlington, etc., Ry. Co., 88 Iowa, 409, 55 N. W. 316, 45 Am. St. Rep. 242 (quoting from 1 Shear. & Red. Neg. § 213: "The mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if for any reason the servant forgets it, and is not at fault in forgetting it, at the precise time he suffers thereby"—an urgent demand for speed on the employé's part is held as sufficient excuse for the forgetfulness); Brown v. New York, etc., Ry. Co., 42 App. Div. (N. Y.) 548, 59 N. Y. Supp. 672, affirmed 166 N. Y. 626, 60 N. E. 1107 (verdict sustained for a fireman leaning out of window, in performance of duty of watching movements of another train, struck by mail crane temporarily forgotten by him); Chicago, etc., Ry. Co. v. Cleveland, 92 Ill. App. 308 (holding under the Illinois statute, which is substantially identical in terms with our Civ. Code 1895, §§ 2611, 2612, "that the term 'knowledge,' as used in defining assumed risks, means no more than that all the facts and circumstances surrounding the given case must be sufficient to charge the employé with the required information," and that a trainman struck by a flag shanty negligently located might recover despite his knowledge of the location, when his attention was distracted by the engrossing character of his duty at the moment); Northern Pacific R. Co. v. Mortenson, 63 Fed. 530, 11 C. C. A. 335 (a low bridge case); Mason & O. R. Co. v. Yockey, 103 Fed. 265, 43 C. C. A. 228 (question of whether fireman was negligent in forgetting the condition which caused him to be injured, he being engrossed in his duties, is for the jury).

We are content to close this discussion by adopting the views expressed in the same valuable treatise to which we have already referred so often in this opinion (Labatt's Master & Servant, p. 166), as follows: "A

correct view of the situation, it is submitted, cannot be arrived at, unless we wholly eliminate from the question the element of a freedom of will which has no existence, except in the imagination of a certain school of economists, and resort to first principles for the purpose of ascertaining what standard of diligence is demanded from the employer by those large considerations of public policy, upon which, in the last analysis, the whole law of negligence may be said to rest. If we view the subject from this standpoint, all the difficulties of the subject will vanish. All that is necessary is to construe, in a manner appropriate to the relations of the parties to the contract of service, the principle that no person has a right to keep his property in such a condition that persons who, with his consent, are brought into close relations with it, will be likely to receive injury, even though they may exercise all the care which it is justifiable to expect from them under the circumstances. If the degree of care which the servant must exercise in order to escape injury is greater than that which, considering the exigencies of the work and other matters which are likely to divert his attention and produce a temporary forgetfulness of a known danger, it is reasonable to demand from men of average prudence and average powers of observation, then it may be fairly maintained that the master ought to bear the responsibility of any accident which may occur, quite irrespective of the question whether the servant was or was not aware of the nature and extent of the danger. The acceptance of this principle would not involve any very startling changes in the law as we now have it. It would merely require us to fix the standard of care incumbent on the master, with a view to the consideration that, as, the implied agreement of the servant is merely that he will use ordinary diligence in the discharge of his functions, it is a breach of duty in the master to keep his instrumentalities in such a condition that ordinary diligence will not always save the servant from injury. A rule formulated upon this basis would not make the master an insurer, nor would it necessarily render him liable simply for the reason that his appliances were old and imperfect. It would merely make his liability dependent upon whether he had or had not acted unreasonably, and therefore negligently, in holding out inducements to do work which, at certain conjunctures not unlikely to arise, could not be performed safely without the exercise of a degree of care which no fair-minded, considerate person would demand from a servant. Such a rule would not impose any burden upon the employer which a just and sensible man would be unwilling to bear, and would effectually prevent that cruel abuse of the doctrine of assumption of risks, which has done so much to embitter the feeling with which capitalists are regarded by the working classes."

It may be proper for us to distinguish this case from the cases of *Blackstone v. Central Ry. Co.*, 112 Ga. 762, 38 S. E. 79, *East Tenn. Ry. Co. v. Head*, 92 Ga. 723, 18 S. E. 976, and *Price v. Central Ry. Co.*, 124 Ga. 899, 53 S. E. 455. In none of these cases was the decision upon this precise point. In the case of *Blackstone*, who was hurt by being struck by a pole located too near the track, it was shown that he was yardmaster, and not only under the duty of knowing the location of the pole, but also of warning other employes. *Head's Case* turned on the point that he was not acting under emergency, and that he carelessly took an unsafe time and place to look out from the engine, whereby he caused himself to be struck by a post of which he had full knowledge. In *Price's Case* the question of forgetfulness or obliviousness, caused by attention to duty, was not involved. Even if there be, in the reasoning upon which any of these cases are based, anything in conflict with the rule which we are here announcing, we feel justified in relying upon the older decisions in *Savannah Ry. Co. v. Day* and *Stirk v. Railway Co.*, *supra*. These cases clearly recognize that the servant may forget, and that to guard against this forgetfulness the company ought to erect and maintain "telltails." The "telltails" would arouse him from his obliviousness, and he would be able to escape injury. *Simmons v. Railway Co.*, 92 Ga. 658, 18 S. E. 990, is akin to the present case in basic principles; and in that action a recovery by the servant was held to be authorized.

3. It is insisted by the defendant that since the track which was being used was the property of the Western & Atlantic Railroad Company, and not of the defendant, the former company alone would be liable for the injury. Unquestionably the allegations of the petition set forth a cause of action against the Western & Atlantic Railroad Company. It is also true that in most of, if not in all of, the cases in the Georgia Reports, where employes of one railway company have been injured by the defective condition of another railway company's tracks, roadway, etc., which were being used under an arrangement between the two companies, the suits were instituted against the company owning the tracks, etc., and not against the company sustaining the relation of master. This is probably due to the fact that more defenses are open to the master company than to the other. However, the right to sue the company owning the tracks, etc., is not exclusive. As was said by Chief Justice Bleckley, in *Ellison v. Georgia R. Co.*, 87 Ga. 722, 13 S. E. 809, under a similar state of circumstances: "Far more reasonable would it be to treat both the negligent parties as wrongdoers, and make them both answerable for the result to which they mutually contributed, than to excuse one of them because the other was also at fault."

The master's duty to furnish a safe place to work is absolute, and he cannot shift this responsibility. The well-considered case of *Story v. Concord, etc., R. Co.*, 70 N. H. 364, 48 Atl. 288, is directly in point. There is some conflict of opinion in the decisions of the courts of the different states, as to this question, but we adopt the above as the sounder view.

We have not overlooked the contention of the defendant that the evidence as to the fact that the tracks belonged to the Western & Atlantic Railroad Company and were leased by the Seaboard Air Line Railway is hearsay, and therefore of no probative value. An inspection of the evidence set out in the record does not sustain this contention. That there was a lease of the tracks by the latter company from the former appears to be sustained only by hearsay; but the proof was direct that the tracks belonged to the Western & Atlantic Company, and that the Seaboard Company was using them for the operation of trains. This alone is material. The exact nature of the agreement by which the use came about is not so.

4. The judgment complained of in the cross-bill was not erroneous. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 818 (6); *Colley v. Gate City Coffin Co.*, 92 Ga. 664, 18 S. E. 817.

Judgment on the main bill of exceptions reversed; on the cross-bill, affirmed.

(1 Ga. App. 302)

**ATLANTA & B. A. L. RY. v. McMANUS.**  
(No. 107.)

(Court of Appeals of Georgia. Feb. 25, 1907.)

**1. COURTS—RECORDS—CORRECTION—INSTRUCTIONS.**

Although a copy of the charge of the court has been approved and filed, the trial judge has the power to change the same, by correcting errors made in transcribing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 369, 372.]

**2. EVIDENCE—HEARSAY.**

The testimony of a witness to a fact of which he swears he has personal knowledge is not rendered inadmissible by the further showing that he also knows it from hearsay.

**3. WITNESSES—CROSS-EXAMINATION—BIAS.**

"The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him." When the object is to show bias, great latitude should be allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1192.]

**4. SAME.**

Where a witness had testified on a former trial, as to one of the most vital questions in the case, that it would have been impossible for the deceased to have fallen from a car door if certain bars had not been removed from across the same, and on the trial under review testified that he had studied over the matter and found it to be different, whereupon he was being subjected to the following cross-examination: "Q. What do you now say, what do you swear now, do you take it back or stand to what you swore? A. I will take it back. I will leave it to any railroad man. He could easily have gone under it or over it, because it is in the

center of the cab door. Q. So you take it back, do you? A. I take that question back I answered there. Q. Mr. Vance, when you swore it before, were you swearing the truth?"—and opposing counsel interrupted the examination with the following objection: "That is a totally improper question," upon which the court ruled, "Yes, I don't think that is proper," *held*, that counsel was within the limits of legitimate cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1230.]

**5. MASTER AND SERVANT—ACTION FOR INJURIES TO EMPLOYE—PRESUMPTIONS AND BURDEN OF PROOF—HARMLESS ERROR.**

In a suit against a railway company for the homicide of an employé through the alleged negligence of a fellow servant, an instruction to the jury that if the plaintiff proves that the death of the deceased employé was occasioned by the railway company in the running of its cars, and nothing further appears, a prima facie case of liability is made out, is erroneous.

(a) Such an error is not rendered harmless by giving in a subsequent portion of the charge the correct law on the subject, unless the court so plainly instructs the jury that the charge first given is incorrect as that the jury cannot be confused and misled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 955; vol. 40, Trial, §§ 705, 709.]

**6. SAME.**

In a suit against a railway company for the homicide of an employé, in order to authorize a recovery the plaintiff must cause it to appear both that the defendant was negligent and that the employé was free of fault; but when the death of the employé is caused in the running of the train, either one or both of these elements, according to the nature of the case, may be prima facie supplied by the proof of the injury being so received.

**7. SAME—FELLOW SERVANTS—STATUTORY PROVISIONS.**

Under the statute in this state, an employé of a railway company does not assume the risk of injury from the negligence of a co-employé, and it is not error for the court, in a proper case, so to instruct the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 543, 567.]

**8. SAME—ASSUMPTION OF RISK—WHAT RISKS ASSUMED.**

Although an employment may be fraught with certain known dangers, yet if, notwithstanding those dangers, the conditions are such that the servant by the exercise of due care may perform the duties of the employment without probable injury, the servant, in assuming the risks of these dangers by entering or remaining in the employment, does not assume the risk of an independent, unexpected, supervening danger produced by the negligence of the master, or, in cases of railway companies, by the negligence of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 543, 547, 567.]

**9. TRIAL—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.**

It is erroneous for the judge, in his charge, to assume or to instruct the jury that certain things, not directly made so by law, are or are not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, § 429.]

(Syllabus by the Court.)

Error from City Court of Polk County: Irwin, Judge.

Action by Mrs. McManus against the Atlanta & Birmingham Air Line Railway.

Judgment for plaintiff, and defendant brings error. Reversed.

Brown & Randolph and Janes & Hutchens, for plaintiff in error. Janes & Hunt, Bunn & Trawick, and Arnold & Arnold, for defendant in error.

POWELL, J. A recovery for something over \$11,000 was obtained by Mrs. McManus against the defendant railway company on account of the death of her husband, T. F. McManus, who was killed while in the service of the company as a conductor on a construction train. It was contended on behalf of the plaintiff that her husband, while standing in the end door of the cab at the rear of the train, which was backing slowly across a trestle, discovered the presence of a number of laborers on the trestle, about 300 feet away, and caused a slow-down signal to be given to the engineer, who instead of merely gradually slowing down, threw on the air brakes in full emergency, thus causing the train to stop instantly with a sudden jerk, whereby McManus was hurled forward through the door and out upon the track, with the result that his neck was broken. The company contended that the conduct of the engineer was not negligent; that the stop was not more sudden than was required under the exigencies; that the jerk was not greater than was ordinarily to be expected in a construction train; that the company had furnished the car with an iron rod, known as a "grab iron," which extended horizontally across the door, near the center; and that the proximate cause of the conductor's injury was the fact that he had removed this protection or had caused it to be removed. The further facts necessary to an understanding of the decision will be referred to in the opinion. In addition to assigning error upon the overruling of a motion for a new trial, the plaintiff in error also excepts to the fact that, after the trial judge had caused a copy of his charge to be filed under his written approval, he caused certain material changes to be made in it. The judge certifies that these changes were necessary in order to make the copy speak the truth.

1. It is the duty of the judge to make the record speak the truth. If by inadvertence he approves as true that which in fact is not true, it is not only his privilege, but his duty, to make the necessary corrections.

2. One of the assignments of error relates to an objection made to the testimony of a witness who gave evidence as to the amount of wages being earned by the plaintiff's husband at the date of his death. He stated that he knew this fact of his own knowledge, but also stated that he had seen his salary checks. The objection is that the testimony is hearsay. A witness may know a fact both from personal knowledge and from hearsay, in which event the testimony is admissible.

3, 4. A witness named Vance testified for the plaintiff. An examination of his testi-

mony as set out in the record reveals many indications of bias towards that side of the case. Upon his testimony the plaintiff chiefly relied. On a former trial of the case, and also in a written statement made by him, he had said that if the "grab iron" had not been removed the conductor could not have been thrown from the car. Upon the trial under review he stated that the presence of the "grab iron" would not have prevented this result. Upon cross-examination the following colloquy occurred: "Q. What do you now say? \* \* \* Do you take it back or stand to what you swore? A. I will take it back. I will leave it to any railroad man. He could easily have gone under it or over it, because it is in the center of the cab door. Q. So you take it back, do you? A. I take that question back I answered there. Q. Mr. Vance, when you swore it before, were you swearing the truth?" It was here that the court sustained an objection that the cross-examination was being improperly conducted. Generally the latitude to be allowed counsel in cross-examination is a matter of sound discretion vested in the trial court, but the right should not be abridged. Our Civ. Code, § 5282, which says, "The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him," announces a rule of ancient standing in courts of justice. Rapalje, Law of Witnesses, § 245 (3), after stating the discretion vested in the trial court, says: "There is no uniform rule governing the matter, greater liberty being allowed when the witness shows partisanship than when he evinces impartiality; and it requires a strong case to justify a reversal for the allowance of too much latitude on the part of the cross-examiner. The discretion particularly extends to the range of a cross-examination in disparagement of the character of a witness; and this without putting the witness to his claim of privilege. The court may postpone the cross-examination to a subsequent stage of the cause, or permit a party, after resting his case, to cross-examine his adversary's witnesses or call others. Where a witness has betrayed bias, partiality, or corruption, this discretionary power will be exercised in extending the latitude of the questioner, and a most searching cross-examination will be allowed." We think that counsel for the defendant had the right to compel the witness to fully disclose to the jury his change of front as to the question, and also to press him with the cross-examination, with the view of disclosing, not only his bias, but also the effects which this bias might have in coloring his testimony. Although, out of deference to the wide discretion allowed the trial judges in these matters, we would not reverse the judgment on this ground, we are constrained to hold that counsel had not exceeded proper limits in his cross-examination of the witness. Mitchell v. State, 71 Ga. 129 (6), 157.

5. At the beginning of his instructions to

the jury the court charged: "Gentlemen of the jury, when the plaintiff shall have shown the killing, proved to your satisfaction that her husband was killed by the railroad in the handling of its cars, as alleged in the petition, that makes out, if nothing further appears, if she does not in that proof go further and show that the death occurred as the result of the negligence of her husband, she would be entitled to recover. In other words, the killing proven, nothing else appearing, as I said, that makes out a prima facie case, and the plaintiff, unless something further appears, would be entitled to recover such an amount as you think under the evidence plaintiff has proven." This charge is clearly erroneous as applicable to the case at bar. The true rule, of course, is that before an employé in such a case raises a presumption of negligence against the company he must show his own freedom of fault, in addition to showing the injury. While it is conceded by counsel for defendant in error that this charge is error, it is contended that the court afterwards cured the error. Prior to the conclusion of the charge the attorney for the plaintiff interrupted the judge and said to him: "If your honor will allow me, I desire to call attention to an inadvertence in your charge, and ask you to correct it. In the beginning of your instructions your honor charged the jury that, if the plaintiff showed the killing to the jury's satisfaction by the handling of the cars, such proof alone raised the presumption of the defendant's liability and made out a prima facie case for the plaintiff. Your honor by inadvertence omitted to charge, as a qualification and addition to this rule, that no presumption arose against the company unless the plaintiff had first proved that the deceased was without fault, or had proved that the defendant was at fault." To which the court replied: "I have tried to do it in every case. It must appear that he was without fault. I had intended to do it. That is the law. It must appear that he was without fault, although it may appear that the defendant was at fault or was negligent. It must in any event and at all times appear that he was without fault, and that he could not have avoided the consequences of the injury to himself, by the exercise of ordinary care and diligence. You will understand that that applies to the case, gentlemen, and under all conditions of the case." We are not prepared to say that this did not cure the error, though we must confess our doubts as to this. Where an erroneous rule is charged as to a material issue, the error is not rendered harmless, by the subsequent statement, or even reiteration, of the correct rule, unless the judge expressly calls the attention of the jury to the incorrect statement and substantially retracts it. *Georgia R. Co. v. Hicks*, 95 Ga. 305, 22 S. E. 251; *Brush Electric L. & P. Co. v. Wells*, 103 Ga. 512, 30 S. E. 538 (1); *Augusta Ry. & El. Co.*

*v. Smith*, 121 Ga. 32, 48 S. E. 681; *Duncan v. State*, 1 Ga. App. 118, 58 S. E. 248.

6. Exception is taken to the following excerpt from the charge: "The jury are instructed that an employé who sues a railroad company for injuries after proving the injury, may recover on proof of either of two facts. After proving the injury, if he proves that he was free from negligence, he can recover; or if, after he proves the injury, he proves that the servants or agents of the company were negligent, he can recover." This statement, standing alone and apart from the context in which it is used, might be regarded as erroneous; for, in a certain sense, the plaintiff must make both things appear—first, the company's negligence, and also his freedom from fault. However, by proving that he was injured in the running of the cars, he thereby raises a presumption which supplies for him the proof of one or the other, or both, of these additional elements, as the case may be. In case the injury is occasioned as the result of an act from which the plaintiff is disconnected, the presumption supplies proof of both these elements. *Central R. Co. v. Kelly*, 58 Ga. 113; *King v. Seaboard Air Line Ry.*, 1 Ga. App. 88, 53 S. E. 252, and citations. In case the injuries are sustained by the alleged negligence of other servants, in the performance of an act with which plaintiff was connected, the presumption supplies only one of these elements in his favor. *Western & Atlantic R. Co. v. Vandiver*, 85 Ga. 470, 11 S. E. 781. The rationale of this latter phase of the rule is that, when the plaintiff proves that he was injured in the operation of the train, the law presumes that the injury was occasioned by the negligence of one or more of the railway company's servants operating the train; and, since the plaintiff himself is one of the defendant's servants engaged in that act, the presumption of negligence attaches equally to him as to his fellow servants, so that he must go further, and show either that he was not at fault, thereby throwing the presumed blame to his fellows, or that some other servant was negligent, thereby relieving himself from the imputation. When we consider the entire context in which the charge quoted appears, we find that the language as a whole amounts to a reasonably apt statement of the correct rule.

7. Under statute in this state, the common-law rule exempting the master from liability to a servant for injuries inflicted by a fellow servant has been modified so that it is not applicable to employes of railway companies. Civ. Code 1895, § 2610, is as follows: "Except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business." The exception in this section is due to Civ. Code 1895, § 2323, which, in defining the liability of railway companies for in-

juries, provides: "If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." Of course, a fellow servant may be guilty of contributory negligence by voluntarily placing himself within, or by remaining within, the range of the fellow servant's negligent conduct, and in a certain sense it may be said that in such cases he assumes the negligence of the fellow servant; but a laconic and not altogether inexact statement of the substance of the two Code sections cited above may be expressed in the words, "The employé of a railway company does not assume the risk of injury from the negligence of his co-employés," and in cases where such a statement of the rule is not likely to prove misleading, and is coupled with explicit instructions as to the element of the servant's contributory negligence, there is no error in so charging the jury.

8. Some of the grounds of the motion make complaint of charges wherein the jury was in substance instructed that, while the conductor in this case assumed the risk of the ordinary dangers connected with the operation of the construction train, he did not thereby assume the risk of the negligence of other employés engaged in the work. This principle, in the abstract, is accepted as correct by the courts of this state. *Lawhorn v. Millen & Southern Ry. Co.*, 97 Ga. 742, 25 S. E. 492; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Blount Carriage & Buggy Co. v. Ware*, 125 Ga. 571, 54 S. E. 637; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 259, 58 S. E. 249. As is said in the case last cited: "The assumption by the servant of the known ordinary risks, even of a dangerous employment, does not carry with it the assumption of an unknown, supervening, extraordinary, hazard occasioned by the master's negligence." Of course, to make this rule as stated directly applicable, we must remember that in cases of railway companies the negligence of the fellow servant is regarded as negligence of the master for most purposes. In the practical application of the rule above stated it must not be overlooked that if the dangers accompanying the employment are brought about in whole or in substantial part by the negligence or wrongful conduct of the employé injured, and these dangers caused the injury or contributed thereto, such servant cannot be regarded as blameless, so as to be allowed to recover, although the supervening negligence of the master or of the fellow servant may justly be regarded as the chief, efficient agency in causing the injury.

9. Error is also assigned on several of the court's charges which approach the border line of error, and in some cases step over, in the respect that in these instructions the court states or assumes that certain conduct

does or does not amount to negligence. The charge, "Even if you believe that the occupation in which the deceased, Mr. McManus, was engaged was dangerous, the jury are instructed that merely to engage in a dangerous occupation is not by itself negligence," approaches the border line; and the charge, "If you believe, from the evidence, that notwithstanding the fact that there was no bar in the door, Mr. McManus would not have been injured if the train had been handled with ordinary care, and if you believe that the death of Mr. McManus was caused by the negligence of the engineer in jerking the train, or in otherwise negligently handling the cars, then the plaintiff could recover in this case, provided, as I have charged you, and always have charged you, that he could not have avoided the consequences of such negligence to himself," steps over. The expression, "was caused by the negligence of the engineer in jerking the train," is justly open to the criticism that it assumes that the jerking of the train would be negligent. If this expression had been accompanied, either directly with, or in reasonably proximate relation with, an instruction that it was a question for the determination of the jury as to whether the jerking of the train, if any such jerk occurred, was, under the circumstances, negligent or not, the meaning given to the language of the trial judge might be regarded as unwarranted. However, we have carefully searched through the entire charge of the court, and find that nowhere did he squarely present to the jury the issue as to whether the alleged conduct of the engineer amounted to negligence, under the circumstances; on the contrary, we think it may justly be stated that a juror of ordinary intelligence would be led to believe, from the charge as a whole, that, if the engineer stopped the train suddenly and with a jerk, such conduct would in law be assumed to be negligent. This error comes at a crucial point in the case, and though, were it not for its existence, we would probably, out of our great reluctance to disturb verdicts for minor errors or irregularities, affirm the judgment, we must hold that for this injustice to the defendant we should grant a new trial. Probably the strongest defense available to the railway company, under the circumstances of this transaction, is the contention that, in view of the sudden discovery of the presence of a number of persons on the trestle a short distance away, it was not negligent for the engineer to apply the air brakes in the fullest emergency, even though a violent and sudden jerk to the train was the natural result of such a course. Such a defense, predicated upon the engineer's exertions to save human life, would likely appeal most strongly to an ordinary jury, and the judge should not have slighted it, and especially should he not have used language in his charge capable of being regarded as assuming that such conduct was, as a matter of law, negligent. Our trial

Judges are allowed no latitude in these matters. They must not assume or declare that any given conduct, not amounting to violation of law, is negligent. As to these things our judges have been stricken dumb by statute, and their very attempt to speak is made mandatory cause for a new trial.

The contention that the verdict is excessive seems not to be well founded. If the defendant was liable at all, the damage assessed by the jury seems to closely approximate the amount fairly justified by the proof. We would not disturb the verdict on the facts; but, for the errors pointed out above, a new trial must be granted.

Judgment reversed.

(1 Ga. App. 772)

**MOODY v. STATE.** (No. 885.)

(Court of Appeals of Georgia. May 9, 1907.)

**1. CRIMINAL LAW—FORMER ACQUITTAL.**

Where, by oversight, inadvertence, or otherwise, the defendant is put on trial upon an indictment alleging the homicide of a living man, and, upon the mistake being discovered, a verdict of not guilty is entered, such acquittal cannot be pleaded in defense to another indictment charging the same defendant with the homicide of another person, although it was the intention in the first instance to indict and prosecute for the killing of the person last mentioned, and no other transaction was contemplated, in the original indictment or trial, by the grand jury, the prosecutor, or the state's counsel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 388.]

**2. SAME—INSTRUCTIONS—CORRECTION OF REPORT.**

The trial judge has the power to correct errors in the stenographic report of his charge, even after it has been filed as part of the record, under his approval.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 369.]

**3. SAME—NEW TRIAL.**

A new trial will not be granted for refusal to grant a written request to charge, where the request contains an inaccuracy of law, where it is not adjusted to the proof or the defendant's statement, or where it is fairly covered by the general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980, 2011, 2012.]

**4. SAME.**

Minor verbal inaccuracies in the charge, not calculated to mislead the jury, do not constrain the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

**5. SAME—INSTRUCTIONS.**

In the absence of a timely written request, no error can be successfully assigned upon the failure of the judge to charge upon the impeachment of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

**6. HOMICIDE—DYING DECLARATIONS.**

While dying declarations should be received with caution, slight preliminary proof will justify the judge in prima facie admitting them, for final submission to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 459.]

**7. SAME—INSTRUCTIONS.**

It is proper for the court to instruct the jury that he passes only prima facie upon the

admissibility of dying declarations, and that the jury are the judges, not only of the weight to be given them, but also as to whether they were made under such circumstances as to be entitled to consideration at all.

**8. WITNESSES—CREDIBILITY.**

The credibility of the witnesses is exclusively for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1719.]

**9. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

Newly discovered evidence, cumulative or impeaching in its character, does not require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2328, 2331.]

**10. SAME—APPEAL.**

A verdict not unsupported by evidence will not be set aside by this court, though the proof of the defendant's guilt may not be altogether satisfactory.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; Rawlings, Judge.

One Moody was convicted of murder, and brings error. Affirmed.

W. T. Burkhalter and H. H. Elders, for plaintiff in error. Alfred Herrington, Sol. Gen., L. J. Tippins, and W. W. Larsen, for the State.

**POWELL, J.** 1. We will first dispose of the plea of former acquittal. The defendant had killed O. D. Barnhill. Upon the investigation of this homicide the grand jury by inadvertence returned an indictment wherein the person killed was named as M. C. Barnhill. M. C. Barnhill was a witness before the grand jury, and was in life at the time of the trial. The defendant was arraigned upon this indictment, the jury was sworn, and, pending the introduction of evidence, the error was discovered. A verdict of not guilty was entered, and a new indictment was returned, charging the murder of O. D. Barnhill. The prosecutor, the state's counsel, and the grand jury were attempting to prosecute and indict in the first case for the same homicide alleged in the last case. Upon arraignment on the second indictment the defendant entered a special plea of former acquittal, and the facts were conceded to be substantially as above. The court found against the plea. If it were not for the precedent of the Supreme Court decision in *Gully v. State*, 116 Ga. 527, 42 S. E. 790, this state of facts would present a close question. However, the *Gully Case* is so closely analogous as to free the question from doubt. *Gully* committed bigamy by marrying Bessie Shingler. Intending to present for this offense, the grand jury preferred an indictment charging the marriage with Gusie Shingler, a sister of Bessie Shingler. The defendant was acquitted on this indictment, and a new bill was returned, charging the marriage with Bessie Shingler. It was conceded, as in this case, that there was but one offense, and that the wrong name was inserted in the first indictment by inadvertence. The plea was held



bad. The meaning of that decision is that, if the first indictment be so drawn that no phase of the transaction in question can be investigated under it, there is no jeopardy as to the transaction, although it was the intention of the grand jury and the prosecuting officer that there should be. In this it is distinguished from *Ingram v. State*, 124 Ga. 448, 52 S. E. 759, *Holt v. State*, 38 Ga. 187, and several other cases of the same tenor.

2. Complaint is made that the court corrected the stenographic transcript of his charge, after having approved it and ordered it filed. No error. *A. & B. Air Line Ry. v. McManus*, 1 Ga. App. 302, 58 S. E. 253.

3. The defendant made a timely request in writing that the court give in charge to the jury section 72 of the Penal Code of 1895. The court did not give this section in charge literally, but did give in charge all of section 70. We think the latter section covered the issues as fully as they were made by the defendant's statement or evidence. In fact, neither of these sections was applicable under the theory of the defendant's statement, for therein he set up that the killing was altogether accidental, so far as he was concerned with it; and this the court covered fully. Another request was properly refused, because it did not contain a correct principle of law.

4. Error is assigned because the court instructed the jury that, if they believed the killing accidental, they would be "authorized" to find the defendant not guilty; the specific criticism being that the instructions to acquit under these circumstances should have been absolute. If this verbal criticism is well taken (and we are not prepared to say that it is), the error is too trivial to work a reversal.

5. Error is assigned that the court did not, without request, charge upon contradictory statements of the deceased, and upon the impeachment of witnesses. Instructions upon such questions are not compulsory, in the absence of written request. *Cress v. State*, 128 Ga. 567, 55 S. E. 491.

6. The foundation for the submission of the alleged dying declarations to the jury was sufficiently laid. *Young v. State*, 114 Ga. 350, 40 S. E. 1000.

7. An excerpt from the judge's charge on the subject of dying declarations is set out, and error assigned because the court instructed the jury that these declarations were first passed upon by the court *prima facie*. An examination of the context discloses that the instructions were in accordance with what the Supreme Court said should be charged on this subject in the case of *Bush v. State*, 109 Ga. 126, 34 S. E. 298.

8. One of the grounds of the motion presents the contention that the testimony of the defendant's witnesses was uncontradicted, and that the jury was bound to give weight to this testimony. The credibility of the witnesses is exclusively for the jury. In this

case the testimony of these witnesses was contradicted in many material respects, and an effort was made to impeach them by previous contradictory statements, yet we feel sure that the jury did give weight to their testimony; otherwise, the verdict should have been for murder, not for voluntary manslaughter.

9. The last ground is upon newly discovered testimony. The showing in this respect did not come up to the rule. Besides, it was mainly impeaching in its character.

10. Though we have some doubt of the defendant's guilt, yet after a careful and painstaking study of the record we find no reversible error; and the evidence is sufficient to support the verdict, which is approved by an honest and conscientious trial judge.

Judgment affirmed.

(1 Ga. App. 146)

#### KINARD v. STATE. (No. 172.)

(Court of Appeals of Georgia. Feb. 5, 1907.)

#### 1. FALSE PRETENSES—PROSECUTION—ACCUSATION—SUFFICIENCY.

The accusation was sufficient, as against the demurrers of the defendant.

#### 2. JURY—CHALLENGE—GROUNDS OF—SERVICE AT PRECEDING TERM.

It is good ground of challenge to a juror in a city court, if the objection be timely made, that such juror served upon the jury in the same court at the next preceding term.

#### 3. FALSE PRETENSES—PROSECUTION—EVIDENCE—ADMISSIBILITY.

Upon the trial of a person charged with cheating and swindling by making false representations as to the ownership of property, claim affidavits, bonds, etc., filed by third persons to a levy upon certain property as the property of the defendant, are not admissible in evidence.

#### 4. CRIMINAL LAW—BEST EVIDENCE—CERTIFIED COPIES OF RECORDED INSTRUMENTS.

Certified copies of duly recorded instruments shown to be in the possession of the defendant are admissible in evidence against him, in a criminal case, as against the objection that the original is the highest evidence, unless he voluntarily offers to produce the originals. *Farmer v. State*, 23 S. E. 26, 100 Ga. 41.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 887, 888; vol. 20, Evidence, §§ 638, 642, 671.]

#### 5. FALSE PRETENSES—PROSECUTION—EVIDENCE—SUFFICIENCY.

The evidence in this case is, as a matter of law, insufficient to sustain the verdict.

(Syllabus by the Court.)

Error from Superior Court, Worth County; Spence, Judge.

C. L. Kinard was convicted in a city court of cheating and swindling. On certiorari the conviction was sustained, and defendant brings error. Reversed.

C. L. Kinard was tried in the city court of Sylvester before Judge Park. The accusation (founded upon the affidavit of G. C. Ford and J. O. Holloman, to the best of their knowledge and belief) alleged that C. L. Kinard, on February 8, 1904, falsely and fraudulently represented to Ford & Holloman that he had rented land enough for 12 plows

from J. R. Hill, and land enough for 5 plows from T. J. Pinson, and was going to run 17 plows that year; that he had and owned 17 mules that were unincumbered, there being nothing against them, that had cost him an average of \$100 each; that he owned and had in his own name and right good and solvent notes enough to make him well worth \$4,000—and thereupon obtained a credit from Ford & Holloman for commercial fertilizers to the amount and value of \$1,579.16, and thereby caused Ford & Holloman loss and injury to that amount and value. The accused demurred on the following grounds: (1) The accusation is not based on a positive affidavit, as prescribed by the act creating the city court. Acts 1905, p. 378. (2) It fails to allege that defendant made or procured another to make any false representations to Ford & Holloman, with intent to obtain from them any money or other thing of value. (3) It does not allege any deceitful means or artful practices made or used by defendant before obtaining the fertilizers. (4) It does not appear that any representation was made prior to or at the time of obtaining the fertilizers. (5) It does not allege with sufficient particularity the place of the commission of the alleged crime, merely alleging that it was in Worth county, without putting defendant on notice of the particular place, without enabling him to prepare his defense, and especially failing to enable him to prepare a defense of alibi. (6) It nowhere sets forth that any fraudulent representations were made by him to any person for the purpose and with intent of defrauding Ford & Holloman. (7) It is insufficient, as a whole, to be the basis of a valid conviction. (8, 11) The representation that he "was going to run 17 plows that year" was of not a past or existing fact, but of an act contemplated to be done in the future, and could not be the basis of an accusation charging him with fraudulently obtaining credit; and it does not appear that he entertained a different intention when the statement was made, nor whether, if he did intend to run this number of plows, he had good cause for changing his mind and not doing so. (9) It is not alleged that his representations misled or deceived Ford & Holloman, or caused them to part with their property to their injury, or in what way they were injured. (10) It is not alleged that they parted with the fertilizers to him on the representations he made to them, nor that they were in any way injured in consequence of the representations. (12) It is not alleged how much Ford & Holloman estimated and considered the proposed crop to be worth, nor how much Kinard's rent contract was worth from Hill and Pinson, nor what amount of solvent notes he claimed he owned; the allegation being that all of the property rights enumerated in the affidavit, according to the judgment of Ford & Holloman, were worth \$4,000, without specifying the value of Kinard's property going

to make up this total, for which reason he is not notified of what he is expected to meet. (13) It does not appear what amount, or that any amount, of property or any other thing of value was parted with by Ford & Holloman upon the representations made to them.

This demurrer having been overruled, evidence was introduced under which, together with the judge's charge, the jury found the accused guilty. On certiorari the conviction was sustained, and the accused excepted. His assignments of error are shown by the headnotes, in connection with the following statement of what appears from the evidence: As a basis of credit for fertilizers sold to him by Ford & Holloman, at the date and in the county alleged, the accused stated to Holloman that he had 17 good mules, unincumbered, on which he did not owe a cent; that he had rented from J. R. Hill a 12-horse farm and from T. J. Pinson a 5-horse farm; and that he had good notes and other property to the amount of \$2,300, the notes being with the Sylvester Banking Company for collection. Ford & Holloman extended him the credit, relying on this statement. He has paid them nothing, and they have lost between \$1,500 and \$1,600. He rented from T. J. Pinson a 2-mule farm, 80 or 90 acres, in 1904, and paid him the rent. In the same year he rented from J. R. Hill 490 acres of cultivatable land, which could be cultivated with 12 plows. There were 12 or 14 mules on this land, 8 wage hands, and 3 croppers. He planted all the land, but could not work it on account of labor failing. There was sickness among the laborers and in his family. He made a poor crop of everything. Walters, his overseer on the Hill place, testified that he ran a 12-horse farm there, and there was a cropper who started a 2-horse farm, but he quit in the spring, and they could not get labor to work the crop. They made about 150 bushels of corn with the 13 plows, and about 60 bales of cotton on both places rented.

Over objection, a copy of a mortgage from the accused to the First National Bank of Sylvester, for \$315.50 principal, dated February 5, 1904, and covering 8 mules, was admitted in evidence. The objection was on the grounds that the original mortgage had not been satisfactorily accounted for, that the mortgage appeared to have been marked paid and canceled of record, and that it was irrelevant. The cashier of the bank testified that the mortgage was marked paid and turned over to the accused on his giving the bank a draft for the amount of it, which draft was dishonored on presentation. It also was put in evidence. The mortgage was foreclosed, and 5 mules were levied on to satisfy the execution issued thereunder. There was a further objection to the admission of the draft and of the testimony concerning it, and of the evidence as to the foreclosure of the mortgage, upon the ground that the same was irrelevant. Objection was likewise made

to evidence concerning a mortgage on mules, made in 1903, by the accused to Sam Farkas. Another objection that was overruled was to the introduction of claim affidavits and bonds interposed by J. F. Kinard, T. M. Wilder, and C. W. Hill to the levy of the mortgage *fi. fa.*, before mentioned, on certain mules; the ground of objection being that the evidence was irrelevant. The testimony shows that in 1904 the accused had with the Sylvester Banking Company notes to the amount of \$1,800 or \$2,000, though in February they had been placed in the hands of an attorney for collection. There were \$2,300 worth of them at first, but the bank had collected some of them. They had been pledged to the bank in 1903, but this pledge had been released by substitution of securities. Most of these notes stood in the name of J. F. Kinard & Sons, but upon a dissolution of the partnership on distribution of assets these notes had been given to the accused. At the First National Bank of Sylvester he had between \$1,000 and \$2,000 worth of similar notes. It appeared from the testimony that he had about 18 mules in February, 1904; but it did not appear that any of the mortgaged mules, already mentioned, were included in this number. He had been engaged during that season in buying and selling mules.

Further objection was made to the admission of the following evidence, on the ground that it was irrelevant and immaterial: The sheriff testified, as to his efforts to find the mules described in the mortgage *fi. fa.* already mentioned, that he found 4 of the mules at T. M. Wilder's place and 1 at G. F. Kinard's place, but his further search did not find any. An officer of the Sylvester Banking Company testified that the consolidated note of J. F., G. F., and C. L. Kinard, held by that bank, on February 8, 1904, was for \$4,048.36. J. F. Kinard testified that he paid at least \$3,000 of the note made to the Sylvester Banking Company with his own money; and in answer to the question whether the defendant was worth \$4,000 on February 8, 1904, he answered: "If he had it, I did not know where it was at."

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

POWELL, J. Judgment reversed.

(1 Ga. App. 534)

MAHAN v. STATE. (No. 253.)

(Court of Appeals of Georgia. March 28, 1907.)

1. CRIMINAL LAW—BEST AND SECONDARY EVIDENCE.

Where the original mortgage was in the possession of the defendant in a criminal case, a certified copy of the same, made from the record, is admissible in evidence against him, as against the objection that the original is the highest evidence, unless he voluntarily offers to produce the

original. *Kinard v. State*, 58 S. E. 263, 1 Ga. App. 146.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 887, 888.]

2. APPEAL—REVIEW.

There was some evidence to support the verdict; and, as the trial court was satisfied therewith, this court cannot disturb the judgment refusing a new trial, where no error of law was committed.

(Syllabus by the Court.)

Error from City Court of Floyd County; Hamilton, Judge.

One Mahan was convicted of crime, and brings error. Affirmed.

George A. H. Harris & Son, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(1 Ga. App. 196)

JOHNSON v. STATE. (No. 180.)

(Court of Appeals of Georgia. Feb. 13, 1907.)

1. STATUTES—CONSTRUCTION—PENAL STATUTES.

Criminal statutes are to be strictly construed; and it cannot be presumed, as against the defendant in a criminal case, that the Legislature (in the absence of a formal expression of such purpose) intended to enlarge or extend the previously well-defined legal meaning of terms employed by that body in a new act, so as to make a new classification or cause the descriptive words to include an additional class of objects to that formerly understood by such terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 302-306, 322.]

2. INDICTMENT—ISSUES, PROOF, AND VARIANCE—PLACE OF OFFENSE—HIGHWAYS—ESTABLISHMENT.

If the criminality of an act depends upon the place where it is committed, the allegation of place is material; and variance between the allegation and the proof is fatal.

(a) Proof that a road was commonly and largely used by the general public for a number of years, without more, will not support an allegation that such was a "public" highway, or a "public" road.

(b) The words "public highway" denote a generic term. The words "a public road," when used in an indictment based upon the act of 1905 (Acts 1905, p. 114), are descriptive of a species whose identity and characteristics are fixed by law, and are material; and the allegation must be sustained by proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 544-547.]

3. DRUNKARDS—INTOXICATION ON HIGHWAYS—HIGHWAY AND ROAD DISTINGUISHED.

The terms "public highway" and "public road" are not synonymous.

(a) The word "road" refers to the piece or strip of land taken. "Way," in legal parlance, merely denotes an easement, and that the land has been subjected to servitude.

(b) "Highway" is also a generic term, which includes other uses besides the right of ordinary locomotion over land which has been subjected to public use.

4. HIGHWAYS—ESTABLISHMENT—DEDICATION.

A road can be proved to be a public road—i. e., in use as a public highway—in four ways. A public road is created in four ways: (1) By a legislative enactment; (2) by action of the proper county authorities; (3) by dedication; (4) by prescription.

#### 5. SAME—PRESCRIPTION—DEDICATION.

In the absence of proof of the establishment of a public road by legislative enactment, or by action of the proper county authorities, evidence of 20 years' use and working by the proper authorities will create a public highway, generally called a "public road," by prescription; and proof of 7 years' use, if accompanied by evidence of intention to give a way on the part of the owner, and like evidence of acceptance on the part of the public authorities, will establish a dedication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 1-10; vol. 15, Dedication, § 13.]

#### 6. SAME.

Consequently, where one is indicted for being intoxicated on a public highway, it is error to charge: "If the evidence shows you \* \* \* that this road was used by the public for a number of years, or \* \* \* by a community of people for any number of years, as a matter of convenience or necessity, \* \* \* or for the regular use of travel, it would not be incumbent upon the state to show that it was a public road or private highway, established by law or the county authorities, and maintained as such."

#### 7. SAME.

It is, for the same reason, error to instruct the jury as follows: "I charge you that it is immaterial as to whether or not this road was maintained by the public or county authorities as a public highway or private way; but if you find that this road was used as a highway by a community of people for any number of years, as a means of ingress or egress to and from their homes, and that the crime was committed on said road by this defendant, it would be your duty to find him guilty."

(Syllabus by the Court.)

Error from City Court of Douglas; Roan, Judge.

One Johnson was convicted of being intoxicated on a highway, and he brings error. Reversed.

J. W. Quincey, for plaintiff in error. M. D. Dickerson, Sol., and W. C. Lankford, for the State.

RUSSELL, J. The defendant in the court below was indicted for the offense of being intoxicated on a public highway. The wording of the act (Acts 1905, p. 114), so far as material in this case, is as follows: "It shall be unlawful for any person \* \* \* to be and appear in an intoxicated condition on any public street or highway." Upon the trial the jury convicted the defendant. He asked for a new trial, which was refused, and he now excepts to the judgment of the trial judge in overruling his motion, and assigns error thereon.

In the amendment to his motion, approved by the court, the defendant complains that the court erred in the following charge: "It is one of the contentions of the defendant in this case that the road or highway upon which the alleged offense was committed is not such a public road or highway as is contemplated by the act. I charge you that if the evidence in this case shows to you to a moral and reasonable certainty, and beyond a reasonable doubt, that this road was used by the public for a number of years, or was used by a community of people for any num-

ber of years, as a matter of convenience or necessity, in going to and from market or church, or for the regular use of travel, it would not be incumbent upon the state to show that it was a public road or private highway, established by law or the county authorities, and maintained as such; but if you find that this road upon which the alleged crime was committed was used as before stated, then it would be your duty to find the defendant guilty, if you find in point of fact that he did commit the act charged in the bill of indictment. I charge you that it is immaterial as to whether or not this road was maintained by the public or county authorities as a public highway or private way; but if you find that this road was used as a highway by a community of people for any number of years, as a means of ingress or egress to and from their homes, and that the crime was committed on said road by this defendant, it would be your duty to find him guilty." The plaintiff in error assigns two errors on the foregoing charge: (1) That it authorized the verdict of guilty, when the evidence showed that the offense charged was not committed on a public highway, as contemplated by the act of the Legislature making drunkenness on a public highway a violation of law; (2) that the charge intimated that a crime had actually been committed. The second ground of the exception was abandoned in the argument in this court. There is but one question, therefore, to be settled in this case, as the evidence would authorize the jury to have found that the defendant was intoxicated; and the purpose of our inquiry will be to ascertain what the Legislature intended by the words "public highway" in the act, and what is the true meaning of the words "public road" in the indictment. If the place where the defendant was alleged to be intoxicated, as shown by the evidence, is a public highway, then the verdict of the jury is right. If the evidence adduced and appearing in the record does not show the place where the acts of the defendant were committed to be a public road and public highway, then the charge of the trial judge was erroneous, and the verdict should be set aside.

It is insisted by state's counsel that the lawmakers intended to protect all highways which are used by the public and which are in this sense public; and the question is asked: "If the Legislature intended to make it a criminal offense for a person to be intoxicated on public roads established by law, why did the act not say such public roads as are statutory or established by law?" In the opinion of the members of this court, the peace and quiet of the citizen who lives on any road which is used for travel by the public is entitled to the same protection, by similar means, to that provided in this healthful statute for those who happen to live on public roads, and it is the prerogative of the

Legislature to so amend the act of 1905 as to make this the law; but it is not within the jurisdiction of this or any other court to legislate, and the fact that in the very creation of this court it is bound by the decisions of the Supreme Court largely limits our power to construe. So while we think, for ourselves, that all roads are alike entitled to protection, it cannot be presumed that the Legislature did not know the meaning of the terms it chose to employ in its act. It is rather to be inferred, and is clear to our mind, that for some sufficient reason the legislative mind did not see proper to apply the operation of its act to roads which might cease to be used at the will of those who owned and controlled them; i. e., at the will of the owners of the fee. Criminal statutes are to be strictly construed with a view to protecting every right of the citizen, and as against the defendant in a criminal case it cannot be presumed that the Legislature intended to enlarge and extend the previously well-defined meaning of terms employed by them to constitute a crime; more especially as the words "public street and highway" had been defined by the courts of this state and had a fixed and definite meaning. The term "public road" is not only distinguished from "private way," but it must mean a way, not only used by the public, but maintained, repaired, and controlled by the proper authorities having in charge the public roads. Penalties are affixed for various violations of the road law, which would be unjust and inapplicable to roadways subject to be discontinued at the pleasure of other than the public authorities; and the safety of a citizen demands that these penalties provided for the public good shall not be enforced as to passways opened, used, and maintained only during the pleasure of private citizens. Furthermore, the burden of keeping up the public roads has to be borne by the great body of the citizens, so that we are bound to construe the words of the statute as well as the allegations of the indictment strictly.

That a variance between the allegations in an indictment which are material and the proof offered in support thereof is fatal is axiomatic; and "if the criminal character of the act depends upon the locality in which it is committed, the allegation of place becomes material, \* \* \* furnishes an essential feature in the description of the offense, must be accurately laid, and matter of local description must be proved." If, therefore, the proof in this case (as we think) does not show that the place where the defendant appeared intoxicated was the same place or such a place as is alleged in the indictment, the variance will be fatal. In our judgment the place shown by the evidence is a piece of land owned and worked by private individuals, over which the public is permitted, at the will of the owners, to pass and repass as may suit the convenience, ne-

cessity, or pleasure of the passer-by, but which has never become either the public highway mentioned in the statute or the public road used to describe it in the indictment. In our opinion the error in this case arose from confusing a road used by the public with a public road. There can be no doubt that the state proved that the locality where the defendant is alleged to have been intoxicated is a road, which simply means a piece of land either used or appropriated for travel. But the indictment alleged "a public road," and the statute penalizes drunkenness on the "public highway." Thus it became essentially material to be shown whether the road in question was a public road and public highway. We think there is a fatal variance between the proof and the allegations made, not because the location was not "a road," but because it was not shown to be "a public road," and because, on the contrary, the evidence established the fact that it was not a public road. So far as the general and continuous use by an entire community is concerned, the proof is sufficient; but mere use is not enough to prove dedication or prescription, if either was relied upon.

The terms "public highway" and "public road" are not synonymous. We sometimes use the term "road" in ordinary conversation in the same sense as "way," but in legal parlance this is improper. "Road" means any piece of land used or appropriated for travel. \* \* \* "Way" \* \* \* means nearly the same thing, as "right of way" or, in other words, the right of one person, \* \* \* or of the community at large, to pass over the land of another." *Chollar-Potosi Mining Co. v. Kennedy*, 93 Am. Dec. 416, 3 Nev. 361. The word used in the statute is "highway," which is defined by 1 Bouv. Law Dict. 750, to be "a passage, road, or street which every citizen has a right to use." But even this definition is not exhaustive, because the term may be applied more broadly. *Abbott's Law Dictionary* says: "There is a difference in the shade of meaning conveyed by two uses of the word. Sometimes it signifies right of free passage, in the abstract, not importing anything about the character or construction of the way. Thus a river is called a highway. \* \* \* Again, it has reference to some system of law authorizing the taking of a strip of land, and preparing and devoting it to the use of travelers. In this use it imports a roadway upon the soil, constructed under the authority of these laws." We may say, then, in brief, that the word "road" refers to the land. "Highway" denotes the easement, and that the land taken has been subjected to servitude, "carrying with it the right to use the soil for the purposes of repair and improvement, and in cities for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality,

health, trade, and convenience." A highway may be a road, but a road is not necessarily a public highway. To be a public highway it must be, as stated in the indictment in this case, a public road.

It being settled, then, that the statute has reference to only such public roads as are public highways, we come to consider the nature of the proof required to show whether a given locality is within the descriptive term "a public road." A public road can be created in four ways: (1) By a Legislative enactment; (2) by action of the proper county authorities; (3) by dedication; and (4) by prescription. No effort was made to prove the character of the road in this case, as coming under either of the first two heads. Was it proved to be a road by dedication? The evidence perhaps established fully that Oberry, the owner, had evidenced an intention to donate the land to the public; but the evidence also disclosed the fact that there had been no acceptance on the part of the public. There is no evidence that the public authorities have ever worked the road as a public road. Construing section 3591 of the Civil Code of 1895, which is in these words, "If the owner of lands, either expressly or by his acts, dedicates the same to public use, and the same is so used for such a length of time that the public accommodation or private rights might be materially affected by an interruption of the enjoyment, he cannot afterwards appropriate it to private purposes," Justice Cobb says: "A dedication to public use is \* \* \* not complete until two things appear; that is, an intention on the part of the owner to dedicate his property to the public use, and an acceptance on the part of the public of the property for such use. \* \* \* The intention to dedicate need not be shown by an express declaration to that effect. But the use must be of such a character as to clearly indicate that the public has accepted the dedication of the property to the public use. The acceptance need not be express; but if the way be used by the public, and worked, or treated by the public authorities as a part of a system of public highways in the place where the way is claimed, and this is continued 'for such a length of time that the public accommodation and private rights might be materially affected by the interruption of the enjoyment,' the dedication to the public use is complete as against the owner of the fee." *Healey v. Atlanta*, 125 Ga. 737, 54 S. E. 749, citing *Mayor and Council of Madison v. Booth*, 53 Ga. 609; *Parsons v. Trustees*, 44 Ga. 529; *Georgia R. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138. And in the *Healey* Case it is further said that unless it appears clearly that the "dedication was accepted by the public authorities, either in express terms or by implication resulting from the maintenance of a way as public

in its nature," the use of one's property will not amount to a dedication. In the headnote it is said that "in every case of an implied dedication it must appear that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift." We assume this latter statement to be a succinct statement as to the time necessary to create a road by dedication, and it is also based upon sound reason; for, if there is an implied dedication, it must rely upon the presumption of a gift, which arises in seven years.

It being further true that the use by the public of Mr. Oberry's property is not necessarily inconsistent with the retention of dominion by him, we think that the state failed to show dedication as to the road in question. Nor will the evidence authorize the conclusion that the road had become a public road by prescription, because it nowhere appeared that the public had used and maintained it as a highway for a period of 20 years or more. In *Southern Railway Co. v. Combs*, 124 Ga. 1010, 53 S. E. 508, the court (while declining to determine the exact term of use by the public and working by public authorities necessary to make a road a public road by prescription) says: "It is certain that a road may become a public road when it has been used by the public and worked by the public authorities for 20 years." And we will add that 20 years' use, and work, maintenance, and control by the public road authorities, are required to fix title in the public, as well as in the citizen, where possession adverse to the owner alone is relied upon. In the recent case of *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138, the Supreme Court held that 20 years' adverse possession was necessary to work a nonuser of a public road once established. So we think there is no question that evidence of 20 years' possession and use would be required were a prescriptive title relied upon, instead of proof of dedication, or an order passed by the proper county authorities, or a legislative enactment. Many of the cases in which the question has been raised as to what constitutes a public road in Georgia have arisen under Civ. Code 1895, § 2222, which relates to railroad crossings over public roads. We have examined, perhaps, all of these cases, and it appears that up to and including the case of *Georgia R. Co. v. Cromer*, 106 Ga. 296, 31 S. E. 759, the view was entertained that the words "public road" were qualified by the words "established pursuant to law." And while it was not directly decided, an inference could have been drawn, from the earlier decisions, that the existence of a road as a public road must be shown by a public record, at least in so far as the terms were applicable to section 2222. By later decisions, however, the rules we have laid down above have been recognized, and the classification of the four meth-

ods of proof we have adopted is authorized. And the doctrine we have drawn from decisions of other states which hold that the road is the land, and the highway the servitude or use to which the land has been subjected, is sustained in our own state in *Kavanagh v. Mobile & Girard R. Co.*, 78 Ga. 271, 2 S. E. 113, where the court held that the streets of Columbus belonged to the state, but as highways they belonged to the city of Columbus.

In view of what we have stated, the charge we have quoted in this opinion, and which was given by our learned brother of the trial bench in this case, was erroneous; and, after reviewing a multitude of authorities in addition to those we have cited, we return to the words of the first headnote in *Hart v. Taylor*, 61 Ga. 156: "A neighborhood road used by a settlement of people, great or small, is not a public road in the sense of the Georgia Code, and in the common parlance of our people." Placing this in juxtaposition with the charge that "it is immaterial as to whether or not this road was maintained by the public or county authorities as a public highway or private way, but if you find that this road was used as a highway by a community of people for any number of years, as a means of ingress or egress to and from their homes, and that the crime was committed on said road by this defendant, it would be your duty to find him guilty," we are compelled to reverse the judgment of the court below.

Judgment reversed.

(1 Ga. App. 662)

**MT. VERNON BANK v. GIBBS et al.**  
(No. 266.)

(Court of Appeals of Georgia. April 25, 1907.)

**1. BILLS AND NOTES—ACTION ON NOTE—ATTORNEY'S FEE.**

The intention of the General Assembly in the passage of the act of 1900 relating to attorney's fees (Acts 1900, p. 53) was evidently dual. It conferred a benefit on the debtor, by relieving him from the burden of attorney's fees, while foreseeing, as a consequence thereof, relief to the public from the expense of the litigation thus prevented. When complied with, the debtor saves the attorney's fees; the public saves the expense of trial.

**2. SAME—RETURN DAY.**

The "return day" of a term of court is the last day a suit can be filed to be returnable to that term. Keeping in view the manifest intention of the Legislature, and conserving the plainly beneficial effect of the act in question, the term "return day," therein contained, is to be presumed to have been used to convey the same meaning which had generally and legally been applied to it previously to its passage *Johnson v. State*, 58 S. E. 265, 1 Ga. App. 195.

**3. SAME.**

Hence, where suit had been brought upon a promissory note containing provision for attorney's fees, and it was admitted that the written notice of intention to sue had been duly given, and it was uncontradicted that payment of the debt and interest thereon was not made until several days after the last return day, it

was error to enter a judgment relieving the defendant from the attorney's fees.

(Syllabus by the Court.)

Error from City Court of Mt. Vernon; Gelger, Judge.

Action by the Mt. Vernon Bank against J. W. Gibbs and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. M. Lewis and M. B. Calhoun, for plaintiff in error.

**RUSSELL, J.** Suit was brought in the city court of Mt. Vernon on a promissory note which provided for the payment of 10 per cent. attorney's fees, if collected by law or through an attorney at law. In the record appears the following: "Notice of Intention to Sue Note. Oct. 24, 1906. To J. W. Gibbs, N. B. Gibbs, El. S. Gibbs: You are hereby notified that I intend to bring suit against you to the December monthly term, 1906, of the city court of Mt. Vernon, of said county, on a promissory note made and executed by you to the Mt. Vernon Bank, on the 23d day of January, 1904, and for the principal sum of sixty-three dollars and eighty-five cents; said note falling due on the 1st day of November, 1904, and bearing interest from maturity at the rate of 8 per cent. per annum, and 10 per cent. attorney's fees.

\* \* \* And if you fail to pay said note on or before the return day of the said court, at the term above mentioned, I shall sue for said attorney's fees, in addition to the principal and interest due thereon; said note having been placed in my hands by the holder thereof for collection. M. B. Calhoun, Attorney for Plaintiff." The time for holding the court, as it appears, was the second Monday (10th) of December, 1906. And on December 3d the principal, interest, and costs due on the note were paid. The attorney's fees were not paid. On the 10th of December, 1906, the defendant J. W. Gibbs filed the following sworn answer: "(1) Defendant shows to the court that he has paid off and discharged all the principal, interest, and costs due on said suit, and that said payment was made before the return day of said court. (2) Defendant denies his liability for the attorney's fees, alleged to be due on said note." By agreement of the parties the issues were submitted to the trial judge without a jury, together with another case between the same parties involving the same issue, and as to which latter case it is further agreed in writing that the judgment of this court shall be binding. On the trial in the court below it was agreed in open court that Gibbs, the maker, had paid the principal, interest, and costs accrued in both of said cases; and therefore the only question submitted in that court, or in this, was whether the defendants are liable for the 10 per cent. attorney's fees stipulated to be paid, in the note.

The case was submitted upon the follow-

ing agreed statement of facts: That the principal, interest, and costs were paid on Monday, December 3, 1906; that the December monthly term, 1906, of said court convened on Monday, December 10, 1906; in other words, that the note was not paid 15 days before the first day of December term, 1906, of the court. And it was admitted that the notice of plaintiff's intention to sue on the note, and to sue for the 10 per cent. attorney's fees, had been duly and legally served on all of the defendants more than 10 days before the filing of the suit. Upon this agreed statement of facts the court entered the following judgment: "It appearing to the court that the above-stated case has been settled, except the attorney's fees alleged to be due, and the same being submitted to the court on an agreed statement of facts, the only question being the liability of defendants for said attorney's fees, it is ordered by the court that said defendants be relieved of the payment of the attorney's fees alleged to be due. This order to be of force and effect in each one of said cases stated as above, filed to the December monthly term of the city court of Mt. Vernon, December 10, 1906."

We think the court erred in not entering up judgment for the attorney's fees. Section 3667 of the Civil Code of 1895, as amended by the act of 1900 (Acts 1900, p. 53), is as follows: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness \* \* \* are void, and no court shall enforce such agreement to pay attorney's fees unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same; provided, the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing, ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." There can be no doubt as to the written notice in the case. Defendant admitted he was notified in writing 10 days before the suit was brought, which means 10 days before it was filed. Did the defendant, as alleged in his answer, "pay such debt" before "the return day"? The trial court seems to have decided the case upon the idea that the words "return day" meant the first day of the term. But, if the words "return day" be construed to mean the first day of the court (as they must have been construed by the trial judge, to authorize the judgment he rendered upon the evidence), the notice provided for by law would be absolutely useless, because the debtor would already have been informed, by service of the petition and process, not that he would be sued, but that he in fact had been sued.

There can be no question as to the meaning of the phrase "return day," as used in the act of 1900. It has a general ordinary meaning, and it has been defined according to that meaning in the decisions of the Supreme Court of this state. It always had ref-

erence to the filing of the suit, and, popularly, is most generally called "the last return day." The Legislature, when changing an existing law, as in creating a new law, is to be presumed to understand the meaning of the words employed, and to use such words to convey the same meaning as is commonly attached to them generally at the time of their use. Furthermore, one of the cardinal rules to be observed, in ascertaining the meaning of any word employed in a statute, is to look to the intention of the lawmakers. In the passage of the act of 1900, the General Assembly evidently intended to accomplish two purposes. It desired to relieve the debtor, as far as possible, from the burden of attorney's fees, where they could be of no benefit to him; and in making it to his interest to relieve himself from the payment of attorney's fees, by speedy payment of the debt, it sought thereby at the same time to relieve the public, as far as possible, from the burdens of useless litigation. The interest of the public and the courts was in view of the legislative mind, as well as the interest of the debtor; and one of the most beneficial results of legislative wisdom is the prevention of useless lawsuits. If the debt was paid, and the law discharged the attorney's fees in consequence of the payment of the debt, before the last return day, the public would be saved the expense of trial, the officers of court their trouble, and the creditor delay. The act confers a benefit on the debtor, foreseeing as a consequence relief to the public from useless litigation. The debtor saves the attorney's fees. The public saves expenses of court. This purpose of the act would be practically defeated, if the words "return day" were held to mean the first day of the court.

Beginning with the passage of the "Twitty bill" (Acts 1890-91, p. 221; Civ. Code 1895, § 3667), our laws have seemed to view attorney's fees askance; and, construing the whole act together, it is the evident intention of the General Assembly to give every debtor who has promised to pay attorney's fees, whether suit be brought or not, at least 10 days in which to remove that liability, by payment, for he is to be notified at least 10 days before the latest day the suit can be brought to that term, and, if he pays the demand before the return day, the obligation to pay attorney's fees becomes void. The manifest purpose of the law was to give to the debtor 10 days, not only to relieve himself from paying attorney's fees, but, in most instances, to avoid suit altogether. The expression "return day," as stated above, as construed by our courts, has a fixed and definite meaning. It means the last day on which suits returnable to the next term may be filed. *Baxley v. Bennett*, 33 Ga. 146; *Hood v. Powers*, 57 Ga. 249; *Everett v. Ferst's Sons & Co.*, 126 Ga. 662, 55 S. E. 916. The defendant made his payment seven days before court; and, under the act of 1906 (Acts



1906, p. 294) creating the city court of Mt. Vernon, the last filing day is 15 days before the first day of the term to which the suit is returnable; so that his payment was after, instead of before, the return day. The defendant admitted in open court that the notice was served more than 10 days before the time of filing the suit; and, by failing to pay within the 10 days, and paying 8 days after the suit was filed, he became subject to the attorney's fees, according to the undisputed evidence. It was, therefore, error for the judge of the city court to enter a judgment relieving the defendant from his obligation as to attorney's fees. There should be a judgment for attorney's fees on the amount due (at the time of the payment), according to the terms of the contract.

Judgment reversed.

(1 Ga. App. 634)

### WOOD v. STATE. (No. 398.)

(Court of Appeals of Georgia. April 25, 1907.)

#### 1. CRIMINAL LAW—EVIDENCE—WEIGHT—POSITIVE AND NEGATIVE.

The rule that the existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many witnesses, who had the same opportunity of observation, swear that they did not see or know of its having transpired, does not apply when one of two persons having equal facilities for seeing or hearing a thing swears that it occurred, and the other that it did not. *Weeks v. State*, 79 Ga. 37, 3 S. E. 323; *Atlanta & W. P. Railroad v. Johnson*, 66 Ga. 260; *Cobb v. State*, 27 Ga. 649.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1248.]

#### 2. SAME—TRIAL—INSTRUCTIONS—RULES OF EVIDENCE.

While the fact that positive testimony affirmative and positive testimony contradictory thereof has been introduced in a given case would, without more, render a charge upon the subject of positive and negative testimony inapplicable and improper, still, if in the same case negative testimony was also introduced, a proper charge upon that subject would not be erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1744.]

#### 3. SAME.

Where, under the evidence, the rule embodied in section 985 of the Penal Code of 1895 can properly be given, the judge should also, and in connection therewith, give an instruction that the jury, in weighing the testimony of such witnesses, must consider and pass upon the question of their credibility. *Grant v. State*, 50 S. E. 946, 122 Ga. 744 (5).

#### 4. SAME.

In any case it is error to give in charge to the jury the rule in regard to positive and negative testimony embodied in Pen. Code 1895, § 985, without stating the qualification that other things must be equal, and the witnesses of equal credibility, and that the rule does not apply as to those witnesses who have each given positive, though conflicting, testimony; some swearing that a certain thing transpired, and others equally positively that it did not.

(Syllabus by the Court.)

Error from City Court of Monticello; Thurman, Judge.

One Wood was convicted of shooting on a

public highway in violation of Pen. Code 1895, § 508, and he brings error. Reversed.

Greene F. Johnson, for plaintiff in error.  
Doyle Campbell, Sol., for the State.

RUSSELL, J. Two assignments of error are insisted upon by the plaintiff in error: (1) That the court erred in giving in charge to the jury section 985 of the Penal Code of 1895, without qualification; and (2) that the court erred in failing to charge that the rule applying to the distinction between positive and negative evidence does not apply when, of two parties having equal facilities for knowing a thing, one swears that it occurred and the other that it did not occur, the testimony of both witnesses, in that event, being positive evidence. In the amended motion is another ground, referring to the court's refusal to charge a written request; but, this assignment was abandoned in this court.

The defendant was indicted for a violation of Pen. Code 1895, § 508, forbidding the discharge of firearms on a public highway between dark and daylight. There was positive evidence that he fired a pistol as alleged in the indictment, and equally positive evidence that he did not fire a pistol at the time and place alleged. The defendant, as appears from the evidence, was in a buggy with two other persons. Some witnesses swore that shots were fired by two of the persons in the buggy, and there was testimony from two of the state's witnesses that they did not know whether the shots were fired by one man or by both who were in the buggy. In other words, there was positive testimony that two men in the buggy fired pistols, positive testimony that no one in the buggy fired at all, and negative testimony from witnesses who did not profess to know whether the shots were fired by the defendant or his companion. The judge gave section 985 of the Penal Code of 1895 in charge to the jury, without any qualification or any instruction as to its application. Under the facts above stated, we think that the omission of the trial court to instruct the jury that the rule embodied in section 985 is only applicable when other things are equal and the witnesses are of equal credibility would require a new trial; and when to that failure of the trial judge is added his failure to explain to the jury that the testimony of a witness who testifies that a certain thing did not occur is as much positive testimony as the statement of one who swears that it did occur, our duty to grant a new trial is imperative.

The headnotes sufficiently embody our opinion, and there is, therefore, no necessity to elaborate the principle which controls our decision. It is said in *Kimbrough v. State*, 101 Ga. 585, 29 S. E. 39, that it would not do to lay down the broad rule that witnesses who testify positively to a fact are to be believed, rather than those whose testimony may be negative; for "the negative testimony

of a witness of good character will always outweigh the positive testimony of a witness shown to be unworthy of belief." That the general rule as to the probative value of positive and negative testimony is subject to the qualification that other things are equal and the witnesses are of equal credibility is again decided in *Atlanta Ry. Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934, and in *Skinner v. State*, 108 Ga. 747, 32 S. E. 844.

The proposition that where one witness swears that a certain thing occurred, and another with equal opportunity to know swears positively that it did not occur, needs only to be stated, to demonstrate that the evidence of both witnesses is positive testimony, the one not more so than the other. The applicability of section 985 to the testimony is often a doubtful matter. Except in a clear case, that section should not be given in charge to the jury; and, when it is given, the jury should be instructed as to its meaning and application, especially in a case like this, where there was positive testimony affirmatory, positive testimony contradictory, and negative testimony, all material to the issue.

Judgment reversed.

(1 Ga. App. 723)

#### JACKSON v. STATE. (No. 382.)

(Court of Appeals of Georgia. May 3, 1907.)

##### 1. PARENT AND CHILD—ABANDONMENT.

The evidence in this case authorized the conviction of the defendant. "A father who within this state willfully and voluntarily abandons his child before it is born, and persists in the abandonment afterwards, leaving it in a dependent and destitute condition, is guilty of a misdemeanor."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 176.]

##### 2. CRIMINAL LAW—WITNESSES—CROSS-EXAMINATION—OFFER TO PROVE.

While the right of cross-examination, thorough and sifting, should not be abridged, nevertheless, even upon cross-examination, where an answer to a question propounded to a witness is refused by the court, and such refusal is assigned as error, it must appear that counsel, on the trial, stated to the court, either what he expected to prove, or (if that is impracticable or impossible) what he desired to prove, by the answer to such rejected question. Upon failure of such statement to the trial court, this court cannot review the alleged error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1593.]

##### 3. SAME—INSTRUCTIONS—APPLICATION—EVIDENCE.

In the absence of evidence sufficient to rebut the presumption of paternity arising from the marriage relation, it is not error to refuse to charge that the defendant would not be guilty of abandonment if the jury are satisfied that the defendant never acknowledged the paternity of the child and has always denied it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1984.]

##### 4. SAME.

The issue as to whether or not the abandonment is willful is not illustrated by the conduct or sayings of the reputed father, unless it be shown by the evidence that he is not such father.

(Syllabus by the Court.)

Error from City Court of Sandersville; Hyman, Judge.

Rufus Jackson was convicted of abandonment of his minor child, and brings error. Affirmed.

E. W. Jordan, for plaintiff in error. G. H. Howard, Sol., for the State.

RUSSELL, J. Rufus Jackson was convicted of abandonment of his minor child. The evidence showed that he married Lillie Jackson, and before the birth of the child abandoned her, and never lived with her or contributed to her or the child's support. The mother was shown to be unable to work, and the child suffered cold and hunger by reason of the abandonment. The father made no provision for it, or for the mother, at the time of its birth, but voluntarily and willfully abandoned it; and, though it appeared that the child's grandmother contributed some to its support and to that of the mother, the evidence shows that this was only at times, and that frequently, from the time of the child's birth, it was dependent and destitute, and actually suffered for lack of food, clothing, and fire to keep it warm. It was argued by the movant that no date is shown when this dependency existed, and whether it occurred before the finding of the indictment. A fair and reasonable construction of the evidence of Lillie Jackson is that this condition existed and continued from the child's birth, on March 22, 1906. The indictment was found in September, 1906.

The defendant, in his motion for new trial, which was overruled, in addition to the general grounds, contends that the court erred in refusing to allow the prosecutrix, as a witness, to answer the following question propounded to her by the defendant's counsel: "How much salary per month does your mother earn?" Movant is unable to state what answer would have been made by said witness to said question; she being the prosecutrix and leading witness for the state. The purpose of said question, as insisted, was to elicit from the witness, upon cross-examination, facts from which the jury could infer that the mother of the prosecutrix and the grandmother of the child earned a sufficient salary to support the child; movant contending that, the evidence showing that the child was supported by the grandmother and lived with its mother in the house of the grandmother, the amount of her earnings was a material fact, shedding light upon whether or not the child was in a destitute and dependent condition. It is further insisted that the court, in refusing to allow the witness to answer said question, erred, because it was an abridgment of movant's right to a full and complete cross-examination of the witness called against him, because the matter sought from the witness was relevant and material upon the issue of his guilt or innocence. In another ground of

the motion it is contended that the court erred in refusing to give in charge to the jury the following instruction, the same having been requested in writing: "If you believe from the evidence in this case that the defendant, Rufus Jackson, has never acknowledged the paternity of the child, and has at no time regarded himself as the father of the child, or claimed the child as his own, then he would not be guilty of abandonment of child." And, finally, the defendant urges as a ground for new trial that the undisputed evidence in the case shows that the defendant has never recognized, claimed, or acknowledged at any time the fatherhood of the child, and that he has never lived with the mother of the child, nor contributed to her support, and that he instituted legal proceedings for divorce before the birth of the child, and that the offense of abandonment is not made out until it is shown that the defendant at some time claimed the child or acknowledged its paternity.

The verdict was authorized by the evidence, unless the court erred in the ruling as to the admission of evidence, or in the refusal to charge as requested in the sixth ground of the motion, and unless these errors so contributed to the verdict as to be harmful to the defendant. There is no merit in the ground that the verdict is contrary to evidence. While it has been held in a number of cases—those cited by plaintiff in error as well as others—that it must be shown that the child abandoned was left by the father in a dependent and destitute condition, the jury were authorized, from the evidence in this case, to find that fact fully established. And while recognizing the principle laid down in a number of decisions, ending with *Williams v. State*, 126 Ga. 637, 55 S. E. 490, that, where an essential element of a crime is prescribed by law, it must both be charged and proved by the state, in the strict construction of criminal statutes, still, in a case where a father is heartless enough to add to antenuptial wrongs the desertion of his innocent offspring, this court will not be overzealous in reweighing the testimony passed upon by the jury. It is further insisted by the plaintiff in error that, admitting that destitution and dependence existed, it is not shown when it existed, and whether it occurred before the finding of the indictment. The indictment was found in September, 1906. A fair and reasonable construction of the evidence for the state leaves no other conclusion than that this condition existed and continued from the child's birth in March, 1906. As to this six months before the indictment the evidence makes a clear case; and as evidence as to the condition existing subsequent to the indictment was not objected to, the error, if any, is immaterial. The evidence, in our view of the case, makes a strong, clear case of abandonment, of dependence and destitution. This case is controlled by *Bull v. State*, 80 Ga. 704, 6 S. E.

178, in which Judge Bleckley, rendering the opinion, declares that "a father who within this state willfully and voluntarily abandons his child before it is born, and persists in the abandonment afterwards, leaving it in a dependent and destitute condition, is guilty of a misdemeanor."

We come, now, to the special grounds of the amended motion. Did the court err in refusing to allow the mother of the child to answer a question as to how much the grandmother earned per month? Conceding that each party is entitled to the right of cross-examination, thorough and sifting, of witnesses called by his opponent, and waiving the fact that it does not appear that the trial court was informed what answer would be made to the proposed question, and that, for that reason, there is nothing that this court can consider upon this assignment of error, and granting that the answer of the witness would have shown an earning capacity on the part of the grandmother sufficient to support the child, there was still no error in the ruling of the court; for while it is competent, in defense of the charge of abandonment, to show that others do provide for the support of the child, still it is not material or proper to allow testimony that others are able to do so. It cannot seriously be contended that there is any legal duty on the grandmother to support this grandchild. However, as matter of law, we cannot consider this assignment of error. Where error is ascribed to a court in refusing to allow a witness to answer a question, it must appear that a statement was made to the court at the time, showing what the answer would be, or what answers were expected. *Bowden v. Bowden*, 125 Ga. 108, 53 S. E. 606 (1). "Where a question is asked, the answer excluded, and no statement made to the judge as to what the witness would have sworn, there is nothing before the court. It is impossible for the judge on the motion for new trial, or for this court on a bill of exceptions, to say whether the complaining party would have been benefited or injured by the answer. The witness may not have known anything of the subject inquired about; and if a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful, instead of helpful, or the witness might reply, 'I do not know,' with the result that the time and money of the parties and the country had been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practicing lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the court held it competent, and the witness replied that he knew nothing about the matter. \* \* \* It would nev-

or do to grant a new trial until it appeared, not only that the question was proper, but that the answer was material and would have been of benefit to the complaining party." *Griffin v. Henderson*, 117 Ga. 383, 43 S. E. 712. It may be considered that the strictness of this rule should be much relaxed in cross-examination; but even then, unless the nature of the question discloses the answer expected, the counsel should state to the court what he expects to prove, or, if he cannot make such statement, what he wants to prove by the witness. The right of cross-examination should in no case be abridged, but this right is granted in order to confer a substantial benefit; and, as there is no duty devolving on a grandmother to support a grandchild, we hold that any answer that witness could have made would have been so immaterial to the issue as to have in no way aided the defendant either in disproving the charge made by the state or in defending himself against it.

There was no error in refusing to charge, as requested by defendant, upon the subject of whether defendant ever acknowledged that he was the father of the child. It could not be material as to whether he claimed or recognized the child, or whether he consistently at all times denied that the child was his. The mother of the child being his wife, he is bound by the legal presumption of paternity, which can only be rebutted by proof.

Judgment affirmed.

(1 Ga. App. 707)

**PHILIP CAREY MFG. CO. v. VIADUCT PLACE et al. (No. 281.)**

(Court of Appeals of Georgia. May 3, 1907.)

**1. MECHANICS' LIENS—PROCEEDINGS TO PERFECT—JUDGMENT.**

A materialman's lien is not complete as such until there is a judgment fixing the amount.

**2. SAME.**

In order to foreclose and perfect such lien, so as to bind the owner of real estate for the price of material furnished a contractor, there must be a judgment against the contractor, where no privity exists between the materialman and the owner of the property.

**3. SAME—OPERATION AND EFFECT—EXTENT OF LIABILITY OF OWNER.**

The filing of a suit to foreclose a materialman's lien, claim of which has been previously filed in accordance with law, does not of itself create such lien; and the existence of such lien may be prevented.

(a) There is a difference between a claim of lien and the lien itself, when established in accordance with section 2804 of the Civil Code of 1895.

(b) The contractor must be sued with the owner of the realty sought to be subjected to the special lien, and the owner's liability as to amount and in all other respects can be no greater than the contractor's.

**4. BANKRUPTCY—DISCHARGE OF BANKRUPT.**

Consequently, where the contractor is discharged in bankruptcy prior to the judgment creating the lien, and his liability is thereby annulled, the lien cannot thereafter be foreclosed against the property of the owner and a judgment be rendered against him. It would require an equitable action to protect the plaintiff in the

rights sought to be asserted under the circumstances. *Hudson v. Lamar*, 49 S. E. 735, 121 Ga. 835; *Bell v. Dawson Grocery Co.*, 48 S. E. 150, 120 Ga. 628.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Suit to foreclose a materialman's lien by the Philip Carey Manufacturing Company against the Viaduct Place and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. E. & L. F. McClelland, for plaintiff in error. Smith, Hammond & Smith, Culbertson & Johnson, and W. E. Talley, for defendants in error.

**RUSSELL, J.** Philip Carey Manufacturing Company brought suit to foreclose a materialman's lien on the property called the "Viaduct Place," in the city of Atlanta, against Steiner-Emery Company as owners and J. F. Clemmons as contractor. By agreement of the parties his honor, H. M. Reid, judge of the city court of Atlanta, without the intervention of a jury, rendered judgment in the case upon the following agreed statement of facts: The Philip Carey Manufacturing Company is a corporation of Ohio with a place of business in the city of Atlanta, and is a materialman. J. F. Clemmons was a contractor, and had contracted to improve the Viaduct Place. Clemmons purchased of the Philip Carey Manufacturing Company certain material, part of which, amounting to \$51.15, was used in improving the building of Viaduct Place. Said material was furnished during the month of August, 1905. Philip Carey Manufacturing Company filed its claim of lien in the office of the clerk of the superior court of Fulton county October 7, 1905, and it was recorded October 10, 1905. The building improved is in Fulton county, Ga. The Philip Carey Manufacturing Company filed their suit on October 13, 1905, against J. F. Clemmons, contractor, and Steiner-Emery Company, now Viaduct Place, owners. Both of said parties were served October 20, 1905. Clemmons was adjudicated a bankrupt on October 5, 1905. On the schedule of said bankrupt it appears that the Philip Carey Manufacturing Company was a creditor of the bankrupt in the sum of \$159.76, and it was admitted that said debt was scheduled in said bankruptcy proceedings, and the manufacturing company had notice of the bankruptcy proceedings, but never proved or attempted to prove their claim. The balance due Clemmons by Viaduct Place was set apart to him as a homestead. The order of court confirming the homestead was dated July 18, 1906, and Clemmons was granted his final discharge in bankruptcy July 21, 1906. Upon the above agreed statement of facts and the admissions of the pleadings the following judgment was rendered: "Upon the pleadings in said case and

upon the agreed statement of facts submitted the court finds for the defendant J. F. Clemmons on his plea of discharge in bankruptcy. As no judgment can be rendered against Clemmons as contractor, I find in favor of the other defendant; and judgment is rendered against the plaintiff for costs." The plaintiff in error excepts, upon the ground that the judgment is contrary to law and without authority of law; that the effect of said judgment is to hold that the discharge in bankruptcy of a contractor relieves the property improved of a materialman's lien for material furnished to improve the same. The contention of the plaintiff in error is that, while no general judgment can be obtained against the contractor after his discharge in bankruptcy, the bankrupt can be made a party for the purpose of fixing the amount of the debt, and that the debt so fixed thus becomes a lien against the property improved, and the contractor's discharge in bankruptcy does not relieve the property improved of its lien.

We think the finding of the trial judge was manifestly correct, in view of the facts submitted. The contractor was adjudged a bankrupt on October 5, 1905, two days before the plaintiff in error filed its claim of lien on the property of Viaduct Place on account of the material in question. In the contractor's schedule in bankruptcy it was shown that the plaintiff in error was a creditor of the contractor on this claim for material, and that the claim was provable in bankruptcy. According to the agreement of facts, the plaintiff in error paid no attention to the proceedings in bankruptcy. It could have gone into the bankrupt court, and have established the amount of its lien and identified the use to which its material was put. It had notice that the bankrupt court was dealing with this debtor, the contractor, and all of his rights and liabilities. This case came on to be tried November 30, 1906. On July 21, 1906, the contractor, Clemmons, was given his final discharge in bankruptcy, and such discharge was set up by defendant in his plea. The amount due the contractor by Viaduct Place, as shown by the agreed statement of facts, had been set apart to Clemmons as part of his exemption. The discharge of the contractor relieved Viaduct Place, especially in view of the fact that the title of the indebtedness was vested in the defendant as part of his exemption. The plea of the defendant Viaduct Place, which is not denied, says that "demands had been made on this defendant by the trustee in bankruptcy for said J. F. Clemmons for the balance due by this defendant to said Clemmons on account of said work. This defendant shows that the exclusive jurisdiction of the assets of said J. F. Clemmons, part of which indebtedness of this defendant to said Clemmons on account of work done by him on said building, is vested in the United

States District Court, sitting in bankruptcy, and, if the plaintiff has any claim to or lien upon said fund or any part of it, the court of bankruptcy has full jurisdiction to adjudicate said claim." The plea proceeded further to state that the defendant withheld the amount due, as shown by the affidavit of Clemmons, made in accordance with the statute, to wit, the sum of \$51.15, which is mentioned in the agreed statement of facts. Under the very letter of the bankrupt act the court could not enter judgment against Clemmons, because he had been adjudicated a bankrupt and discharged. Being without power to render judgment against the contractor, the court could not render a general judgment against Viaduct Place; and the plaintiff's only remedy was to enforce against the specific property, into which its material went, a previous or contemporaneous judgment against the contractor, fixing the amount of the balance due the contractor by the property owner for material furnished. It is well settled that a special judgment, fixing a lien on the property of an owner in favor of one as to whom no privity of contract exists, cannot be obtained until there is first a general judgment for the claim against the contractor. *Lombard v. Trustees*, 73 Ga. 322; *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772; *Clayton v. Farrar*, 119 Ga. 37, 45 S. E. 723; *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32. It is held in *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A. 229, that even the process to secure an inchoate lien against one who is adjudged a bankrupt during the progress of the proceeding may be interrupted by bankruptcy proceedings. But this case is even stronger than the *Klipstein Case*; for in the present case Clemmons had been adjudged a bankrupt before any claim of lien was filed by the plaintiff in error. Before the claim of lien was filed, the debt was duly scheduled in bankruptcy, was provable in bankruptcy, and could be discharged in bankruptcy. For the plaintiff's right of lien to be perfected, it was bound to file a suit within 12 months and to procure a judgment against the contractor. As bankruptcy proceedings were already pending, the suit was destined to be of no avail, unless the bankrupt failed to procure a discharge. When the discharge was granted, and was pleaded in the suit, the last chance for the establishment of the special lien was obliterated. In the *Klipstein Case*, cited above, an effort was made to subject the property of a third person to garnishment proceedings. Before final judgment, affecting the rights of such third person, was rendered, there was no obligation as to such third person. The rendition of the final judgment was interrupted by the discharge in bankruptcy, and the bar thus interposed relieved and discharged the garnishee from all liability, notwithstanding a dissolution bond had been given. In the case at bar the Carey Manufacturing Company

sought to subject the property of Viaduct Place, a third person, so far as any contractual relation is concerned, to the payment of Clemmons' debt. Before this could be done, judgment against Clemmons was essential. Before such judgment could be rendered, discharge in bankruptcy intervened and made the rendition of a judgment against Clemmons impossible. And the plaintiff having without objection allowed the amount due by Viaduct Place to the contractor to be set aside as part of his exemption, not only would Viaduct Place, if judgment were rendered against it in this case, be compelled to pay the same amount twice, but the effect of the bar of the judgment of discharge was to relieve Viaduct Place and its property from all liabilities to the plaintiff in error. Under the admitted facts the judgment of the lower court appears to us to be a legal necessity.

Learned counsel for plaintiff in error cite the case of *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468, as authority for the proposition that in an action in which only the establishment of a special lien on specific property is sought, and no judgment in personam is prayed against the defendant, a plea to the effect that the defendant has been adjudicated a bankrupt presents no defense to the action. In that case a security deed upon his own property was given by the bankrupt more than four months prior to the bankruptcy. It was not in any manner affected by the bankruptcy proceedings, as there was a legal method of enforcing it without the necessity of a judgment against the bankrupt. From the statement of facts in the *McCall* Case it appears that the United States court passed an order allowing the plaintiff to prosecute her suit for the purpose of obtaining a special judgment and having her lien fixed against the property described in the deed. And in this case, if the plaintiff had proceeded in the United States court to bring to the attention of that court the fact that it claimed a special lien for the material furnished, it is to be presumed, following its prior ruling in the *McCall* Case, that the United States court would have arrested its proceeding as to the claim in question until the plaintiff, if entitled thereto, could have established its special lien, and thereupon would have directed that the amount admitted by the contractor to be due be applied to the payment of the special lien, instead of making it a part of the bankrupt's exemption. The holding in the *McCall* Case was to the effect that the fact that defendant had been adjudicated a bankrupt was no bar to the assertion of her lien by one who held a deed to the land as security for her debt. There is considerable difference between this and the assertion of a lien for material furnished to a contractor in building or repairing a building. In the one case, by law, the title vests in the holder of the security deed. In the other case the owner of the property may not even know of

the claim against his realty. The dealing in the first case is *inter partes*. In the latter the rights of third persons are affected. The property conveyed to secure the debt in the *McCall* Case could not be exempted so as to defeat plaintiff's lien. In the present case the plaintiff had no lien which would withstand or overcome the exemption, unless it had procured its recognition in the bankruptcy proceedings.

The cases of *Smith v. Zachry*, 115 Ga. 722, 42 S. E. 102, and *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100, are not in point. In the *Zachry* Case *Smith* was adjudicated a bankrupt more than a year after *Zachry* obtained his judgment. The court held that the lien was not lost because *Smith* had been adjudicated a bankrupt; and in this case, if the manufacturing company had obtained a lien by a judgment against Clemmons (instead of merely claiming a lien) prior to the adjudication in bankruptcy, our holding would be the same as in the *Zachry* Case. In the *Evans* Case there is nothing in conflict with what we now hold. All that is decided is that a valid lien, created on the property of the bankrupt more than four months before the filing of the petition in bankruptcy, is not affected by his discharge, and that after such discharge a creditor holding such a lien may proceed to enforce it against the property of the bankrupt in the state court. Counsel also cites the case of *Carter v. People's National Bank*, 109 Ga. 573, 35 S. E. 61. As construed by the Supreme Court in the *Evans* Case, *supra*, the only ruling made in the *Carter* Case with reference to the bankruptcy law is that "a plea interposed to a proceeding to foreclose a mortgage on land, in a superior court of this state, that pending the proceedings to foreclose the mortgagor was adjudicated a bankrupt, and praying that such proceedings be stayed for the period of 12 months, or until the question of the discharge in bankruptcy of the mortgagor is determined, is not good, and the court committed no error in sustaining a demurrer to the same." The cases of *Philmon v. Marshall*, 116 Ga. 811, 43 S. E. 48, *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433, and *Camp v. Young*, 119 Ga. 981, 47 S. E. 560, have no application to the issue before us. Each of these decisions passes upon liens already established and firmly fastened on the property of the bankrupt more than 4 months prior to adjudication.

If the question is, as distinctly stated by counsel for plaintiff in error, whether or not a valid vested lien of a materialman, under the state law, against the owner of property for improvement of his real estate, is divested by a petition in bankruptcy by or against the contractor, we would unhesitatingly answer, "No." But if the question as applicable to the facts of this case is whether a lien in process of establishment is prevented

from ripening by a discharge in bankruptcy, where the rights of innocent third parties are concerned (whose double liability might have been prevented by the plaintiff), we answer, "Yes." As to whether a mere petition in bankruptcy would have the effect of estopping the prosecuting and perfecting of the lien, it is not necessary now to decide, as a final discharge was admitted in this case. All of the cases cited are similar to the pending case. In *Kollock v. Jackson*, 5 Ga. 153, the factor's lien rested on actual possession of the property of the bankrupt prior to the bankruptcy. In *Louden v. Blandford*, 56 Ga. 151, the question raised here was not decided, but the lien was complete prior to the bankruptcy proceedings. In *Berry v. Jackson*, 115 Ga. 196, 41 S. E. 698, 90 Am. St. Rep. 102, the title to specific property was involved; the plaintiff in the trover proceedings, on the one hand, claiming the actual title, and the bankrupt resisting on the other. A fundamental distinction, however, between all the cases cited and the case at bar, is that in this case the plaintiff in error seeks to establish a lien on the property of a third person, whereas the cases cited treat only of liens already established on the property of the bankrupt himself prior to bankruptcy proceedings.

Judgment affirmed.

(1 Ga. App. 719)

McCABE v. STATE. (No. 370.)

(Court of Appeals of Georgia. May 3, 1907.)

LARCENY — WHAT CONSTITUTES HOUSE — WHARF.

A house or building, within the meaning of Pen. Code 1895, §§ 173, 179, defining larceny from the house, is a structure having a roof and lateral inclosure of some sort, in which persons live or work, animals are confined, or property is stored or contained. A wharf or landing place, where vessels are brought to discharge or take on cargoes, and where freight is placed awaiting removal, covered by a roof, but otherwise wholly uninclosed, is not a house or building, within the above sections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 48, 98.]

(Syllabus by the Court.)

Error from Superior Court, Oatham County; Cann, Judge.

One McCabe was convicted of larceny from a house, and brings error. Reversed.

O'Connor, O'Byrne & Hartridge, for plaintiff in error. William W. Osborne, Sol. Gen., for the State.

HILL, C. J. The defendant in the court below was indicted for the offense of larceny from the house; the house described in the indictment as "the storage wharf, same being a building of the Ocean Steamship Company of Savannah." The goods were piled up on the wharf, and sheds were built over the wharf for the protection of the freight from the weather. The evidence does not show

that this wharf was inclosed at the sides, and it is fair to presume that the wharf was simply a platform upon which the freight was stored, and was only protected from the top by the shed, and that there was no inclosure or protection on the sides. The main question for our decision is whether this structure constituted a house or building under sections 173 and 179 of the Penal Code of 1895, which define the offense of larceny from the house.

Under the common law there was no such offense as larceny from the house, but such offense was included within the definition of simple larceny. 4 Blackstone's Commentaries, 239. But, beginning with the statute of Henry VIII, the distinct offense of larceny from the house was created, the evolution as to the kind of house in which larceny could be committed being, first, the dwelling house and outhouses within the protection or curtilage of the dwelling house, and then any outhouse, shop, warehouse, or storehouse, and finally any building in which anything of value was contained or stored. The fact that such places were invaded to consummate the larceny made the offense more aggravated, and a severer punishment was inflicted than in cases of simple larceny. Our own statute is very broad in its classification of buildings protected; the language being, "any dwelling house, store, shop, warehouse, or any other building." The words "any other building" must be construed in connection with the character of buildings specifically enumerated. The building or structure protected by the statute must have the distinguishing features of a house. A house is defined to be "a place of abode or shelter; \* \* \* a building used for storing or sheltering something;" and a "building" is defined as "an edifice for any use; that which is built, as dwelling house, barn, etc." Standard Dictionary. The Supreme Court of Georgia, in particular cases, has made several very broad applications of the word "house," as used in the statute defining larceny from the house. In *Carter v. State*, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262, it declared that, "a freight car body, which had been detached from the wheels and placed upon permanent posts near a railway track at a station, and to which a platform had been attached, thus constituting a structure to be used as 'a freight warehouse,' and which is used for this purpose only, is a 'house,' within the meaning of section 136 of the Penal Code of 1895," defining arson. And in *Williams v. State*, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82: "A structure which is stationary, which is eight feet tall, covered with shingles and inclosed with wire, erected for the purpose of the safe-keeping of birds and fowls, is a house, within the meaning of our Code, which defines the offense of larceny from the house." In *Bone v. State*, 121 Ga. 147, 48 S. E. 986, the court upheld a conviction

tion of larceny from the house, where property was taken from a car in the union passenger depot in Atlanta. The specific question whether the depot was a house, in the meaning of the statute, was not before the court in that case. The contention was that the indictment should have been framed under section 185 of the Penal Code of 1895, which specifically makes it an offense to steal from a railroad car. The record does not disclose the kind of building the union passenger depot was, but the court treated it as "a permanent structure designed for the accommodation of passengers"; and it is fair to presume that it contained rooms for passengers and baggage.

Courts of other states have defined the word "house," or "building," as contained in larceny, burglary, arson, and disorderly house statutes. It is unnecessary to cite the decisions of those courts on the subject. In all of them the structure falling within the definition was not only covered by some sort of a roof, but was also enclosed in some way or by some kind of material. In other words, according to those decisions, a platform covered by a roof is not enough to constitute a house; but, in addition to the platform or roof, or floor, there must be some lateral inclosure—an inclosed structure, where people live or work, or animate property is confined, or inanimate property is stored or contained. The Supreme Court of Texas, in *Favro v. State*, 39 Tex. Cr. R. 452, 46 S. W. 932, 73 Am. St. Rep. 950, defines the word "building" in the burglary statute as "a fabric built or constructed; a structure; an edifice; \* \* \* a house for residence, business, or public use, or for shelter of animals or storage of goods. \* \* \* In the widest sense, any production or piece of work artificially built up, and composed of parts joined together in some definite manner; any construction." In *Willis v. State*, 33 Tex. Cr. R. 168, 25 S. W. 1119, it was held that a fruit stand built in the shape of a piano box, large enough for the owner to stand up in while making sales, and in which he slept and kept his clothing, was a house, within the contemplation of the burglary statute. It has also been held that a tent in which persons lived was a house. And even a covered wagon, in which a man and woman traveled and slept, was held to be a house. The law protects the humble tenant in his tent as well as his more fortunate neighbor in his palace, but the building must be protected from intrusion or trespass by some sort of material. It may be stone, wood, wire, or cloth. As was said by the Supreme Court of Indiana in *Schilling v. State*, 116 Ind. 205, 18 N. E. 685, "the house must be some sort of a building or inclosed structure." "Any structure which has walls on all sides and is covered by a roof, is a house." *Maul v. State* (Tex. Cr. App.) 26 S. W. 200. In this Texas case the building in question was inclosed by four sides, but had

no roof. And the Supreme Court of California, in *People v. Stickman*, 34 Cal. 245, in construing the burglary statute, held that the word "house" included every kind of building or structure "housed in."

We think a careful reading of the language of our statute contained in Pen. Code 1895, §§ 178, 179, bears out the construction that a house is something more than a mere covering or roof for a platform or wharf. "Larceny from the house is the breaking or entering any house with the intent to steal, or, after breaking or entering said house, stealing therefrom," etc. There must be some sort of house or inclosure to break or enter, and to steal from. We therefore hold that a wharf only covered by a shed, and open on all sides, with nothing to obstruct entrance, and wholly uninclosed, is not a house or building, within the statute defining "larceny from the house." Where there is doubt as to whether the offense is larceny from the house or simple larceny, the safe plan would be to have two counts in the indictment, charging both offenses. The decision of this court on the foregoing question rendering a new trial necessary, we do not decide the points made on the evidence.

Judgment reversed.

(1 Ga. App. 332)

#### BRAWNER v. MADDOX. (No. 27.)

(Court of Appeals of Georgia. March 1, 1907.)

##### 1. WRIT OF ERROR—RECORD—BILL OF EXCEPTIONS—INCORPORATION OF EVIDENCE—STATUTORY PROVISIONS.

The right given Civ. Code 1895, § 5529, is one the exercise of which is optional with the plaintiff in error. It is cumulative of the right to take the course pointed out in section 5528. The plaintiff in error is not required to prefer its use to the method laid down in section 5528.

##### 2. SAME — BILL OF EXCEPTIONS — SETTING FORTH EVIDENCE—SUFFICIENCY.

The brief of so much of the evidence as is "material to a clear understanding of the errors complained of," which is incorporated in the bill of exceptions in this case, is sufficient. Enough evidence admitted to be true is specified in the bill of exceptions and appears in the record to make clear the errors complained of.

##### 3. SAME — DISMISSAL — DEFECTS IN RECORD—STATUTORY PROVISIONS.

Even if this were not the case, this court has no power to dismiss the writ of error on that ground. Civ. Code 1895, §§ 5534, 5569. We therefore refuse to dismiss the writ of error.

##### 4. JUDGMENT — DEFAULT—ENTRY—STATUTORY PROVISIONS.

The entry "Def't" on the judge's docket is a sufficient entry of the fact that no defense has been filed in the case.

(a) The entry of the judge on his docket is in the nature of a memorandum for his use and guidance. No set formality is required for the judgment mentioned in section 5077 (judgment by default), except that "the court shall enter default on the docket, which shall be considered a judgment by default, without a formal entry thereof."

(b) The word "default" may be represented by an intelligible abbreviation.



##### 5. SAME—OPENING—DISCRETION OF COURT.

The opening of a default at a trial term, after the defendant conforms with the conditions imposed by section 5072, is a matter expressly within the discretion of the trial judge.

(a) That power conferred on him is ample and to be used in the exercise of a sound legal discretion.

(b) We are not prepared to say that this discretion was abused in this case, and therefore hold that no error was committed in opening the default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 265.]

##### 6. PLEADING—PETITION—SUFFICIENCY.

There was no error in sustaining defendant's demurrer to plaintiff's petition.

(Syllabus by the Court.)

Error from City Court of Atlanta; Reid, Judge.

Action by J. J. Brawner against J. J. Maddox and another. A default judgment against defendants was by order of the court opened, and defendants' demurrers to the petition sustained, and plaintiff brings error. On motion to dismiss writ of error. Motion overruled, and judgment affirmed.

F. E. Radensleben, for plaintiff in error.  
C. D. Maddox, for defendants in error.

**RUSSELL, J.** The defendant in error has filed a motion to dismiss the writ of error; and as this motion, if sustained, will dispose of the case, we will consider it first. The first ground of the motion sets up that the plaintiff in error has failed to incorporate in the bill of exceptions a brief of so much of the evidence as is material to a clear understanding of the errors complained of. By Civ. Code 1895, § 5528, a duty is imposed on the judge, as well as on the plaintiff in error; and hence this ground of the motion calls for a review of the actions of both. Paragraphs 1, 2, and 3 of section 5528 read as follows:

"(1) If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding.

"(2) If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted.

"(3) The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of."

We think that the plaintiff in error did what he was required to do by paragraphs 1 and 2. We think the trial judge did what he was required to do in paragraph 3. It is true plaintiff in error did not detail in toti-

dem verbiis, or set forth in chronological sequence, the statements coming from the mouths of the witnesses as they were introduced on the hearing of the motion. A brief of the evidence is what is required, and the briefer the better, and certainly the more helpful to courts of review in reaching the merits of a case. In the bill of exceptions certified by the judge it is stated that all recitals in the motion (to open the default) are "accepted as true and undisputed by the plaintiff in error," and thereafter he asks to be sent up, as part of the record, the motion, the statements of which, he says, are facts. It amounts to saying: "All the evidence, material to a clear understanding of the errors the motion, and I ask it to be sent up." A fact admitted is not required to be otherwise proved; and a statement of a fact cannot be better verified than by the admission of its truth by the opposite party. We think that it will hardly be questioned that the able judge in the court below so understood it, or he would have complied with the duty laid upon him in Civ. Code 1895, § 5528, par. 3, and would have "changed it so as to make it contain all the evidence necessary to a clear understanding of the errors complained of." This court approves the manner in which this duty was performed by the trial court. Certainly it would have been impertinent for the defendant to have proved more than he stated in his motion, and plaintiff in error says he admits all the recitals in the motion to be true. No testimony, no matter how many witnesses repeated it, nor how great their respectability and reliability, could have proved the statements in the motion any better, or have made the evidence any more full, than did this admission of their truth. We cannot determine from the record whether this admission was made in the court below or not; but, if it had been as full and sweeping there as it appears in the bill of exceptions, we feel sure that the able trial judge would not have uselessly consumed time in hearing the evidence as to these facts, the law declaring them proved when admitted by the opposite party. It was the duty of the judge to make the bill of exceptions contain all the evidence material to a clear understanding of the errors complained of, and we think that duty was performed, not only as fully as required by law, but in such a way as to be practically helpful to this court. When plaintiff in error accepted all the recitals in the motion now before us as true, he said in effect: "Upon this agreed statement of facts (with regard to which there can be no dispute), I contend that the judge erred in opening the default, and here are the facts which were addressed to his discretion." No doubt the trial judge so understood it, and so do we.

In the brief of the defendant in error further objection is urged to the certificate of the judge in that it reads, "certain recitals

of the evidence," while section 5532, as is insisted, requires the wording to be either "contains all the evidence" or "specifies all the evidence." We are not required to consider this objection, because it is not set forth in the motion to dismiss; and we will only say, in passing, that the bill of exceptions shows, in the first place, that it is not true in fact. The words used, instead of being "certain recitals of the evidence," are, "contains recitals of the evidence." And, in the second place, while it is true that section 5532 (Acts 1889, p. 114) prescribes a set form for the judge's certificate, it is also true that a later enactment (Acts 1893, p. 52, codified as section 5534) expressly provides that it shall be the duty of the judge to whom any bill of exceptions is presented to see that the certificate is in legal form before signing the same; and any failure of any judge to discharge his duty in this respect shall not prejudice the rights of the parties by dismissal or otherwise. And the uniform current of authority in this state approves the rule to which the concluding portion of this section gives utterance.

The second ground of the motion to dismiss complains that the plaintiff in error, not having incorporated in the bill of exceptions a brief of the evidence, also failed to have such brief approved and sent up as provided in Civ. Code 1895, § 5529. This section presents a right the exercise of which is optional with the plaintiff in error; and section 5531 specifically declares that "the plaintiff in error, at his election, may incorporate the brief of so much of the evidence as is necessary to a clear understanding of the errors complained of, in the bill of exceptions, rather than have the same sent up in the record." Having already ruled that section 5528 was effectually complied with, and, even if it had not been so complied with in this case, that it is not good ground for dismissal, there is, in our opinion, no merit in this ground of the motion. It is therefore adjudged that the motion to dismiss be overruled and refused.

The facts in this case are as follows: J. J. Brawner brought a suit against J. J. & J. E. Maddox, to the November term, 1905, of the city court of Atlanta. The defendants failed to file either answer, demurrer, plea, or other defense at said term, as required by law, or afterwards during said term. At the regular appearance call of the court for said term the case was called, and, no defense having been filed, defendants were in default and the court so entered upon its docket. The defendants did not, during said first term, when the default was entered against them, make any motion to open the default. At the next term (January, 1906) the defendants presented to the court a written motion or petition praying the court to open the default and to allow them to plead. The motion set up, as reasons why the default should be opened, that J. E. Maddox, one of

the members of the firm, had charge of this particular kind of business; that when he was served the copies were laid upon his desk, and he fully intended to file proper pleadings by way of defense; that at that time J. E. Maddox was sick, barely able to be at his office or attend to business, and he forgot the papers lying on his desk; that important matters of business called him to New York, and during his absence the papers became misplaced and there was nothing to remind him of them on his return; that defendant's attorney was also sick at that time, for which reason defendants failed to file proper demurrers, pleas, and answers; that J. J. Maddox, the senior member of the firm, was also in bad health and was unable to attend to any business; and that defendants had a meritorious defense, were ready to plead instantler, and announced ready to proceed with the trial. This petition to open the default was heard at the March term in open court, the defendants introducing an affidavit substantiating its allegations. The plaintiff accepted the recitals therein as true and undisputed, and offered no evidence. The court thereupon passed an order opening the default and allowing defendants to file their plea, answer, or demurrer to plaintiff's petition, upon payment of costs; and this action of the court is one of the exceptions of plaintiff in error. Upon the showing made the court might either have refused to grant the petition or have granted it and allowed the default to be opened. Civ. Code 1895, § 5072, provides that: "At the trial term the judge in his discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of a plea, or for excusable neglect, or where the judge from all the facts shall determine that a proper case has been made for the default to be opened on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instantler, and announce ready to proceed with the trial." There was, for some time after the passage of the act of 1895, doubt as to whether there were any terms upon which a default could be opened after the trial term. We think it now well settled that a default cannot be opened after the trial term has passed. *Deering Harvester Co. v. Thompson*, 116 Ga. 419, 42 S. E. 772. But at the trial term, both by the terms of the statute as well as by numerous decisions, it is left a matter wholly within the discretion of the trial judge whether he will open the default at the trial term, provided always that the conditions required by section 5072 be complied with. And by special act the provisions applicable to judges of the superior court are made applicable to the city court of Atlanta in the matter of opening defaults. Acts 1902, p. 117.

The defendants further insisted that the

entry made by the judge did not put the case in default. The consideration of this contention is of no great moment, inasmuch as we hold that the judge did not err in opening the default. But we think that the entry made by the judge was a perfectly good judgment by default, and, if it had not been opened, would have entitled the plaintiffs to take a verdict at the trial term. It is better practice to make entry on the docket by using the words "in default," as prescribed by section 5069; but as the entries on the bench docket have been held to be mere memoranda for the information and guidance of the judge and for his special use, we are of the opinion that the abbreviation "Def't" was just as intelligible, and equally as effective to inform the court at the trial term that the defendant had not filed any defense at the appearance term, as if the words "in default" had been written out in full. The wording of section 5072 is such that it conveys very ample powers as to opening defaults—not only providential cause, which is broad, and excusable neglect, which is still broader, but finally, as if reaching out to take in every conceivable case where injustice might result if the default were not opened, the section goes on to say, "Where the judge from all the facts shall determine that a proper case has been made," etc. We cannot say that the learned trial judge abused the discretion, as insisted by plaintiff in error. It is true that in *Cannon v. Harrold*, 61 Ga. 158, it was held that a motion to vacate a judgment by default, on the ground that defendant was sick and could not put in his plea, was properly overruled; no reason being shown why the plea was not filed before the trial term. In *Athens L. M. Co. v. Myers*, 98 Ga. 397, 25 S. E. 508, it was held that it was not error to refuse to set aside a judgment by default, made at the same term at which the judgment was rendered, where no defense had been made to the act on account of the gross negligence of the defendant or his counsel, though defendant's showing contained allegations which might have constituted a good defense. In *W. U. Tel. Co. v. Lark*, 95 Ga. 806, 23 S. E. 118, a refusal to allow a default opened, where the motion was made upon the ground that a plea had been sent by mail to the clerk in time to be filed at the first term, was upheld. But all of these cases were decided prior to the passage of the act of 1895, now embodied in Civ. Code 1895, § 5072. We apprehend the true rule for the exercise of the discretion conferred by section 5072 to be laid down in *Brucker v. O'Connor*, 115 Ga. 95, 41 S. E. 245: "While this section gives to the judge a broad discretion, it does not mean that he can act arbitrarily, but that he may exercise a sound and legal discretion. It does not give him authority to open a default capriciously or for fanciful or insufficient reasons. Excusable neglect does not mean gross negligence. It does not mean a willful disregard of the

process of the court, but refers to cases where there is a reasonable excuse for failing to answer. The Code gives a judge no authority to open a default, after the term has passed, for reasons that fall short of a reasonable excuse for the negligent failure to answer." See, also, *Kellam v. Todd*, 114 Ga. 981, 41 S. E. 39, and *Ingalls v. Lamar*, 115 Ga. 296, 41 S. E. 573. But while this court might, in the first instance, have refused to open the default on the showing made in this case, the law has such regard for and confidence in the proper exercise of discretionary powers of those of its ministers to whom it commits such authority that every presumption is against the abuse of this trusted discretion. We will not say, therefore, that the judge erred when he determined "that a proper case had been made for the default to be opened."

After the opening of the default the defendants demurred to the plaintiff's petition. In addition to general demurrer, defendants demurred specially upon the ground that plaintiff alleged no demand for the property, the value of which he sought to recover, because his petition shows that he has never paid the debt which he alleged he owed the defendant and to secure which he surrendered the property to defendants, and because, under the allegations of plaintiff's petition, the suit is really a petition for an accounting, of which the city court of Atlanta had no jurisdiction. Upon the consideration of the petition we think the court did not err in sustaining these demurrers; no amendments of the petition being offered.

Judgment affirmed.

(1 Ga. App. 338)

**HOLMES & CO. v. POPE & FLEMING.**  
(No. 55.)

(Court of Appeals of Georgia. March 1, 1907.)

**1. GARNISHMENT—PROCEDURE.**

Subject to a few exceptions (as, for instance, as to torts which a garnishee may have committed against a defendant), a judgment creditor may by garnishment acquire a control over the choses in action of the defendant, and thereby in effect bring suit against his debtor's debtor; and, though by garnishment the creditor may stand in the debtor's shoes as to choses in action, he enjoys the privilege cum onere.

**2. SAME—PROPERTY SUBJECT.**

For the converse is likewise true: "Creditors cannot reach by garnishment any assets which the debtor himself could not recover from the garnishee." *Tim v. Franklin*, 13 S. E. 259, 87 Ga. 95. "What one cannot recover himself cannot be recovered by garnishment against him." *Bates v. Forsyth*, 69 Ga. 365.

**3. SAME.**

Consequently, as to a fund in the hands of a garnishee to be advanced under a contract and in pursuance thereof and held for one special purpose only, as the debtor cannot compel its payment to other purposes foreign to the contract, neither can the garnishing creditor extend his rights beyond those of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 94, 102-104.]

#### 4. SAME—SET-OFF BY GARNISHEE.

As to assets in the hands of a garnishee belonging to a nonresident of this state, such garnishee is entitled to set off any indebtedness owed by said nonresident defendant in garnishment, even though such indebtedness be not due. The question as to whether such garnishee is or is not indebted to the nonresident defendant, or has assets of such defendant in his hands, should be ascertained by a comparison of their respective claims, and answer made accordingly. Civ. Code 1895, § 3755.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 255-259.]

(Syllabus by the Court.)

Error from City Court of Richmond County; Eve, Judge.

Action by Holmes & Co. against A. M. Calhoun, with garnishment on Pope & Fleming. Judgment for garnishees, and plaintiffs bring error. Affirmed.

C. P. Pressley, for plaintiffs in error. W. H. Fleming, for defendants in error.

RUSSELL, J. Holmes & Co. sued out an attachment against A. M. Calhoun as a nonresident, and served a summons of garnishment on Pope & Fleming, who filed an answer denying the indebtedness. The plaintiffs in attachment traversed the answer of the garnishees, and at the conclusion of the evidence the court directed a verdict in favor of the answer of the garnishees and against the traverse of the plaintiffs. The plaintiffs made a motion for new trial, which was overruled, and the overruling of this motion is the error assigned here.

A motion to dismiss the writ of error was duly presented here, and will be first considered. The motion is as follows: (1) "Because there is no sufficient assignment of error, the only assignment of error being the following recital in the bill of exceptions, namely: 'To which order of Judge Eve, overruling said motion [for new trial] and denying said new trial, the said John F. Holmes & Co. did then and there except and assign the same as error.' From their recital it does not appear upon which one or more of the grounds of motion for a new trial assignment of error is predicated, nor does it appear that plaintiff in error made any exception to the said ruling at the time of presenting the bill of exceptions." (2) Because the grounds of motion for new trial were certified as true, "subject to correction at the hearing," and it does not appear that said grounds were subsequently approved without qualification. (3) Because the brief of evidence contains only a brief of the oral testimony, and does not embrace in any form any of the written documentary evidence introduced at the trial; the said written documentary evidence being included as part of the transcript of the record, and not in the brief where it legally belonged.

We find no merit in this motion. The assignment of error is sufficient under numerous rulings of the Supreme Court. "A mo-

tion for a new trial being based upon several grounds distinctly set forth therein, an assignment of error in a bill of exceptions that the court erred in overruling the motion is sufficiently plain and specific in setting forth the errors complained of, under the act of November 11, 1889." Gray v. Phillips, 88 Ga. 199, 14 S. E. 205. See, also, Hardison v. Burr, 73 Ga. 125; Erskine v. Duffy, 76 Ga. 602; Futch v. State, 90 Ga. 472, 16 S. E. 102. The second ground for motion to dismiss is because the grounds of the motion for new trial were certified as true, subject to correction at the hearing. This ground of motion to dismiss is obliterated by the positive statement in the bill of exceptions that the recitals of fact contained in the motion for new trial are true and correct. There is no merit in the third ground of the motion to dismiss. While the documentary evidence should always be briefed, it appears from the approved brief of evidence that the rule was substantially complied with in this case. And it is "unlawful \* \* \* to dismiss any case for any want of technical conformity to the statutes or rules regulating the practice, \* \* \* where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case," etc. Civ. Code 1895, § 5569. In this case the full copies may be treated as mere surplusage. Rudolph v. Underwood, 88 Ga. 665, 16 S. E. 55 (9). "Where the bill of exceptions and the judge's certificate both conform to the act of 1889 for bringing cases to this court, and the error complained of is the overruling of a motion for new trial, the writ of error will not be dismissed because this court may be of opinion that some parts of the record specified are not material."

For another reason the motion to dismiss is not well taken. "It appears that the brief was agreed upon as correct by counsel for both the movant and the respondent in the motion for a new trial, and the bill of exceptions states affirmatively that this brief was approved by the court and ordered filed. The record also discloses that the motion for a new trial was heard and determined without objection of any kind to the brief of the evidence. In other words, it was, at the hearing, treated by the respondent as coming up to all the legal requirements. In view of these facts, it was too late for him, after the motion for a new trial had been heard upon its merits, to raise any question as to the form of the brief, or to make complaint that it was not duly filed." It is not the policy of our law to favor dismissal, but rather its constant aim to reach substantial justice without undue regard to mere technicalities. A motion to dismiss is not the proper manner or the remedy to compel compliance with Civ. Code 1895, § 5528. See sections 5568, 5569; Rudolph v. Underwood, 88 Ga. 665, 16 S. E. 55; Southern M. Co. v. Brown, 107 Ga. 264, 33 S. E. 73; Pullen v. State, 116 Ga.

555, 42 S. E. 774. As held by this court in *Brawner v. Maddox*, 1 Ga. App. 332, 58 S. E. 278, a writ of error will not be dismissed if the bill of exceptions and the record disclose what may be material to a clear understanding of the errors complained of. In this case, while it was improper to have sent up full copies of the documentary evidence, the court is fully and clearly apprised by the brief of evidence of everything material therein, and the full copies can well be treated as surplusage, the costs of which, in case of reversal, might be taxed against the plaintiff in error, but which do not require the severe penalty of dismissal. The motion to dismiss the writ of error is therefore refused.

On the trial of this case it appeared that Mrs. Calhoun, against whom a judgment was rendered on an attachment as a nonresident, had procured a loan of money from the garnishees, Pope & Fleming, and that a balance of said loan was still in the hands of Pope & Fleming. This sum Holmes & Co. sought to reach by process of garnishment. It further appeared that the fund in the hands of Pope & Fleming was part of a loan advanced for one specific purpose, to wit, to aid Mrs. Calhoun in her farming operations—assist her to produce a crop of cotton, which, as was contracted, should afterwards be handled and sold upon commission by Pope & Fleming as cotton factors. Not only was the money to be used for only one purpose, but there was a benefit in the contract to Pope & Fleming, who were to receive commission on a fixed number of bales of cotton to be raised by Mrs. Calhoun and to be handled by them. The consideration inducing the loan was less affected by the interest on the money than by the larger commissions on the cotton to be delivered, and the single purpose for which the money was advanced was to aid in raising that crop. In their amended answer the garnishees claim that there was no indebtedness on their part subject to garnishment, for the following reasons: "Mrs. Calhoun is a nonresident of the state of Georgia, as appears from the affidavit on which the attachment was sued. On the date when the summons of garnishment was served, and continuously and up to and beyond the date of filing the answer, to wit, July 3, 1905, Mrs. Calhoun was indebted to Pope & Fleming on the note for \$524.89, dated March 24, 1905, due November 1, 1905. The largest amount of money owed by Pope & Fleming to said Mrs. Calhoun at any time from the service of the summons of garnishment on May 10, 1905, was \$500, the amount which they agreed to advance for the express purpose of raising crops on the plantation in South Carolina, on which crops Pope & Fleming had a lien for the repayment of said money, and which sum was placed to her credit on March 24, 1905; and on July 3, 1905, the balance due as shown by the books was \$72.30, Pope & Fleming having paid out on drafts the following sums: \$200, April 17, 1905; \$225, May 6, 1905;

\$270, June 6, 1905. Mrs. Calhoun was also indebted to Pope & Fleming in the sum of \$75 under a written contract to send Pope & Fleming, as commission merchants, for sale, all the crop of cotton, not less than 50 bales, which was to be raised by Mrs. Calhoun on said plantation; and, in the event the 50 bales were not sent in whole or in part, a payment of \$1 per bale was to be made for the deficiency. At the date of filing the answer to said garnishment on July 3, 1905, the crops on said plantation had not matured, and the expense of making and gathering the same had not been paid, and hence the purpose for which the money was advanced under the terms of the contract above referred to had not been performed, and a diversion of the whole or any part of said money by Mrs. Calhoun, or the seizure thereof by any creditor, would necessarily have been an injury to Pope & Fleming, and would have prevented the fulfillment of said contracts." Holmes & Co. traversed the answer of the garnishees. On that issue trial was had, and the evidence introduced by the plaintiff fully sustained all the material allegations of fact contained in the answer of the garnishees. The judge directed a verdict against the traverse and in favor of the garnishees. Holmes & Co. filed a motion for new trial, which was overruled, and they excepted.

We think there was no error in refusing a new trial, because the verdict was demanded under the evidence by either one of two legal reasons: The money, which Pope & Fleming were still due to Mrs. Calhoun under the contract, was to be advanced only for one special purpose beneficial to them; and, secondly, the defendant being indebted to them on a note, they were entitled to apply any amount they might be due her toward the payment of their note, although it was not due, because she was a nonresident. Generally a judgment creditor may acquire by garnishment a control over the choses in action of the defendant, and thereby in effect bring suit against his debtor's debtor; but there are many exceptions to this rule, for there are cases in which a creditor may enforce claims where the debtor could not, and, conversely, the debtor may proceed where the creditor could not. Secret liens and fraudulent deeds may blind the one and be ineffective against the other. On the other hand, the debtor may sue for torts; but the creditor cannot make such a cause of action available even by a process of garnishment. *Williams v. Williams*, 122 Ga. 180, 50 S. E. 52, 106 Am. St. Rep. 100. But where by garnishment the creditor is placed in the shoes of the debtor as regards the garnishee, he enjoys that privilege in connection with the burdens of the position; for what the debtor cannot recover he cannot reach. The fund in the hands of Pope & Fleming, if subject to be advanced to Mrs. Calhoun without limitation, could be reached by Holmes & Co. But as the uncontradicted evidence showed that

hirer, such person is, on conviction, to be punished as a common cheat and swindler. This is the distinct class of those who get the money on the faith of the contract, but never set to work. The fraudulent intent antedates the contract. The second class is composed of those who, after making a contract, procure money or other thing of value with intent not to perform the service. This includes all those who, being already under contract, then conceive the fraudulent intent. The fraudulent intent must antedate the full performance of the contract, but need not have existed before the contract. The statute makes two distinct offenses, and the defendant is entitled to know whether he is charged with both, or one of them, and, if only one, which one he is required to answer. And he should be so charged in the accusation as to enable him to prepare his defense. It appears, from the accusation, that this defendant was only charged with the second offense in the act—cheating and swindling after the contract was made.

The accusation alleges that "after having contracted with M. A. Kilas to perform labor for him as a farm laborer, by entering into a contract with said Mathew Kilas to work a crop on halves with him for the year 1906, \* \* \* did, with the intent not to perform said labor, procure from said Mathew Kilas the sum of \$55.70 in money, did without any excuse fail to perform said labor, thereby damaging and injuring the said M. A. Kilas in the sum of \$55.70," etc. The prosecutor testified that the defendant contracted with him in December, 1905, to work with him and to run a one-horse farm on halves on his (the prosecutor's) place for the year 1906; that the defendant moved on the prosecutor's place in January, 1906, made his crop, and laid it by; and the prosecutor had no cause of complaint as to the defendant's working the crop, but he would not gather his crop as he should have done. Defendant and his family gathered some of the crop, but would not gather it all, and witness had to employ cotton pickers to gather some of it. On December 22, 1906, defendant moved off prosecutor's place, and left 500 or 600 pounds of seed cotton in the field. Prosecutor furnished defendant, on the faith of the contract of labor, \$5 a month in cash from January to August, paid W. J. Kidd \$10, and Dr. Griffin \$22, for the defendant, and furnished to the defendant merchandise and other things (of which he had an account on his books at home). The total amount furnished to the defendant, including the money advanced, was about \$200. Prosecutor further testified that defendant made 4 bales of cotton, the cotton seed therefrom, and 75 bushels of corn, one-half of which, under their contract, belonged to defendant; but witness got all of this, and, after he gave him this credit, defendant still owed him \$55.70, and moved of his place owing him. The warrant put in evidence showed that it was sworn out on February 4,

1907. The defendant stated that he and his family gathered all the crop in the fall that they could gather; that out of the four bales of cotton the prosecutor only let him have \$3 to buy provisions, and did not let him use any of the corn for bread; and that the prosecutor would not let him have bread out of the field, nor furnish him with money with which to buy food. He stated that he completed his contract and gathered all of the crop before he moved away, about Christmas, 1906.

The objections to the accusation were waived by the joinder of issue, and cannot be considered; and we will not consider the exceptions in regard to the different initials and name by which the prosecutor was designated in the accusation, because (if Mathew Kilas and M. A. Kilas are not one and the same man) the fact that the accusation sets forth that defendant entered into a contract with Mathew Kilas and concludes that M. A. Kilas was injured would have afforded good ground for general demurrer, as setting forth no offense, inasmuch as a prosecution under the act of 1903 will not lie for injury to any one except the hirer.

We think the court erred in refusing a new trial upon the eighth ground of the motion. The court allowed the witness Kilas to testify, and admitted in evidence, over the defendant's objection, the statement from that witness, that he had furnished merchandise and other advances, which, together with the money furnished, amounted approximately to \$200, and, after receiving all of the crop made by defendant and crediting him with it, it still left defendant indebted to him \$55.70. The objection insisted on at the time was that this evidence was illegal, irrelevant, and inadmissible. We think that the objection is well taken. It was certainly irrelevant, to the charge made in the accusation (that the defendant had procured \$55.70 in money at one certain time with fraudulent intent), to prove anything in regard to "merchandise and other articles" furnished at various other times. The evidence was illegal, because irrelevant and inadmissible, and because it plainly established the fact that the subject-matter of the prosecutor's evidence was the unpaid balance of an indebtedness running through an entire year, for which the prosecution could not be maintained, instead of being an amount of money alleged to have been illegally procured by means of a fraudulent intention formed at a particular time. It is very plain to us that the objection to the evidence should have been sustained; and, if this evidence be rejected, there is none upon which the judgment of guilty can rest. The excuse given by the cropper in this case for even his temporary absence from the farm was good—that he is a father, and his family had to have food, and his employer failed to furnish it, and even refused to let him have corn from the field for bread. And this statement was uncontradicted, even by the prosecutor. But

as the court did not believe it, we will, for the purpose of the case, eliminate it from the record. *Lamar v. Prosser*, 121 Ga. 154, 48 S. E. 977. This statute was not intended to provide a means of an accounting and to secure effectual settlement by laborers and croppers at the end of the year. The dread of a criminal sentence is more effective than a worthless fl. fa. The hirer cannot take advancements which may have been procured by his employé with an honest intention to perform service, and to those add advancements fraudulently procured, and, by striking a balance, assume that the balance is the amount procured in fraud by the defendant. The intent to defraud must exist at some particular time, and with reference to some particular advancement. It can exist as to more than one transaction, but, in that event, is a distinct offense, and must be so charged and proved.

Failure to return the money is one of the circumstances from which, by the terms of the second section of the act, the intention to cheat may be presumed, and failure to perform labor is another; and yet both of these, by the very terms of the statute, may be nullified, if the employé had good and sufficient cause for neither paying nor working. The statute was not intended to enforce contracts, or collect debts uncollectible by ordinary process. If, by reason of sickness or other unavoidable cause, the contract of labor cannot be performed, nor the money repaid, neither the nonpayment of the debt nor the failure to work raises the presumption of a fraudulent intent. The hirer must show loss or damage resulting from the particular fraudulent transaction upon which the prosecution is based—either partial or total loss of the money he advanced, or the labor he lost; but that is merely for the reason that the offender is deemed a common cheat and swindler, and it is elementary that there can be no cheating without proof of loss. The offense cannot be proved, therefore, without proof of loss and damage. But proof of loss and damage will not alone suffice to establish guilt. For instance, in the present case, if the defendant had acted, with regard to the cultivation of his crop, in the manner that the prosecutor testified that he did, and hail or wind, or a cloudburst, had destroyed it, the hirer's loss would have been far greater than (without giving the cropper any credit for his cotton seed) he estimated it to be, and yet no one would seriously insist that the mere procuring of money and advances, the failure to perform service or to repay the money with interest, no matter what was the hirer's loss, would render the defendant guilty of cheating and swindling.

The state alleged that \$55.70 was procured with fraudulent intent, as the transaction on which it planted its case. It was obliged to select a certain definite transaction (unless it preferred, either in the same or in different counts, to charge more than one) in

which the defendant, with the intent of not performing the service, procured a definite sum or definite articles of value, with the definite fraudulent purpose of causing loss or damage by not repaying, and of thereby cheating the prosecutor. The legal evidence totally failed to show that the defendant ever received the amount of money alleged in the accusation at the time alleged, or at any other time within two years before the date of the accusation. This court is most reluctant in any case to set aside the verdict or the judgment of a court acting as a jury, and will never disturb such finding on the ground that it is contrary to evidence, where there is any evidence to support it; but, where there is no evidence to authorize the verdict, it is contrary to law, and must for that reason be set aside.

Judgment reversed.

(1 Ga. App. 794)

EVERETT, RIDLEY & CO. v. HOLCOMB.  
(No. 184.)

(Court of Appeals of Georgia. May 10, 1907.)

1. APPEAL—REVIEW—DISCHARGE IN BAIL-TROVER.

If a judge, after hearing evidence upon a petition for discharge in bail-trover proceedings, shall find that the applicant is, under the provisions of Civ. Code 1896, § 4608, entitled to be discharged upon his own recognizance, and there is some evidence to support that finding, it will not be set aside by this court, unless the discretion of the judge is manifestly abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4020, 4028.]

2. ARREST—BAIL-TROVER—RELEASE.

While the provisions of the Code in bail-trover proceedings contemplate imprisonment in jail, the defendant may petition to be released from any detention against his will by a sheriff or his deputy by virtue of proper bail process.

3. SAME—SHERIFF'S RETURN—TRAVERSE.

In proceedings based upon such a petition, a traverse to the sheriff's return upon the bail process is too late, if filed after pleading to the merits.

(Syllabus by the Court.)

Error from City Court of Sandersville; Hyman, Judge.

Action by Everett, Ridley & Co. against J. H. Holcomb. From an order discharging defendant on his own recognizance, plaintiffs bring error. Affirmed.

R. Douglas Feagin, for plaintiffs in error.  
A. R. Wright and T. W. Hardwick, for defendant in error.

CANN, J. On August 23, 1905, J. H. Holcomb, in the name of his wife, M. C. Holcomb, transferred in writing to Everett, Ridley & Co. certain open accounts due her. On November 2, 1906, Everett, Ridley & Co. brought trover against J. H. Holcomb therefor, alleging that they had delivered to him the said accounts, to collect, and to turn over the proceeds as fast as collected. Demand was alleged to have been made upon him November 13, 1905, April 7, 1906, and October

26, 1906. The value of the property was stated to be \$1,250. On November 3, 1906, the sheriff made his return that he had served the petition and process, and executed the bail process, "by arresting the said J. H. Holcomb, and have him now in custody." On the same day J. H. Holcomb petitioned, in proper form, the judge of the city court of Sandersville for discharge from imprisonment, and thereupon the judge issued a rule for Everett, Ridley & Co. to show cause why the defendant should not be discharged. On December 4, 1906, Everett, Ridley & Co. waived the five-day notice required by the statute, and agreed that the hearing be had on December 7, 1906. The hearing was held in conformity with this agreement, without any traverse of the sheriff's return until after pleading to the merits of the application for discharge. During the hearing the defendant testified that he was not able to give a solvent bond for \$2,500, as required; that he had no property or money; that neither Everett, Ridley & Co., nor any one for them, had put in his hands for collection the accounts alleged; that he had not held them for collection for Everett, Ridley & Co.; that he had not been in possession, custody, or control of those accounts; that he was not, at the time of the hearing of the application for discharge, in possession, custody, or control of them, and was not on October 31, 1906, the day the affidavit for bail was made, and has not been since; that he has no money in his possession arising from the collection of those accounts; that he has no money of Everett, Ridley & Co.; that he was in custody at the time he made application for discharge, and has been in the custody of the sheriff ever since; that the deputy sheriff, in whose charge he was, did not permit him to go anywhere he wanted to. R. H. White, a witness for the plaintiffs, testified that he was a member of the firm of Everett, Ridley & Co.; that the affidavit for bail was true in every particular; that the defendant had possession of the property when he went to see him in November; that the defendant had the custody of M. C. Holcomb's stock and books; that he has never known of anybody else having custody of the property; that on April 7, 1906, he went to see the defendant as the agent of his wife, M. O. Holcomb, and asked him to deliver to Everett, Ridley & Co. those accounts, and that the defendant did not at that time deny the title of Everett, Ridley & Co. to them; that he said he did not consider those he had not collected worth anything; that he admitted having the accounts in his possession in April, 1906; that in March, 1906, he wrote Holcomb something regarding them, and had his letters here; that he knew personally, from having talked with the defendant, that he had collected some of those accounts; that he saw defendant November 13, 1906; that Holcomb made a statement at that time as to what accounts he had collected, and showed White a list of

the accounts he had collected; that he did not deliver to White the money he had collected for them; that White made a demand upon him for the money, and the response Holcomb made to the demand was that he did not have it and could not deliver it; that as to the other accounts he gave White very little satisfaction, and told him some of them were not worth anything, that the ones he had collected were all that were worth anything, and declined to deliver the accounts; that the mercantile business of M. C. Holcomb was terminated some time prior to the witness' visit in April, 1906, about January, 1906; that J. H. Holcomb said he had possession of those accounts since that time; that up to the time of his demand, April 7, 1906, the witness presumed that M. C. Holcomb had signed the transfer of the accounts from herself to Everett, Ridley & Co. The sheriff, a witness for Everett, Ridley & Co., testified that he took the defendant in charge; that the defendant was partly imprisoned at the jail, but was not locked in a cell, because he had no cell to lock him in; that he was in custody; that he was permitted to go home the day he was arrested, and was put in the charge of a deputy living some distance from the county seat. The deputy was not in Sandersville, the county seat, with the defendant, on the day of the trial. After hearing the evidence the judge discharged the defendant, J. H. Holcomb, upon his own recognizance, to appear at the January, 1907, term of the city court of Sandersville, to answer the plaintiff on the merits of the action of trover brought to that term of the court. To this judgment Everett, Ridley & Co. excepted.

1. Under Civ. Code 1895, § 4604, the property, at the time of the making of the affidavit, must be in the possession, custody, or control of the defendant, unless it affirmatively appears that, since the plaintiff's affidavit was made, the defendant has acquired the power of producing the property. *Ragan v. Chicago Packing Co.*, 93 Ga. 712, 21 S. E. 143. There was little, if any, testimony to show definitely that either of these conditions existed. The hearing upon an application for discharge without security is a summary one to hear evidence upon the facts contained in the petition for discharge before the judge of the court in which the suit is pending, and if he should find "that the petitioner can neither give the security nor produce the property, and that the reasons for the nonproduction are satisfactory, he shall discharge the petitioner upon his own recognizance, conditioned for his appearance to answer the suit brought; otherwise, he shall recommit him to custody." Civ. Code 1895, § 4608. As was stated by Justice Simmons in *Ragan v. Chicago Packing Co.*, *supra*, this provision of law "means that even if a man does obtain the possession of personal property illegally and wrongfully, and disposes of it, he may, upon being required in a proceed-



ing of this kind to produce the property or give security therefor, be discharged if he gives the judge satisfactory reasons for his inability to do so; and it is not necessary for him to show that the property was lost by misadventure or by blameless conduct on his part. If he is unable, at the time process is sued out, to comply with the requirements of the law in regard to producing the property or giving security, and his inability to do so continues, without any fault or misconduct on his part since that time, this must be deemed a satisfactory reason." The judge is the one to determine all these issues. Unless his determination affirmatively appears to be a manifest abuse of discretion, it will not be disturbed. The bail-trover remedy is a summary and harsh one. It is in derogation of the right to personal liberty. Persons seeking to avail themselves of this remedy should be held to strict proof of the statutory requisites, and the petitioner for discharge should be treated with reasonable liberality in applying the evidence, keeping in mind the purposes intended by this law. Applying the foregoing principles, the evidence was sufficient to authorize the judgment discharging the petitioner upon his own recognition.

2. While section 4606 of the Civil Code of 1895 contemplates that the defendant shall be committed to jail, and section 4608 that he "be held in imprisonment" at the time of the petition for discharge, the sheriff testified in this case that the defendant was partly imprisoned at the jail; that, while he never locked the defendant in a cell more than he had on the day of the hearing the defendant was in jail that day; and he had not been locked in a cell "for the simple reason that he did not have one to lock him up in." The sheriff also testified that he had the defendant in custody. "Custody," in criminal law, is the same thing as "detention" in civil law, and is synonymous with "imprisonment." *Rapalje & Lawrence, Law Dictionary*. "Imprisonment" is the detention of a person contrary to his will. 10 Am. & Eng. Enc. of Law (1st Ed.) 197. The evidence shows such custody or imprisonment as would render the sheriff liable for his discharge. The confinement or detention was against the will of defendant, by virtue of the affidavit for bail, which was sufficient legal authority. See, in this connection, *Pen. Code 1895, § 106; Civ. Code 1895, § 3851*. The testimony disclosed sufficient holding in imprisonment to authorize the judge to act upon the petition for discharge.

3. The traverse to the return of the sheriff was too late, as it was not submitted until after pleading to the merits. *Civ. Code 1895, § 4988*. It is not necessary to discuss the other grounds of error alleged, even where properly specified. If there was any error, it was not of such character as to require a reversal.

Judgment affirmed.

HILL, C. J., and RUSSELL, J., being disqualified, Judges CANN, of the Eastern circuit, and GOBER, of the Blue Ridge circuit, were designated to preside in their stead.

(2 Ga. App. 79)

CEDARTOWN COTTON & EXPORT CO. v. MILES. (No. 332.)

(Court of Appeals of Georgia. May 24, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING—PETITION.

Every petition should set forth the facts upon which the cause of action is based "plainly, fully, and distinctly," and with such certainty that the same may be understood by the defendant who is to answer them, the jury who are to ascertain the truth thereof, and the court who is to give judgment.

(a) The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the petition.

(b) The certainty required as to the allegations in a suit by a servant against his master for personal injuries occasioned by a defective instrumentality is discussed.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 39, Pleading, §§ 31, 105; vol. 34, Master and Servant, § 809.*]

2. SAME.

The court erred in overruling the demurrers to the petition.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 34, Master and Servant, § 818.*]

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by W. L. Miles against the Cedar-town Cotton & Export Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bunn & Trawick, for plaintiff in error. Seaborn & Barry Wright and J. A. Wright, for defendant in error.

POWELL, J. The exception in this case is to the overruling of a demurrer to the plaintiff's petition. The petition, omitting formal parts, alleges: Paragraph 1: That defendant operates a cotton factory. Paragraph 2: That on the 15th day of July, 1905, petitioner was in the service of defendant as a card stripper. Petitioner was cleaning his card, and while cleaning the feed shaft the pulley, upon which the belts from the cylinder and from the comb run, flew off the axle, and the belt from the cylinder pulley caught petitioner's arm between the shoulder and elbow, and jerked petitioner against the card, pulled and wound his arm around and between the feed shaft and the card, and broke it in two places between the shoulder and elbow. Paragraph 3: The flying off of said pulley was due to the negligence of defendant, in that the nut and screw which held said pulley on the axle were not in their places, and the end of the axle was also broken. Said fact should have been known to the defendant, and was unknown to the plaintiff, and his injury is due to the

negligence aforesaid. Paragraph 4 specifically describes the injury received. Paragraph 5: All of said injuries were due to the negligence of defendant, and could not have been averted by plaintiff by the exercise of ordinary care. Paragraphs 6 and 7 allege plaintiff's age (45 years), his earning capacity, pain, and suffering, and contain the ad damnum and usual prayers. By amendment there is added, after the word "plaintiff," in the third paragraph, the words "and could not, by the exercise of ordinary care, have been known to him."

In addition to the general demurrer, the defendant, by special demurrer, insists "that the allegations of fact set out in said petition show that the defect complained of was a patent one, and that, if plaintiff did not know the existence of the same, he could, by the exercise of ordinary care, have discovered it"; also that they do not sufficiently describe the defect complained of in said machine and the manner in which the injury was received; also, as to the third paragraph of the petition, that "the allegations in said paragraph do not show how or why said nut or screw happened to be off, who took it off, or when it was removed; said paragraph charges that the end of the axle was also broken, but there are no allegations which show that said alleged broken axle in any way caused or contributed to the injury; said paragraph does not show that plaintiff did not know about said nut and screw being out of place; the last sentence in said paragraph sets out a conclusion, and contains no averments which show how or wherein defendant was negligent"; also, as to paragraph 2, that "the allegations therein are confused, vague, indefinite, and do not put defendant on notice as to how plaintiff was injured"; also, as to paragraph 5, "that the same is too general; said paragraph contains no allegations showing negligence on part of defendant; the last clause of said paragraph is merely a conclusion of the pleader." The trial court overruled all the demurrers.

1. As to pleadings at common law it has been said on eminent and unquestioned authority (Chitty on Pl. 256): "The principle rule as to the mode of stating the facts is that they must be set forth with certainty, by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." Our Civil Code (section 4960), requires that the plaintiff, in his petition, shall plainly, fully, and distinctly set forth his charge, ground of complaint, and demand. As construed by the courts of this state, this statutory provision requires a higher degree of certainty in pleading than was necessary at common law; but the object to be obtained is the same under both systems, to wit, that the

pleadings be understood by the party, the jury, and the court. They certainly ought to be so certain and full that the court may look to the allegations of fact and know whether a cause of action is set forth or not. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a demurrer cannot properly be used to compel him to do so; but all the facts necessary to be stated should be set forth plainly, and special demurrer will compel this. In negligence suits, in order that the court may determine from an inspection of the pleading whether a cause of action is set forth, each fact necessary to raise the duty and to show the specific breach thereof, or the specific wrong inflicted, should be plainly and unequivocally stated; and enough of the details of each element of the case should be set out to clearly distinguish the transaction as an actionable one, and not to leave it doubtful whether it is so or not. Many facts, especially those resting peculiarly within the knowledge of the opposite party, may be alleged in general terms; but they should be alleged as facts, not merely as legal conclusions.

In a suit by a servant against the master for an injury occasioned by a defective instrumentality, the servant should allege the facts of his employment. This usually may be done in general terms, provided the language used is sufficient to clearly distinguish his relation to the master from that of a volunteer. He should allege, also, the character of the services he was hired to perform. The allegations as to this may be general, except that they should increase in definiteness as they relate to the particular instrumentality in question, and as to this they should be sufficiently specific to show the relationship of the service to the instrumentality. It is not ordinarily necessary to allege the master's duty to furnish reasonably safe instrumentalities; for this is a matter of which the court will take judicial notice, and, if this duty be alleged at all, it may be stated, without objection, in the form of a legal conclusion. Things of which the courts take ex officio notice need not be specially pleaded. Chitty, Pl. 236. He should also set out a definite description of the instrumentality in question; and more details are required when the instrumentality is not a simple and well-known contrivance than when it consists of something that people generally, from their common knowledge, understand in detail without elaboration of description. However, it is not necessary to go into details of description, except so far as may be necessary to show the relation of the instrumentality to the duties of the servant, to the specific mode of the injury, to the exact nature of the defect, to the negligence of the master, to the lack of contributory negligence of the servant, or to some other essential element of the case. The defect in the instrumentality should also

be set forth with similar certainty, and it should appear whether the defect was latent or patent. This should be shown by facts stated, and not by mere conclusions of the pleader. The facts should disclose the proximate cause of the defect as a cause of the injury. The master's actual or constructive knowledge must appear. If the allegation be that the master knew of the defect, this may be simply and directly stated, and it is not necessary to state how or why he knew it. If constructive knowledge be charged to the master, and the facts stated in the petition make a case where by law the duty of knowing is imposed upon the master, the legal conclusion "that he ought to have known" is not subject to objection; but if the duty of knowing does not arise as a matter of law from the facts already stated, then the specific circumstances creating the duty of knowing must be detailed. See *Babcock v. Johnson*, 120 Ga. 1034, 48 S. E. 438. Also the servant's lack of knowledge must appear. As to this, the allegation that the servant "did not know" of a defect is a statement of fact and is sufficient as alleging actual lack of knowledge. Freedom from implied knowledge can be alleged in the form of a legal conclusion only when the facts set forth show such a state of circumstances as to relieve the plaintiff from such an imputation; otherwise the court will disregard the legal conclusion and give judgment on the facts actually stated. If the plaintiff relies upon his tender years, his inexperience, a false sense of security occasioned by misrepresentations of the master, the latent character of the defect, or other reason regarded by the law as sufficient to relieve the servant from implication of knowledge, the facts should be definitely stated. The details of how the injury occurred should, of course, be specifically set forth. So far as they illustrate the character of the defect in the instrumentality, the master's negligence, or the servant's freedom from fault, they should be more specific than wherein they are merely collateral to the salient legal elements of the case. The sum of the whole matter is that the petition should set out plainly and distinctly, by allegations of facts, an unequivocal cause of action. If the facts as alleged also reasonably tend to establish some defense which would defeat the action, enough additional facts must be set out to negative this defense. But the petition need not anticipate a defense which the facts alleged do not disclose. Of course, these suggestions are not intended to be considered as exhaustive. There are many other matters to be regarded. We are merely trying to stress the point that the pleader should make his necessary allegations plain, definite, and unequivocal, and that he may be compelled by demurrer to do so, but that, when he has done this, he cannot be compelled by special demurrer to go further and allege details which might be valuable to the opposite party in the preparation of his defense, and that it is not required that the pleader set forth the evidence by which he expects to prove the allegations so made.

2. Applying these rules to the petition in the present case, we think that it is deficient in certainty. The description of the machine at which the plaintiff was working is very indefinite. The court cannot say, from what is set out, whether the defect was latent or patent, or whether the fact that the end of the axle was broken had any relation to the injury. The plaintiff relies upon constructive notice on the master's part as to the absence of a nut and screw, without alleging that the nut and screw, which were not in their places, were left off by the master, or that they had been off such a length of time to charge him with notice. He alleges the conclusion that by ordinary care he himself could not have known of their absence, without showing any facts on which to base this conclusion. So far as the petition discloses, the defect was patent. We recognize the rule that if the defect was latent the master would be ordinarily held bound to discover the fact sooner than the servant, since the duty of inspection rests on the master and not on the servant; but the allegations are not sufficient to justify an application of this rule. Every fact alleged in this petition might be true, and the master not be liable. Unless the plaintiff amends his petition and cures these defects, it should be dismissed.

Judgment reversed.

(2 Ga. App. 224)

CURTIS et al. v. STATE. (No. 424.)

(Court of Appeals of Georgia. June 26, 1907.)

CRIMINAL LAW—NEW TRIAL.

The judgment of the trial court refusing a new trial is not, for any reason assigned, erroneous.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Joe Curtis and others were convicted of crime, and bring error. Affirmed.

Marion W. Harris and John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(2 Ga. App. 104)

FERRY & CO. v. MATTOX & TURNER.

(No. 82.)

(Court of Appeals of Georgia. May 28, 1907.)

1. PARTNERSHIP—JUDGMENT—INDIVIDUAL LIABILITY.

Judgment against a partnership binds, not only the firm property, but, when that is exhausted, it binds the individual assets of the partners served. A judgment need not be rendered against the individual members of a partnership in order to bind individual assets. "A judgment against a copartnership binds not only the partnership property, but also the individu-

al property of each member of the same who has been served with the process; but it does not bind, and execution issuing thereon cannot be levied on, the individual property of one not served." *Ellis v. Bone*, 71 Ga. 469.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 438.]

## 2. SAME—PARTNERSHIP DEBTS.

A partner's separate property is bound alike by all judgments against him, whether they be judgments against him as an individual or judgments against him as a partner. As to the proceeds of partnership property, an equity among the partners themselves requires that this property be applied first to the payment of partnership debts, and it works in such a way as to give debts against the partnership a preference over debts against a partner, in respect to that partner's interest in the partnership effects. *Hoskins v. Johnson*, 24 Ga. 630.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 438.]

## 3. SAME—SERVICE ON PARTNER.

Service on a partner is service on the firm. Notice to a partner is notice to the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 377.]

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by D. M. Ferry & Co. against Mattox & Turner. Judgment for plaintiffs. From an order overruling a certiorari and rendering final judgment, plaintiffs bring error. Reversed.

Z. B. Rogers, for plaintiffs in error. I. C. Van Duzer, for defendant in error.

RUSSELL, J. Suit was brought in a justice's court by D. M. Ferry & Co. against the firm of Mattox & Turner. The summons was directed to the firm of Mattox & Turner. There was an acknowledgment of service in these words: "I acknowledge service on the within summons, and waive all other service of any kind. [Signed] Mattox & Turner, per J. R. Mattox." This was the only service of the summons that was ever had. When the case came on for trial before the justice of the peace, that magistrate entered up judgment against the firm of Mattox & Turner, and against John R. Mattox and M. W. Turner as individuals. Mattox & Turner certioraried to the superior court, and the judge of the superior court overruled the certiorari and denied a new trial, but, in doing so, rendered a judgment finally disposing of the case, to which D. M. Ferry & Co. excepted. The judgment of the judge of the superior court overruled the certiorari, but corrected the judgment entered by the justice of the peace upon the verdict of the jury, so as to make it bind nothing but the partnership assets (if any) of Mattox & Turner. His judgment was as follows: "After hearing the within certiorari and argument thereon, and after considering the same, it is ordered that the same be refused and a new trial of the case be denied. It is ordered, further, that the plaintiffs recover of the defendants, Mattox & Turner, the sum of ——— dollars, costs of this proceeding. It is ordered that the

judgment rendered in the justice's court have the effect of binding the partnership assets of the firm of Mattox & Turner, and that said verdict and judgment operate only against said assets, and that portion of the judgment against J. R. Mattox and M. W. Turner as individuals is stricken from said judgment." The plaintiffs in error except only to that portion of the judgment which orders that the justice's court judgment operate only against assets of the firm of Mattox & Turner, and strikes J. R. Mattox and M. W. Turner as individuals from the judgment. The defendants in error, who were the petitioners in the petition for certiorari, have not filed any cross-bill of exceptions, and hence we have only two questions to decide: (1) Did the court err in adjudging that the judgment against a partnership should bind only partnership assets? (2) Did the court err in striking that portion of the judgment rendered against J. R. Mattox and M. W. Turner as individuals?

We think that the court erred in declaring in his final judgment that the judgment rendered previously in the justice's court should only bind partnership assets. It is well settled that, when partnership assets are exhausted, the individual property of the partners served become liable for partnership debts. This is true, even if there be no service on all of the partners. As to the second question, we think that the court erred in part, and that his judgment was partly right. There was no error in ordering that M. W. Turner be stricken from the judgment, because he was not served with copy summons, nor did he acknowledge service; but we think that the judgment should bind the property of J. R. Mattox, and that it was error to strike the portion of the judgment binding him as an individual. Service of a partner is always good service of the firm, and notice to a partner is always notice to the firm. The acknowledgment of service, which we have quoted above, was in reality a personal acknowledgment of service by Mattox, though signed "Mattox & Turner, per J. R. Mattox." He had notice of the suit. He appeared and pleaded to it. He is bound by the judgment. The plea is in the following words: "And now comes J. R. Mattox, a member of the firm of Mattox & Turner, and for plea and answer to the above suit says (1) that the said firm of Mattox & Turner is not indebted to the plaintiff in the manner and form alleged or in any manner whatever; that said Mattox & Turner is not indebted to the plaintiff in any sum whatever." And the affidavit to the plea was made by J. R. Mattox. The words "a member of the firm of Mattox & Turner" may be treated as surplusage, and that leaves it merely a plea made by Mattox. But even if he acknowledged service as a member of the firm, and only pleaded in behalf of the firm, he had notice of the suit, was in court, and not only took no steps to protect himself against the judgment, but did

not even except thereto by certiorari. The question of amending the judgment was not before the superior court. It was not one of the complaints made by the petitioner, and no errors except those brought to the attention of the court can be corrected on certiorari. We think it extremely doubtful, for this reason, whether even Turner's name could have been stricken from the judgment; but, as there is no insistence as to him, we will assume that it was proper to relieve him from the binding force of the judgment. But as to Mattox the case is different. In the entire litigation he was not only personally participating in the proceedings, but he was in reality the partnership's only representative. Neither as a partner nor as an individual can he be heard to complain of the judgment in the justice's court; and, not having complained, the judge of the superior court unnecessarily afforded him a relief he had not asked.

Judgment reversed.

(2 Ga. App. 116)

**RHODES, DOLVIN & CO. v. CONTINENTAL FURNITURE CO.** (No. 339.)

(Court of Appeals of Georgia. May 28, 1907.)

1. **JUSTICES OF THE PEACE—JURISDICTION—TRANSFER OF CAUSES.**

Where an attachment is returned to a court which the papers show on their face does not have jurisdiction thereof, that court should refuse to entertain jurisdiction, and may order the proceedings transferred and returned to the proper court.

2. **SALES—DELIVERY.**

Where a contract of sale contemplates transportation to the purchaser through the medium of a common carrier, ordinarily delivery of the goods to the carrier and acceptance from it of its standard bill of lading is delivery to the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 377.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by the Continental Furniture Company against Rhodes, Dolvin & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Samuel H. Sibley, for plaintiff in error.  
J. P. Brown, for defendant in error.

**POWELL, J.** This action commenced by attachment issued by the justice of the peace of the 123d district, G. M., Greene county. The affidavit recited the residence of the defendant as being in the 141st district of that county. The bond in describing the case recited that the attachment was returnable to the justice's court of the 143d district, and the attachment itself was, by the justice, made so returnable. Thereafter the plaintiff by leave of that court amended the attachment and bond by striking the words "143d district" and inserting the words "141st district." It does not appear that the security

to the bond consented to this amendment. After ordering the amendment, the justice of the 143d district directed that the case be withdrawn from that court and transferred to the justice's court of the 141st district, "to which it is returnable." The statutory notice of the pendency of the attachment in the justice's court of the 141st district was given to the defendant for the purpose of recovering a personal judgment. Without objection, the parties went to trial in that court, the defendant obtained judgment, and the plaintiff appealed to the superior court. In that court the defendant assailed the pleadings by moving to dismiss the case, "upon the ground that the papers showed upon their face that the case was one regularly sued out and returned to the justice's court of the 143d district, G. M., and that the attempted amendment and transfer thereof from said named court to that of the 141st district was without authority of law and void, and said court of the 141st district was without jurisdiction to enter a confession of judgment by the plaintiff therein, and the superior court was without jurisdiction to entertain an appeal from such a confession, and further moved that the case be remanded to said court of the 143d district, as a case pending therein and undisposed of therein." The court overruled the motion and the trial resulted in favor of the plaintiff. The defendant renewed his attack by motion in arrest of judgment, on the following grounds: "Because it appears on the face of the record that said case was an attachment regularly sued out to the justice's court of the 143d district, G. M., and that the bond given was for an attachment returnable to said court, and the attachment was actually returned to said court, and the papers made a case lawfully pending therein. It appears further that said court, without consent of the defendants or of the security in the attachment bond, undertook to transfer said case to the justice's court of the 141st district, and that confession of judgment was there entered by the plaintiffs without a trial. Movants show, therefore, that said court of the 143d district was without lawful authority to enter the orders it did and to transfer said case to said court of the 141st district, and that said latter court acquired no jurisdiction thereof, and that an appeal from a judgment in said latter court invests this court with no greater jurisdiction than said justice's court had, and that there is no regular or lawful basis in the record for a judgment in this court." The court overruled the motion in arrest of judgment and also a motion for a new trial. The defendant brings error.

1. We think that neither the motion to dismiss the action nor the motion in arrest of judgment was well taken. The law fixed the jurisdiction to hear the case in the district of the defendant's residence. While an attachment should give directions for its return,

still "it is not this written direction to the sheriff or constable which gives the court jurisdiction, but the law." *Blake v. Camp*, 45 Ga. 298. Lack of jurisdiction in the justice's court of the 143d district appeared on the face of the record, since the affidavit recited that the defendant resided in the 141st district. The justice's court of the 143d district, therefore, properly declined to assume jurisdiction of the same. Every court has jurisdiction to entertain cognizance of a matter presented to it to the extent of determining whether it has jurisdiction, and, if it finds that it has no jurisdiction, of giving directions to the matter, consistent with its lack of jurisdiction. When the justice of the peace discovered that he had violated the provisions of the statute, in returning the case to his own court, he properly refused to take jurisdiction, and his direction that it be transferred to the proper court, while probably not necessary, was an order consistent with his lack of jurisdiction. See *Carreker v. Thornton*, 1 Ga. App. 508, 57 S. E. 988, and citations.

At all events, the case was finally in fact filed in the proper court. In that court every amendable defect became cured by the trial and the judgment; for it is shown by the record that the defendant appeared at the trial and testified, though that trial resulted in a confession of judgment by the plaintiff. See *Covington v. Cothrans*, 35 Ga. 156; *Blake v. Camp*, 45 Ga. 298; *Townsend v. Stoddard*, 26 Ga. 430; *Williams v. Buchanan*, 75 Ga. 789; *R. & D. R. Co. v. Benson*, 86 Ga. 205, 12 S. E. 357, 22 Am. St. Rep. 446. It is true that the bond recited that it was given in a case returnable to the 143d district; and it may be that consent of the surety was necessary to an amendment of the bond, and even that the attempted amendment of the bond rendered it void as to him, so that it was no longer a good bond; but as to these things we give no opinion, for no attack was made upon the bond in accordance with the statutory method provided in the act of November 11, 1899. Ga. Laws 1899, p. 37. If the bond were found deficient, there would result, not a dismissal of the case, but a dismissal of the levy, and the plaintiff might have judgment notwithstanding the levy was dismissed. *Lockett v. De Neufville*, 55 Ga. 458; *Perry v. Mulligan*, 58 Ga. 479; *Hodnett v. Stone*, 93 Ga. 645 (2), 20 S. E. 43.

2. We think that upon the merits of the case the evidence demanded a verdict for the plaintiff. The defendant ordered a shipment of furniture from the plaintiff to be sent to him at Siloam, Ga., from High Point, N. C. It appears beyond controversy that the furniture was delivered in good order to the railroad company at High Point, and that it was damaged in transit by water leaking on it through a defect in the roof of the car. Indeed, one of the defendants, testifying as a witness, conceded: "I order-

ed all the furniture to be shipped in one car, and to come by railroad in the customary way. It was so shipped in the way I expected it to be." Counsel for the plaintiff in error concedes that ordinarily in such sales delivery to the carrier is delivery to the purchaser, but contends that the rule is not applicable in this case, because the shipper took from the carrier a bill of lading which contained many material exceptions from its common-law liability, though the same was not signed by the shipper. It appears that the consignors took from the railway company its "standard bill of lading." It may be true that under the law of North Carolina it is not required, as in Georgia, that the shipper sign the contract of carriage in order to make its special terms effective; but we know of no common-law rule nor of any North Carolina statute which requires a carrier to issue any other than its standard bill of lading. However, an examination of the law in North Carolina as declared by its courts will show that in that state a carrier cannot contract against its negligence. The rule there on that subject is as it is in this state. Nor is the stipulation in the bill of lading requiring the claim for damage to be filed within thirty days valid, under the laws of that state. *Capehart v. Seaboard R. Co.*, 81 N. C. 438, 31 Am. Rep. 505. We think that delivery to the carrier may be held as delivery to the purchaser, where the carrier's standard bill of lading is accepted, in the absence of express direction from the purchaser requiring some other method of shipment, especially in the absence of any showing that the shipper had the power to compel the carrier, by whom it was mutually anticipated that the transportation was to be effected, to make any other form of contract of carriage, or that the carrier customarily issued any other form of bill of lading.

Judgment affirmed.

(3 Ga. App. 245)

#### TERRELL v. TOMMEY. (No. 274.)

(Court of Appeals of Georgia. July 4, 1907.)

CERTIORARI—ERROR, WRIT OF—REVIEW—OVERRULING CERTIORARI.

Where a certiorari involves no legal principle, but on the sole ground that the judgment was not supported by the evidence challenges a judgment of the recorder or police judge of the city of Atlanta declaring the existence of a private alley, and finding that a fence or gate built across the alley interfered with the right to its use, and directing that the obstruction be abated as a nuisance, the judgment of the superior court overruling the certiorari and affirming the judgment will not be disturbed unless manifestly erroneous.

(Syllabus by the Court.)

Error from Superior Court, Fulton County: J. T. Pendleton, Judge.

Action by G. A. Tommey against W. H. Terrell. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Tommey filed a petition in the recorder's court of Atlanta, alleging that she was the owner and in possession of a certain lot in that city; that along the east side of the lot was an alley, which was an appurtenance to it, and which had been open and used continuously and uninterruptedly by her and her predecessors in title and possession for more than 20 years, and that the right to use the alley as a means of ingress and egress had been fully recognized and undisputed for more than 20 years, that the defendant, Terrell, had deprived her of the use of nearly half of the alley, and had prevented her from using the alley as a way of ingress and egress by constructing a gate and fence across it; and that the fence and gate so constructed across the alley were a private nuisance; and she prayed for an order requiring the defendant to abate the same. The evidence was conflicting, but there was much testimony, both documentary and oral, in support of the plaintiff's contentions. The recorder entered a judgment finding that the alley in question "is appurtenant to the property of the plaintiff," and "that she had the right to use the same for the entire length of her lot on the east side," and "that the fence and gate erected across said alley by the defendant, W. H. Terrell, is a nuisance, and that said Terrell is hereby required to abate the same within 10 days after this date by removing said fence and gate and leaving said alley open and unobstructed." To this judgment, the defendant, by his petition for certiorari, excepted on the ground that it was without evidence to support it. The judgment of the superior court, overruling the certiorari, is assigned as error.

W. H. Terrell and Edgar Latham, for plaintiff in error. Walter T. Colquitt, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 126)

**GAINER v. STATE (No. 480.)**

(Court of Appeals of Georgia. May 28, 1907.)

**1. VAGRANCY—EVIDENCE.**

The fact that a party is black and ragged, and asleep at night, and has not worked for four days, although he may have no money, will not of itself authorize a conviction for vagrancy. Where a person has been arrested without a warrant, evidence obtained by unlawful search and seizure that such person has no money should have been rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Vagrancy, § 3.]

**2. SAME.**

The evidence did not authorize the conviction, which consequently was contrary to law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 876.]

(Syllabus by the Court.)

Error from City Court of Douglas; C. T. Roan, Judge.

Ben Gainer was convicted of crime, and brings error. Reversed.

Rogers & Heath and F. Willis Dart, for plaintiff in error. M. D. Dickerson, Sol., for the State.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 140)

**RUCKER v. STATE. (No. 204.)**

(Court of Appeals of Georgia. June 19, 1907.)

**1. CRIMINAL LAW—NEW TRIAL.**

A verdict of guilty, dependent upon an uncorroborated confession, should be set aside upon motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1222.]

**2. SAME—INSTRUCTIONS—CONFESSIONS.**

While, in the absence of a request to charge upon that subject, a trial court is not generally required to instruct the jury upon the subject of confessions, or as to their force and effect, still, where the case of the state is entirely dependent upon a confession in order to authorize a conviction, the jury should be given appropriate instructions with reference to the care with which such confessions should be considered, and they should be informed that a conviction is not authorized unless such confession be corroborated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1864.]

(Syllabus by the Court.)

Error from Superior Court, Hart County; H. M. Holden, Judge.

Wylie Rucker was convicted of a misdemeanor, and brings error. Reversed.

A. G. & Julian McCurry, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

RUSSELL, J. The defendant, Wylie Rucker, was convicted of the offense of a misdemeanor under Pen. Code 1895, § 122. It is alleged in the indictment that the defendant enticed, persuaded, and decoyed one George Smith, who was under a verbal contract as a farm laborer, to leave his employer, after he had actually entered the service of such employer, by offering to pay said Smith higher wages. The evidence on behalf of the state showed that George Smith was under a verbal contract, made about the 10th of May, 1904, by which he was to work for the prosecutor until Christmas, for \$7 a month and his board. He worked a little over two months with his employer, and then went to work with the defendant. The prosecutor further testified that the defendant confessed to him that he had employed said George Smith, and was to give him \$8.50 or \$9 a month, and that he knew that the servant had actually entered the prosecutor's service and had worked over two months. It further appeared, from the evidence, that George Smith, the employé, wanted to "knock around a while," and that the prosecutor agreed to let him rest from the time they got done laying by. Under this agreement he worked

with the defendant, or with his father, from the latter part of July until some time in August, and "after the vacation he came back and worked for [the prosecutor] about two weeks." The evidence for the defendant, which was uncontradicted, showed that George Smith was a minor, whose mother was living. It also appeared that the defendant made a contract with his mother for the hire of the boy, and that nothing was done to induce the boy to work with the defendant, and that he did not work with him after the defendant was informed that the boy was under contract with the prosecutor. The defendant insisted that he only boarded the boy, George Smith, for the month during laying-by time, during which his employer had given him leave of absence, and that the agreement was that he was to work for the defendant for his board.

We think the court erred in not granting the defendant a new trial. The motion for new trial was based upon the general grounds; and, in addition, it is averred that the court erred in failing to charge the jury, although not requested so to do, that "all admissions should be scanned with care and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction." The movant also insisted that the court erred in failing to charge the jury the rule of law with reference to circumstantial evidence, to wit, that to warrant conviction on such evidence the proved fact must exclude every other reasonable hypothesis save that of guilt of the accused. The conviction in this case must depend entirely upon the evidence of the prosecutor that the defendant admitted to him that he persuaded the servant, George Smith, to work with him and leave his employer by offering the boy higher wages. Without this evidence the state would have no case whatever, and the essential fact contained in this statement is the very gist of the whole criminal action. Generally the court is not required to charge the jury upon the subject of confessions at all, in the absence of a written request for instructions upon that subject; but there is a distinction between a case in which the conviction may depend upon a confession or upon other evidence, and a case in which conviction, if had, must depend upon the confession alone, as in this case. In cases of the former class the confession is always more or less corroborated by the other evidence in the case. In this case there was no corroboration; and, for that reason, although the testimony "as to the confession be true, it cannot support a conviction. If the state had proved that George Smith and the prosecutor made the contract alleged in the indictment, and that Smith entered into such service and left before its completion, the state would have had no case whatever against this defendant; for it would have failed absolutely to show that he enticed, persuaded, or decoyed George

Smith away from such employment. As before remarked, the knowingly enticing, persuading, and decoying of the farm laborer or other servant of another constitutes the whole offense, and therefore the statement made by the defendant to the prosecutor was not a mere inculpatory admission, but a confession, and we think, therefore, that the jury should have been charged that confessions of guilt should be received with great caution and that a confession uncorroborated will not justify a conviction. "The case, at best, is close and doubtful, and it is by no means clear that the evidence warranted a conviction. It was therefore essential to the fairness of the trial that the jury should have distinctly understood that they could not lawfully convict upon a confession alone, and that it was incumbent upon them to pass on and determine the all-important question whether or not the confession, if proved to their satisfaction, was corroborated by other evidence, which in connection with the confession itself was sufficiently strong and convincing to satisfy their minds beyond a reasonable doubt of the guilt of the accused." The confession is not corroborated in this case by the corpus delicti, for the entire criminal act depends upon the confession.

We are further of the opinion that a new trial should have been granted for the reason that the evidence is insufficient to authorize conviction. Taking the confession, as proved, to be sufficiently corroborated, it nowhere appears that the defendant knew, at the time that George Smith came to his house, or at the time that he employed him, that he was under contract with the prosecutor. The most that was proved by the prosecutor upon that subject was that the defendant knew that the laborer had actually entered his service and had worked over two months. This, the prosecutor says, the defendant told him he knew; and the only evidence that the boy, George Smith, was ever at the defendant's house after the conversation between the prosecutor and the defendant, comes from the prosecutor, as being a statement made to him by a person other than the defendant. This was, of course, inadmissible against the defendant, unless the evidence had shown that the defendant was present and by his silence acquiesced in the statement made. Nothing is more vexatious, abominable, or injurious than the interference of outsiders with the servants or laborers with whom another has contracted and upon the faith of whose contract he relies to honestly fulfill his own obligations, and the laws against these violators of the public peace and comfort should be enforced. But it must be borne in mind that in this class of cases, as in every other criminal charge, the state is required to prove the guilt of the accused. And to sustain a conviction in this case this court would have to shut its eyes to the fact that it was proved, and not contradicted, that the



boy, George Smith, had a mother living, and that the state produced no evidence to show how he was able to make a legal contract, and further failed to show that the defendant knew that a legal contract had been made.

It is indispensable to show, in accusations brought under section 122 of the Penal Code, that there was a legal contract and that the defendant knew it. Both of these essentials the state failed to establish. The evidence in this case is very similar to that in *McAllister v. State*, 122 Ga. 744, 50 S. E. 921. It is not enough to show that a defendant employed a servant who had already quit the service of his employer or had been temporarily released from such service, even though it be shown that the defendant employed such a servant by a promise of higher wages. If the servant has already left his employer, or if there was no legal contract with the former employer, he who employs such servant does not violate section 122 of the Penal Code. In the *McAllister Case*, above cited, the defendant sent his wagons and helped the servant, Jackson, to move his household goods, over the protest and threats of the employer. And yet the Supreme Court in that case says: "The words used in the statute, 'entice, persuade, or decoy,' indicate that there must be some word or act of incitement or inducement on the part of the defendant, whereby he influences the will of the servant so that the latter becomes dissatisfied with his employment and is allured away. That Jackson of his own volition quit the service of his employer, and was then hired by the accused and by him assisted in moving his household effects, is not enough to authorize a conviction under the statute, unless it be shown that the servant was prompted to leave his employer by the accused. But it was argued, if this is not sufficient, it will be impossible to convict any one under this statute. That may be true, but the courts cannot bend the construction of a statute in order to assist the state in making out a case if the statute does not authorize such a construction. \* \* \* Penal statutes are to be construed strictly, and a sufficient answer to the argument *ab inconvenienti* is '*Ita lex scripta est.*'"

Judgment reversed.

(2 Ga. App. 198)

DENNARD & CO. v. BUTLER. (No. 308.)  
(Court of Appeals of Georgia. June 26, 1907.)

1. POSSESSORY WARRANT—WHEN LIES.

Possessory warrant is the proper remedy to recover possession of personal property where such possession has been obtained by fraud, violence, seduction, or other like means.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Possessory Warrant, § 2.]

2. SAME—EVIDENCE.

The undisputed evidence in this case clearly showing that the personal property was obtained by none of the means inhibited by the statute, but by consent, the judgment of the

court sustaining the certiorari and making a final disposition of the case was without error (Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by S. E. Dennard & Co. against R. L. Butler. Judgment for plaintiff was reversed on certiorari, and plaintiff brings error. Affirmed.

R. Douglas Feagin, for plaintiff in error.  
Hardeman & Jones and E. P. Johnston, for defendant in error.

HILL, C. J. This was a possessory warrant sued out to recover possession of a horse. The justice decided the case in favor of the plaintiff, and the defendant filed a petition for the writ of certiorari. This was granted, and on the hearing of the certiorari the superior court entered judgment sustaining the certiorari, "upon the ground that S. E. Dennard & Co. never had possession that would entitle them to maintain a possessory warrant." Error is assigned to this judgment.

The following is a substantial statement of the facts: Dennard & Co. were livery stable keepers. They boarded a horse in the daytime for one Will Stewart, who used the horse at night to a public hack. Stewart did not pay for the board of the horse, and Dennard & Co. thereupon told him that he could not get the horse. Stewart stated that it would be impossible for him to pay the board due for the horse unless he could get him at night to use to pull his hack. He told Dennard & Co. that he could, by using the horse, keep up the current board and pay 50 cents a day on the back board. Dennard & Co. consented to let him take the horse out, with the understanding that the horse was to remain under their control and be brought back to their stable as soon as the work was done for the night. The horse had been in the stable for 8 or 10 weeks before Dennard & Co. found out that he did not belong to Stewart, but to the defendant, R. L. Butler. Butler was informed by Dennard & Co. that Stewart was not paying the board of the horse. One afternoon a negro by the name of Banks, who was driving for Stewart, came to the stable, and, with the permission of Dennard & Co., took the horse out. R. L. Butler, the owner of the horse having previously told Stewart that he wanted him back, saw him in the possession of the negro, Banks, and demanded him from the negro, who voluntarily turned him over to Butler. Possessory warrant is the remedy when any personal chattel has been taken, enticed, or carried away, either by fraud, violence, seduction, or other means, from the party complaining, or when such personal chattel having recently been in the just, peaceable, and legally acquired possession of such complaining party, has disappeared without his consent, and has been secured or taken posses-

sion of by the party complained against, under some pretended claim, or without lawful warrant or authority. Civ. Code 1895, § 4799. "Unless it clearly appears that the defendant acquired possession in one of the modes inhibited by the [statute], there is nothing for the proceeding to rest on. Under a possessory warrant there is no question as to the title or as to the right of possession, but the sole question is as to the manner in which the possession has been obtained by the defendant." *Trotti v. Wyly*, 77 Ga. 684; *Brown v. Todd*, 124 Ga. 939, 53 S. E. 678. The plaintiff could have kept possession of the horse for the enforcement of his lien as a livery stable man, but he chose not to do so, and surrendered possession of the horse to Banks, who was not his agent, but the agent of Stewart. Banks surrendered possession peaceably and voluntarily to Butler, the owner. Butler's possession was obtained by consent and without fraud, violence, seduction, or other like means. These facts being undisputed, the superior court did right in sustaining the certiorari and making a final disposition of the case.

Judgment affirmed.

(2 Ga. App. 189)

**MOSELY v. STATE.** (No. 483.)

(Court of Appeals of Georgia. June 20, 1907.)

**MASTER AND SERVANT—LABOR CONTRACT—VIOLATION—EVIDENCE.**

No error of law was committed, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Dodson Mosely was convicted of violating the labor contract act, and brings error. Affirmed.

W. M. Harper, for plaintiff in error. Zach Childers, Sol., for the State.

**HILL, C. J.** The defendant was convicted of a violation of what is known as the "labor contract act" of 1903. By consent, he was tried by the court without the intervention of a jury. He filed a motion for a new trial, which being refused he brought the case to this court.

The following is a substantial statement of the evidence: The accused worked for the prosecutor during the year 1906. In the fall of 1906 he asked the prosecutor for \$15, who replied that he already owed him so much money which he had advanced to him during the year 1906, and that he would not be able to work it out under his contract for that year. The prosecutor told the accused that he would advance him the \$15, if he would agree to work for him for such time during the year 1907, commencing January 1, 1907, as it would require to work out the sum of \$62 at \$11 per month, said sum of \$62 including the sum of \$15 then advanced, and the balance of the \$62 was money the

accused then owed the prosecutor, and which had been advanced to the accused by the prosecutor during the year 1906 under the contract of 1906. The accused agreed to these terms, and the prosecutor then and there advanced to the accused the \$15 on the faith of such contract. The accused worked for the prosecutor on his farm the 1st day of January, 1907, and on that day drew his rations for a week, but left after that day and did not do any more work for the prosecutor, and did not return the \$15 so advanced. The prosecutor advanced the \$15 to the accused by giving him a check for \$15 on the Planters' Bank of Americus. The failure to work for the prosecutor according to the agreement damaged him to the amount of \$15 so advanced on the faith of the agreement, and the prosecutor knew of no good or sufficient cause for the failure to perform the service so contracted for. The accused in his statement admitted every fact testified to by the prosecutor, except the contract for 1907. He denied that he made such contract.

It is insisted by the plaintiff in error that the contract proved by the prosecutor is too indefinite and uncertain as to duration to support the accusation; and *McCoy v. State*, 124 Ga. 218, 52 S. E. 434; *Presley v. State*, 124 Ga. 446, 52 S. E. 750; and *Watson v. State*, 124 Ga. 454, 52 S. E. 751, are cited and relied upon. In these cases and in *Glenn v. State*, 123 Ga. 585, 51 S. E. 605, it was held that before a lawful conviction could be had for a violation of the act of 1903 there must be proof of a distinct and definite contract for service. In the *McCoy Case* the proof was that the accused got the money before he made the contract to perform the service. Ten dollars was advanced on the statement of the accused that he would return some time after Christmas and work for the prosecutor. At what time after Christmas he was to come back and work for the prosecutor was not stated. How long he was to work, how he was to work, whether by the day, week, month, or year, or whether he was to be paid according to the amount of work he should do, or what compensation he was to receive, was all left to conjecture. In the *Presley Case* the headnote is that an accusation for a violation of this act, "which fails to set forth in substance a contract definite and certain as to its terms and duration, is subject to demurrer." In the *Watson Case* the same ruling was made. Applying the law as declared in these cases to the case now under consideration, it will be seen they do not support the contention of the plaintiff in error, but, on the contrary, the facts here measure fully up to the requirements of the law as laid down by the Supreme Court. Here there was a definite and distinct contract. The time when service under the contract was to begin was definitely stated as January 1, 1907. The duration of the contract was definitely fixed by the words, "beginning to work Jan-

uary 1, 1907, and to continue work thereafter until the \$62 has been worked out at \$11 per month"; and the amount of compensation was to be \$11 per month during the period of the contract. It did not make any difference that a part of this compensation was the payment of a debt which the accused owed the prosecutor for advances made during the year, 1906. In addition to the payment of this debt by his labor, the accused procured \$15 in money from the prosecutor on his contemporaneous contract of service. If there had been nothing but the agreement to pay an existing debt due his employer, by rendering to him future services, and a failure to perform such services or to pay the debt, the offense as defined in the act of 1903 would not have been committed; but money was procured on a contract to perform services therefor. These facts constitute a violation of this act. *Bridges v. State*, 126 Ga. 91, 54 S. E. 916.

It is insisted in the next place that there was no proof that the accused in failing to perform the services or return the money did so "without good and sufficient cause." Unquestionably this fact is one of the material elements of the offense which the state must prove. *Johnson v. State*, 125 Ga. 243, 54 S. E. 184. This fact must usually be shown by the circumstances of the case. It is difficult to prove the negative by direct testimony. The prosecutor testified that he knew of no good and sufficient cause for the failure of the accused to perform his contract. The evidence showed that the accused quit work for the prosecutor after the first day, and went to work for another employer, to whom he had previously hired. If he could perform labor for another, it is fairly inferable that he could have performed his contract with the prosecutor.

This conviction is doubtful on the essential point as to the existence of the criminal intent at the time the money was obtained by the defendant. The money was obtained some time in the fall of 1906, under contract to work for 1907. This seems rather long for the incubation of the criminal intent, and it might be that such intent was formed subsequently to the time of procuring the money. However, since this point is not made in the brief or argument, we must assume that this question of criminal intent was fairly and fully considered by the court acting as the jury; and we will not disturb the finding.

Judgment affirmed.

(3 Ga. App. 66)

DURDEN et al. v. SOUTHERN RY. CO.  
(No. 307.)

(Court of Appeals of Georgia. May 24, 1907.)

1. RAILROADS—DUTY TO FURNISH SHIPPING FACILITIES.

In the absence of charter limitations, contractual obligations, rule of the railroad commission, or statutory enactment to the contrary,

a railway company may exercise its discretion in removing a side track or spur at which it has been accustomed to receive and deliver freights as a common carrier.

2. SAME—NOTICE OF REMOVAL OF SIDE TRACK.

As a common carrier a railway company owes to the public the duty of giving reasonable notice of the intention to abandon such a side track, if the result of such removal is to leave no facilities for the receipt or delivery of such goods as it has been accustomed to receive and deliver there. From a breach of this duty a cause of action will arise in favor of one who, in response to the implicit invitation of the carrier to bring goods to that place for shipment, has so located his goods, intended for shipment, that, by the removal of the track and the discontinuance of shipping facilities without notice, he has been specially damaged.

3. SAME—QUESTION FOR JURY.

What is reasonable notice in such cases is a question of fact for the jury; and, in determining it, the exigencies, both of the public, so far as its members are likely to be interested as shippers, and of the carrier, in the light of its private rights and public obligations, should be considered.

4. SAME—MEASURE OF DAMAGES.

The damage recoverable by a particular prospective shipper, who, having arranged his property for shipment, is disappointed by the unexpected removal of the facilities, is so much of his loss sustained by reason of such removal as he would not have sustained if reasonable notice of the intention to remove had been given by the carrier.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Charity Durden and others against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed, with direction.

Jos. H. Hall and Warren Roberts, for plaintiffs in error. N. E. & W. A. Harris, for defendant in error.

POWELL, J. The error assigned in this case is the sustaining of a demurrer to the plaintiff's petition. According to the allegations of the petition, the defendant is a foreign corporation, operating a line of railway in this state. The plaintiff, about two years prior to the bringing of the suit, bought a tract of land lying immediately on the line of the railroad. This land lies between the Ocmulgee river and the railroad, was bought for the wood and timber on it, and has little value for any other purpose. At the time the plaintiff purchased this land there was located adjacent thereto, on the defendant's line of railway, a side or spur track, at which the defendant was receiving and had been for 15 years accustomed to receive and deliver cars of freight as a common carrier. For about two years defendant had been accustomed to receive from the plaintiff for transportation cars of wood at this side track. In February, 1906, without any previous notice being given, defendant removed this side track, and left plaintiff no means of delivering his wood for transportation. At the time the side track was taken up, plaintiff actually had on the railway right of way, awaiting cars, a

quantity of wood. He also had 45 additional cords of wood cut and ready for transportation. All of said wood had been sold to customers in the city of Macon. There is no other available means of transportation, and a total loss of the value of the wood has been occasioned to the plaintiff by the removal of transportation facilities. Further, there are 500 cords of uncut wood on said land, for which plaintiff had a ready market, which will be totally lost by reason of the destruction of plaintiff's transportation facilities. By amendment to the petition, it is alleged that the side track was not a private side track, but was established and maintained for the benefit of the public, in the reception and delivery of freights by the carrier; also, that a portion of the cut wood previously referred to had been delivered actually into the custody of the carrier for shipment before the removal of the side track. The defendant demurred generally and specially. The effect of the demurrer is to assert that the defendant had the right to move the side track at its pleasure or discretion; that no contract to maintain the same is set forth; that no right of the plaintiff has been violated; that the defendant has failed in no duty due the plaintiff; also, that the damages alleged are too remote and speculative. The trial court sustained the demurrers, and the plaintiff brings error.

1. The point involved in this case is somewhat novel; for, while there are several reported cases apparently cognate, each of them, so far as our research has disclosed, contains some feature which distinguishes it from the case at bar by the reason of the peculiar facts or of the statute law of the jurisdiction where rendered. There are cases involving the right of railway companies to abandon stations once established, but special reference is usually had, in the determination of them, to the terms of charters, local statutes, or orders of railroad commissions. Some cases have involved breaches of contracts to maintain side tracks for the benefit of particular shippers. In this case no charter is involved, for the defendant is a foreign corporation, and no duty by charter is asserted, no special contract is alleged, no violation of state statute law is claimed. There is no rule or order of the railroad commission upon the subject. Looking to the common law, we find that, in the absence of charter requirements, statutory regulation, or special contract to the contrary, there is no inhibition against a carrier using its discretion in abandoning the stations at which it has been accustomed to receive freight. The safety of public travel frequently demands the abolition of side tracks or spurs, and the discretion of the railway company in removing them will rarely be interfered with by the court. *Jones v. Newport News & M. V. Co.*, 65 Fed. 736, 13 C. C. A. 95; *Mercantile Trust Co. v. Columbus R. Co.* (C. C.) 90 Fed.

148; *Oman v. Bedford Co.*, 134 Fed. 64, 67 C. C. A. 190. The United States Supreme Court, in *Northern Pacific R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092, held that a station at a county seat might be abolished; but this decision was by a divided court, and we really think that the dissenting opinion presents the sounder view.

2. However, from a recognition of a railway company's rights to remove the side track and to discontinue the receipt and delivery of freight at the place where it was located, it does not necessarily follow that the manner in which this right is exercised may not create a cause of action in favor of one who has been damaged thereby. We do not think that a common carrier can, without liability, hold out to the public either an actual or implied representation that it will receive goods for shipment at a certain place, and then, without reasonable notice, withdraw its facilities for complying with its implicit invitation, to the injury of one who, upon faith of the carrier's representation, has, with the view of accepting the carrier's offer to receive goods at the place named, caused his goods to be placed in such position that the withdrawal of the facilities for shipment specially damages him. When the carrier erects a public station or side track, at which it receives and delivers goods for transportation, it in a sense makes to the public an open promise to receive goods there, a representation that it is ready and willing to perform there the right, due to the public, of receiving goods for transportation. Individual members of the public have a right to act upon this open promise, this public representation, until due notice is given that the same is to be withdrawn. This in line with the reasoning of the court of Queen's Bench in *Denton v. Great Northern Ry. Co.*, 34 Eng. L. & Eq. Rep. 154. In that case the court says that such a course of dealing with the public amounts to a contract broken and a deceit perpetrated. Says Crompton, J.: "It is very much like the case of an advertisement offering a reward; \* \* \* but I prefer resting judgment on the duty and obligation of the defendants as common carriers. \* \* \* It is not necessary for me to say whether the defendants are liable as for the breach of a particular contract made with the plaintiff, at the same time they are liable." Carriers have the right to change the schedules of their passenger trains, but, if the schedule be changed, or if a regular train be discontinued, without reasonable notice, a prospective passenger, who has arranged his affairs in contemplation of a maintenance of the schedule, may recover the damages actually sustained by him as a result thereof. *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180. The duty of common carriers to anticipate that members of the public will arrange their affairs with refer-

ence to located shipping points, and will be specially damaged by a discontinuance of facilities at such points, without notice, is analogous to their duty to anticipate and to provide cars for handling the ordinary and varying volume of traffic likely to be offered for transportation along its lines. See the cases cited in footnote to the case of *Houston Ry. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225. The illustration given by Lord Campbell, C. J., in the case of *Denton v. Great Northern Ry. Co.*, supra, is also in point: "Now, suppose a ship advertised as lying in St. Katharine docks, and bound for Calcutta, and that she would carry goods at a certain rate, if sent within a certain time; and suppose that, relying on these representations, goods are sent, and the answer then is that the adventurers have changed their arrangements, that they got better freights, and that, instead of going to Calcutta, the ship is going to Jamaica; I think, under such circumstances, an action could be maintained by a party prejudiced against the parties making such representations to the public."

3. As to what is reasonable notice is a question of fact, a jury question. In determining what is reasonable, the exigencies, both of the public, so far as its members are likely to be interested as shippers, and of the carrier, in the light of its private rights and public obligations, should be considered.

4. Such damages as would have accrued to the plaintiff by the removal of the side track if the reasonable notice had been given is *damnum absque injuria*. In this case no damage can be allowed to the plaintiff because his standing timber is rendered less valuable. The failure to give the reasonable notice has not affected that. It is doubtless true that the plaintiff paid an enhanced price for it because he expected the shipping facilities to remain; but as to this his loss is similar, in legal contemplation, to what it would be if he had bought a mercantile business near a factory, at an increased price, because of the anticipated trade of the employees, and the factory had suspended operations. But as to the wood cut in bona fide anticipation of shipment at this sidetrack he may recover actual damages, if the allegations of the petition be sustained by proof. The measure of this damage is not necessarily the market value of the wood. In assessing this actual damage the jury may consider the expense incurred in getting the wood ready for shipment; and, if the allegation that there is no other feasible way of removing this wood be sustained, the actual deterioration, or even total loss of the wood, if the proof goes to that extent, based on its market value, may be recovered. The damages recoverable is so much of the loss sustained by reason of the removal of the side track as the plaintiff would not have sustained if reasonable notice of the inten-

tion to remove had been given. The trial court having sustained the demurrers, both general and special, the judgment is reversed, with direction that further proceedings be had in accordance with this opinion. The trial court may require the petition to be amended to correspond with the views herein expressed.

Judgment reversed, with direction.

(2 Ga. App. 185)

#### CRAWFORD v. STATE. (No. 476.)

(Court of Appeals of Georgia. June 20, 1907.)

#### FALSE PRETENSES—ACCUSATION — SUFFICIENCY.

The accusation in this case does not allege facts constituting a criminal offense, and the demurrer thereto should have been sustained.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 23, *False Pretenses*, § 13.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

F. B. Crawford was convicted of obtaining money under false pretenses, and brings error. Reversed.

C. B. Rosser, Jr., for plaintiff in error. C. D. Hill, Sol. Gen., R. B. Blackburn, and Lowry Arnold, Sol., for the State.

HILL, C. J. Crawford was charged, by an accusation in the criminal court of Atlanta, with a violation of section 670 of the Penal Code. This section is in the following language: "Any person using any deceitful means or artful practice, other than those which are mentioned in this code, by which an individual, or the public, is defrauded and cheated, shall be punished as for a misdemeanor." The accusation, describing specifically the deceitful means and artful practice used by the defendant, is in these words: "State of Georgia, Fulton County. I, C. S. King, in the name and behalf of the citizens of Georgia, charge and accuse F. B. Crawford, of the county and state aforesaid, with the offense of misdemeanor, for that the said F. B. Crawford, in the county aforesaid, on the 19th day of October, 1905, did, by deceitful means and artful practice, cheat and defraud the Stephen A. Ryan Co., a corporation duly incorporated under and by virtue of the laws of the county of Fulton and state of Georgia, out of the sum of \$10.00, in lawful currency of the United States, in that on the 19th day of October, 1905, the said F. B. Crawford did represent unto C. S. King, who was agent for the said Stephen A. Ryan Co., the corporation aforesaid, that he was in the employ of the Western & Atlantic Railroad Company, and that the said Western & Atlantic Railroad Company was due him for wages earned for the month of October, 1905, more than the amount of \$11.00, and that there were no judgments, attachments, or orders against his salary; that said representations were made for the purpose of inducing

C. S. King, agent for the said Stephen A. Ryan Co., to purchase from the said F. B. Crawford his salary account while in the employ of the said Western & Atlantic Railroad Company earned for the month of October, 1905, to the extent of \$11.00, and that the said C. S. King, agent for the Stephen A. Ryan Co., believing that said representations were true, and acting upon the faith of the same, purchased from F. B. Crawford his salary account while in the employ of the Western & Atlantic Railroad Company, earned for the month of October, 1905, to the extent of \$11.00 and paid to him on said date, October 19, 1905, the sum of \$10.00, and took from the said F. B. Crawford an assignment of his salary account of his wages earned while in the employ of the Western & Atlantic Railroad Company for the month of October, 1905, in words and language as follows: 'Atlanta, Ga., Oct. 19th, 1905. For value received, I this day assign to Stephen A. Ryan Co. \$11.00 of my salary earned for the month of October, which pay him. In order to obtain the above amount of money, and make this salary sale, I state that I am employed regularly by the firm, corporation, or party, to whom this is directed, and that they are indebted to me more than the above amount for salary, for month named, and there are no garnishments, attachments, or orders against my salary. I state that this is an original transaction, and is not a renewal or an extension of any kind, and that I received the money for this paper the day I signed it, less the legal fee. I appoint S. A. Ryan my attorney in fact, to indorse my check and receipt for same. To Western & Atlantic Railroad Company. F. B. Crawford, 29 Hill's Ave.'—that after making said representation in order to obtain the said sum of money from the said Stephen A. Ryan Company, and after obtaining the money on said assignment, as herein set out and described, the said F. B. Crawford, by artful practice and with the purpose to defraud and cheat and swindle the said Stephen A. Ryan Co., did himself cash the time so sold and transferred to said Stephen A. Ryan Co., and appropriated the same to his own use, with the intention to defraud the said Stephen A. Ryan Co. out of the sum of \$10.00 as herein set up, and did defraud the said Stephen A. Ryan Co. out of the sum of \$10.00; that at the time the said F. B. Crawford collected the money due him for wages, earned while in the employ of the said Western & Atlantic Railroad Company, for the month of October, 1905, he, the said F. B. Crawford, knew that he did not have title to the wages assigned by him to the said Stephen A. Ryan Company to the extent of the assignment, as herein set up, and that, in collecting the wages due him, for the month of October, 1905, he intended to defraud, and did defraud, the said Stephen A. Ryan Company out of the sum of \$10.00; of the value of \$10.00, all of which said acts on the part of F. B.

Crawford were contrary to the laws of said state, the peace, good order, and dignity thereof. C. S. King, prosecutor. Lowry Arnold. Sol. December term, 1906. Criminal court of Atlanta." The defendant demurred to this accusation, on the ground "that it sets forth no distinct crime; that it is vague, uncertain, and indefinite and general in its allegations, and does not properly put the defendant on notice of what he is expected to defend; and that it is fatally defective because it is nowhere alleged that the defendant made any false representations relating to any past or existing fact." This demurrer was overruled, and the defendant was tried and convicted. He thereupon petitioned the superior court for a writ of certiorari, alleging in his petition that the court erred in overruling the demurrer, and that the verdict was without evidence, and was contrary to law. The court sanctioned the petition and granted the writ of certiorari, and, upon hearing the certiorari, entered a judgment overruling the same, and the case comes to this court on exceptions to the judgment of the superior court overruling the certiorari.

The section of the Code upon which this accusation is framed is very broad in its terms. It very greatly enlarges the common-law and statutory offense of cheating and swindling by false pretenses or representations. In other words, many acts would be criminal under this statute which would not be criminal under the common law, or under statutes specifically defining the offense of cheating and swindling. Some of the essential elements necessary to constitute cheating and swindling by false pretenses or representations need not exist to make a violation of this section. For instance, the deceitful means or artful practice need not be false, or relate only to existing facts or past events. It might exist if the representations made were absolutely truthful, but were deceitfully and artfully used with the intent to defraud, and actually did defraud. A future promise or agreement might constitute "deceitful means or artful practice" by which an individual was defrauded and cheated. "Any deceitful means or artful practice" by which an individual is defrauded and cheated is within the terms of this statute. It is a question of fact for the jury to determine whether the means or practice used in defrauding and cheating were deceitful or artful, under the ordinary signification of these words. To illustrate: If all the allegations in this accusation as to the representations of the defendant, which were made to induce the prosecutor to buy his salary, were absolutely true, as represented, yet, if at the time of making such representations he had the intent to cheat and defraud the prosecutor by subsequently himself collecting from the railroad company the amount of the salary which he had actually sold and for which he had been paid, this offense would be shown, under section 670

of the Penal Code 1895. These representations, made to induce the buying of the salary, was the artful practice used by him which put him in position and made it possible for him to carry out and execute his fraudulent intent. If, however, at the time of making these representations and selling his salary, he did not have any fraudulent purpose, or any intention of himself collecting his salary he would not be guilty of violating this statute. We think these general statements are sound and are fully supported by the decision of the Supreme Court in *Garner v. State*, 100 Ga. 257, 28 S. E. 24. But the accusation in this case does not measure up to the requirements above announced, so as to set forth any offense, even under this omnibus section of the Code. The accusation nowhere alleges in terms that the representations were false and made with intent to defraud; nor does it allege that the representations were true, yet were used artfully and deceitfully by the defendant with the specific intent to defraud the prosecutor, or that the defendant when he made these representations then and there had the intent, notwithstanding the sale of his salary, to himself collect the same and fraudulently convert it to his own use. The fraudulent intent is applied only to the act of subsequently collecting the salary and converting it, and it is not alleged that such fraudulent intent was in the mind of the defendant when he made the representations that induced the purchase of his salary account. The accusation being defective in the particulars pointed out, it should have been quashed on demurrer.

Judgment reversed.

(2 Ga. App. 144)

**SMITH v. SHEPPARD. (No. 343.)**

(Court of Appeals of Georgia. June 19, 1907.)

**1. HUSBAND AND WIFE—GIFTS—VALIDITY.**

"The husband can make a gift to his own wife, although she lives in the same house with him, \* \* \* as easily as he can make a present to his neighbor's wife," and when such gift is made in good faith, and consummated by delivery and acceptance, it cannot thereafter be defeated by a sale made by the husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 252.]

**2. SAME—BURDEN OF PROOF.**

In a contest between the wife, as donee, and a subsequent purchaser from the husband, the burden is on the former to show the gift and its validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 253.]

**3. SAME—ACTION BY WIFE—TRIAL—DIRECTING VERDICT.**

Whether this burden was successfully carried in this case should have been submitted to be determined by the jury, and the direction of a verdict for the defendant was erroneous.

(Syllabus by the Court.)

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by Sallie Smith against G. W.

Sheppard. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. I. Geer, Arnold & Arnold, and J. B. Ridley, for plaintiff in error. J. R. Pottle, for defendant in error.

HILL, C. J. 1. In *McNaught v. Anderson*, 78 Ga. 503, 3 S. E. 668, 6 Am. St. Rep. 278, Chief Justice Bleckley declares, speaking for the court, that "the legal unity of husband and wife has, in Georgia, for most purposes been dissolved, and a legal duality established. A wife is a wife, and not a husband, as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound. A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on an equality with other ladies, and looks like progress." Therefore a husband can make a valid gift of a personal chattel, such as a horse, to his wife, although she may be living with him; and such a gift, when consummated by delivery to the wife and acceptance by her, will be upheld by the court, unless made with fraudulent intent. Civ. Code 1895, § 3554.

2, 3. When the husband makes a gift to the wife of a personal chattel, bona fide and without any fraudulent intent, and the gift is consummated by delivery and acceptance, he cannot subsequently deprive the wife of such gift by a conveyance of the personal chattel to a third party. In a contest between the wife and a subsequent purchaser from the husband of such personal chattel, the presumption would be that the gift to the wife by the husband was made with intent to defraud the purchaser, and the burden would be upon the wife to show the bona fides of the gift. The provision of the statute of Elizabeth, as codified in Civ. Code 1895, § 3530, that a voluntary conveyance is void as against subsequent bona fide purchasers for a valuable consideration without notice, is not a general rule of law without an exception. The exception to this general rule is where the evidence rebuts the presumption of fraud against the gift and clearly establishes its bona fides. We think this exception is clearly pointed out in the case of *Howard v. Snelling*, 32 Ga. 195, and in the case of *Cathcart v. Robinson*, 5 Pet. 279, 8 L. Ed. 120. This must be the law, else there would be presented an irreconcilable conflict between section 3504 of the Civil Code of 1895, which defines a valid gift, and section 3530 of the Civil Code of 1895, as to the rights of bona fide purchasers against voluntary conveyances. The law's purpose is to prevent a fraud by the donor upon the donee in the subsequent sale, as well as to prevent a fraud upon the purchaser by the previous gift. There was conflict in the evidence in this case as to

the making of the gift by the husband to the wife and its consummation. There was no evidence that, if the gift was made and consummated, there was any fraudulent intent on the part of the husband as against the subsequent purchaser. The gift, if made, was consummated, according to the evidence of the plaintiff, two years prior to the sale of the horse by the husband to the purchaser. In the language of Mr. Justice Jenkins, in *Howard v. Snelling*, supra, this was "a very long incubation of a fraudulent intent." Whether the gift was made, and its consummation and bona fides, under the evidence in this case, should have been submitted to the jury to be determined by them. The direction of the verdict for the defendant was error.

Judgment reversed.

POWELL, J., disqualified.

(2 Ga. App. 207)

**BELL v. FOSS BROS. et al.** (No. 355.)  
(Court of Appeals of Georgia. June 26, 1907.)  
**ERROR, WRIT OF—REVIEW—GRANT OF NEW TRIAL.**

This being the first grant of a new trial, and it not affirmatively appearing that the verdict as rendered was demanded by the law and the evidence, this court, following the repeated rulings of the Supreme Court, will not interfere with the discretion of the trial judge. Civ. Code 1895, § 5585.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3863, 3871.]

(Syllabus by the Court.)

Error from City Court of Quitman; W. B. Bennet, Judge.

Action by G. W. Bell against Foss Bros. and another. Verdict for plaintiff. From an order granting a new trial on motion of defendant C. C. Foss, plaintiff brings error. Affirmed.

The suit was by G. W. Bell against Foss Bros., a firm composed of C. C. Foss, R. J. Foss, and against J. L. Massey, on a promissory note made by the defendants and payable to the plaintiff. The only defense filed was by C. C. Foss. He denied that he signed or delivered the note, or authorized any one to do so for him, and alleged that at the time it was made he was in the ginnery business with his brother, R. J. Foss, but that it was not made in the transaction of their partnership business or in any way connected therewith, and that R. J. Foss was not authorized to sign the partnership name to it. There was conflict in the evidence as to the consideration of the note; the evidence for the plaintiff being that the note was given to him for borrowed money to pay the debts of Foss Bros., and the evidence of C. C. Foss being that the money was borrowed by R. J. Foss for the individual use of R. J. Foss in the purchase of a mule. A verdict was rendered against all the defendants, and C. C. Foss filed a motion for a new trial on the statutory grounds, which was granted by the trial judge.

Stanley S. Bennet and Sam S. Bennet, for plaintiff in error. L. W. Branch, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 154.)

**GODDARD v. STATE.** (No. 472.)  
(Court of Appeals of Georgia. June 19, 1907.)

**1. FALSE PRETENSES—ELEMENTS OF OFFENSES.**

The essential requisites in the offense of cheating and swindling by false representations are: (a) That the representations were made; (b) that they were knowingly and designedly false; (c) that they were made with intent to deceive and defraud; (d) that they did deceive and defraud; (e) that they related to an existing fact or past event; (f) that the party to whom the false statements were made, relying on their truth, was thereby induced to part with his property. It is incumbent upon the state to prove all of these elements of the offense, and if any one is lacking in the proof the offense is not made out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 1-20.]

**2. SAME—EVIDENCE—SUFFICIENCY.**

Applying the facts proved to the above legal requirements, the verdict in this case was without evidence to support it, the conviction of the accused was contrary to law, and the trial court should have granted him a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 62.]

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

E. Goddard was convicted of cheating and swindling by false representations, and he brings error. Reversed.

Joe M. Moon, for plaintiff in error. T. Q. Milner, Sol., for the State.

HILL, C. J. The defendant was convicted of cheating and swindling, in the city court of Cartersville, on evidence substantially as follows: The accused was the owner of a light bay medium-sized horse, which he sold to the prosecutor for \$35. At the time of the sale he represented to the prosecutor that the horse "was not over 10 or 12 years old, and was a good corn and fodder eater, and was sound in every respect." The prosecutor saw the horse before he bought him, and drove him to his buggy. He was apparently very old, and was very poor. The accused told the prosecutor that his condition was due to the fact that a negro had made a crop with him and had fed him on Johnson grass; that all he needed was "feed," was a good horse, and "had all the gait and a pair of drawbars thrown in," and that he was worth \$45, and if he kept on fattening as he had done in the one month in which he had had him he would be worth \$75. The prosecutor told the accused, after examining the horse, that "he seemed to be older than 10 or 12 years, and looked like he might be 16 years old"; but the accused insisted that he was only 10 or 12 years old. The prosecutor asked the accused if the horse could eat corn and fod-



der, and he replied that he could eat anything. The prosecutor and the accused hitched the horse to a buggy, and, after driving him awhile, told the accused that "he moved very well," and that he would give him \$35 for the horse. The accused wanted \$45. A friend of the accused, standing near, listening to the barter, advised the accused to take the \$35, and the accused, after hesitating awhile, consented to do so, and delivered the horse to the prosecutor. The prosecutor paid for the horse and took him home. This was on Saturday. On the next Monday the horse was returned to the defendant by the prosecutor, who stated that the representations that the horse was a good corn and fodder eater, and was only 10 or 12 years old, were untrue, and demanded the return of his money, which was refused. On Saturday night and Sunday morning the prosecutor and his son gave the horse corn and fodder to eat, but he did not eat any of it. The prosecutor stated that he relied solely upon the representations made to him by the defendant as to the age of the horse and as to his ability to eat, but that he afterwards learned that the horse was 15 or 16 years old and could not eat corn and fodder. The prosecutor stated that, if he had known these facts, he would not have paid anything for the horse and would not have had him as a gift. One witness, besides the prosecutor, stated that the horse ate corn with difficulty and "stemmed" his fodder. This was substantially the case as made by the state. Several witnesses for the defendant testified that the defendant was approached by the prosecutor and asked to sell him the horse; that the defendant was reluctant to sell the horse, stating to the prosecutor that he was in a bad condition because of bad treatment, and was not fit to sell, but that he thought he was worth \$45; that he told the prosecutor that the horse had been fattening rapidly while in his possession, and that he had fed him on meal from the mill; that the horse was sound, and that he did not know his age, but that he was apparently an old horse; that he was told by the party from whom he got him that he was about 12 years old; that, while the accused told the prosecutor that he fed the horse on meal from the mill, he also told him that the horse could eat corn and fodder, as he had fed him on some. Several of these witnesses also testified that they fed the horse on corn and fodder after the prosecutor had turned him loose, and that he ate both. All the witnesses stated that the horse was old and very poor. One witness stated that after the prosecutor returned the horse, and the accused refused to take him, and he was turned loose without an owner, he took possession of the horse, and for two months fed him on corn and fodder and other feed; that the horse fattened about two pounds a day, and got in good condition, and he "swapped him" for another horse, worth \$35; and that he got in cash \$10 besides. The fore-

going is a substantial statement of all the material evidence in the case.

In repeated rulings of this court it has been announced that the verdict of the jury will not be disturbed if there was any evidence to authorize it, but that, if the verdict was entirely without evidence to support it, it will be set aside as contrary to law. Several exceptions are made to the charge of the court and to the refusal to charge as requested, and these exceptions are urged very forcibly by the able attorney for the plaintiff in error; but the view that we entertain of this case on the merits makes it unnecessary for us to consider any of these specific exceptions. We think the verdict against the defendant, even under the evidence for the state, is wholly unwarranted. To support a conviction for cheating and swindling, as charged in this case, there are certain essential facts which it is incumbent upon the state to prove. Were the alleged representations made? Were they knowingly false? Were they made with intent to deceive and defraud? Did they deceive and defraud? And was the prosecutor induced by such representations, believing in their truth, to part with his property? All these elements must exist before the offense is complete. There was evidence that the representations were made by the defendant to the prosecutor, to wit, that the horse was a good corn and fodder eater, that he was not more than 10 or 12 years old, and that he was sound in every respect. Were these representations false, and known to be so by the defendant when he made them? That the horse was sound in every respect was affirmed by all the witnesses, and was undisputed. The statement that he could eat corn and fodder was abundantly shown by actual experiments. The only testimony to the contrary was that of the prosecutor and his son that he did not eat the corn and fodder given to him by them on two occasions. There was no proof that the corn and fodder which they gave to the horse was in good condition; and, in view of the evidence that the horse always had eaten corn and fodder, it is fair to presume that its condition on the two occasions when he failed to eat them was the reason for such failure, and not the horse's inability to eat such feed. The statement as to the age of the horse was apparently only the opinion of the defendant, for he said he had only owned the horse a short time; but it is fair to presume that the statement as to the age was not made with intent to deceive the prosecutor, for the defendant gave him every opportunity to determine that question for himself. He turned the horse over to the prosecutor to drive, and assisted the prosecutor in making an examination of the horse. The age of the horse was a patent defect, discoverable by ordinary inspection. All the witnesses testified that the horse, in the language of Dr. Johnson, describing an old maid, was "old, ugly, and miserably poor." Besides, the state-

ment of the prosecutor shows that he was not deceived as to the age of the horse. After making an examination he stated that he believed the horse was more than 12 years old, and looked like he might be 16 years old. "The evidence showing that the defects in the mare traded by the accused to the prosecutor were patent, and that they were actually discovered by the latter before the trade was concluded, the conviction of the accused of being a common cheat and swindler was not warranted, although he represented the mare to be 'all right.'" *Rainey v. State*, 94 Ga. 599, 19 S. E. 892.

We have preferred to go fully into the merits of this case, because we are convinced from a careful consideration of the evidence that the conviction of the defendant was wrong. All the facts and circumstances clearly indicate that the defendant did not use any "deceitful means or artful practice" to induce the prosecutor to purchase the horse. By general consent, much latitude should be allowed in trading horses; but the evidence in this case failed to show that the defendant availed himself of any such latitude, but showed, on the contrary, that he was a fair and honest trader, and the reason, apparently, for dissatisfaction with his purchase by the prosecutor, was because his family did not like the horse, or, in the language of his son, "would not have such an old, poor horse." We think the verdict of the jury was unsupported by the evidence, and that the defendant should have been granted a new trial.

Judgment reversed.

(2 Ga. App. 75)

**SOUTHERN RY. CO. v. PURYEAR.**  
(No. 326.)

(Court of Appeals of Georgia. May 24, 1907.)

**1. RAILROADS—INJURIES TO ANIMALS—NEGLIGENCE—BLOWING WHISTLE.**

The act of an engineer in blowing a whistle in compliance with the mandate of the statute in approaching a public crossing is not negligence, unless the whistle was blown in such manner as to produce an unnecessary and unusual noise. Neither is the blowing of the whistle by the engineer for the purpose of preventing stock from getting on the track in front of a running train, where there is apparent danger that the stock would get on the track unless so frightened away, negligence, unless the blowing was done in an unusual and unnecessary manner. There was no evidence in this case to support the verdict against the railway company, and the presumption of negligence was clearly rebutted by the positive and uncontroverted testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1403, 1476.]

**2. SAME—PROXIMATE CAUSE.**

To render a railroad company responsible in damages for killing a horse, the evidence, or some reasonable inference deducible therefrom, must show that the death of the horse resulted from the injuries received. The evidence and circumstances in this case failed to show that the death of the horse in April was the result of the injuries received in December before, but

did clearly show that such death was caused by some disease disconnected with those injuries. (Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by D. Puryear against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

See 56 S. E. 73.

Shumate, Maddox & McCamy and J. M. Rudolph, for plaintiff in error. Geo. G. Glenn, for defendant in error.

HILL, C. J. Puryear sued the Southern Railway Company in a justice's court for damages for the alleged killing of his colt in December, 1904, by the running of the train of the defendant company; the suit being for \$75. The verdict and judgment in the case were against the defendant, for \$75. Thereupon it brought its petition for certiorari to the superior court. The judge of the superior court, on the hearing of the certiorari, overruled the same, and refused to grant a new trial. This judgment is brought here for review. The evidence makes the following case: In the latter part of December, 1904, the colt in question and a mule were in the dirt road, at a point about 400 or 500 yards south of where the dirt road crosses the track of the Southern Railway. The colts were a short distance south of the blow post of said crossing. The dirt road at this place runs parallel to and within a very short distance of the railroad track. At the time of the injuries complained of the train of the defendant company was running north. The uncontradicted evidence of the engineer is that, as he approached the blow post for said crossing, he observed the colts in the dirt road, and that they commenced running along the dirt road together; that when he reached the blow post he blew the crossing signal; that the colts continued to run up the road ahead of the engine, and that, being afraid that they would run on down to the crossing and take up the track, which was the habit of animals under similar circumstances, in the effort to prevent this and to frighten the colts away from the track and make them turn back, he commenced blowing the stock alarm at them; that the mule colt did turn back, but that the horse colt continued running down the road, outrunning the train, and passed over the crossing, and that was the last he saw of him. The engineer further testified that there was no unusual or unnecessary noise made by the running of the train, or by the blowing of the whistle at the time and place of the blowing, and that the blowing of the whistle was the proper thing to do under the circumstances; that he ceased blowing the whistle before the colt reached the crossing, and did not blow it any more. This evidence of the engineer was corroborated by the fireman, and was not

contradicted by any of the witnesses for the plaintiff. The testimony shows that the colt, after running across the railroad crossing, ran into the fence, knocked down two panels and one of the posts, and cut its shoulder and its flank, and sprained its right ankle. The cut in its shoulder was from four to six inches long and about an inch deep in the deepest place; but the wounds were flesh wounds, and did not strike the bone. The sprain in the ankle caused it to become slightly enlarged, and when the colt would walk it had a slight limp. There were no bones broken at all. The flesh wounds healed, but the colt never seemed to get right. On April 15th thereafter the plaintiff drove the colt through the country, 18 miles, to his father's. Some time afterwards the colt was turned loose in the pasture with other stock, and it got sick. It was doctored, and got better; but it again got sick, and died. Several of the witnesses testified that they could not tell what was the matter with the colt, but that it just "got down and seemed to be weak." One of the witnesses, who seemed to be somewhat of a horse doctor, thought the colt had the colic, and drenched it with buttermilk. This is substantially all the evidence in the case, and the question presented is: Does this evidence, considered most favorably for the plaintiff, make a case of liability against the railroad?

1. The proximate cause of the fright of the colt, as shown by the uncontradicted evidence, was the noise of the approaching train; for there had been no blowing of the whistle at the time the colt was seen running up the dirt road parallel with the railroad track. There was no unusual noise caused by the running of the train, only the noise incident usually to the running of a heavy freight train. The evidence showed that it was absolutely necessary for the whistle to be blown at the blow post, in order to comply with the imperative mandate of the statute; but the testimony is uncontradicted that in the performance of his duty the engineer did not blow the whistle so as to cause an unnecessary or unusual noise. If the noise of the running train and the blowing of the whistle at the blow post caused the fright of the colt, the railroad would not have been liable; for these things were not negligence, unless unusual and unnecessary, or done in an unusual or unnecessary manner. This is too clear for doubt. The blowing of the whistle by the engineer subsequently was done by him (according to his uncontradicted evidence) for the purpose of preventing the colts from running on the track or across the crossing, and was done for the purpose of preventing injury to the colts by frightening them away from the track. We do not think that the engineer can reasonably be adjudged guilty of negligence for blowing the whistle for the purpose indicated, if done in a proper way. On the

contrary, we think it was the prudent thing for the engineer to have done. We think, therefore, that if the noise of the running train and the blowing of the whistle, under the circumstances, caused the fright of the colt, and caused it to injure itself as described in the evidence, the company is not responsible for such fright or the consequences thereof; for the evidence clearly shows that its agent exercised all ordinary and reasonable care and diligence in connection with the matter and to prevent any injury to the colt, the specific acts of alleged negligence in blowing the whistle being neither unusual nor unnecessary at the time when and the place where it was done.

2. The evidence showed that the colt was injured the last of December, 1904, by running into the fence and inflicting upon itself two flesh wounds and spraining one ankle. These wounds were not serious, and the two flesh wounds were entirely healed, and as a result of the sprained ankle there was a slight limp. The colt died five months thereafter from some unknown disease, which was thought by the person who treated it to have been colic. Even if the company was liable for the injuries which the colt received in running against the fence, unless it died as a result of such injuries, the company would not be liable for its death. The facts of this case, instead of showing, or even raising an inference, that the death was the result of the injuries, indicated very clearly that death was caused by some disease wholly unconnected with the injuries. We therefore conclude that there was no evidence of negligence on the part of the defendant railway, but that, on the contrary, any presumption of negligence arising from the injuries was fully rebutted by the positive and uncontradicted testimony of unimpeached witnesses, and that the death of the colt resulted, not from the injuries received in December, but from some disease wholly disconnected therefrom in April following.

The judgment of the superior court in overruling the certiorari and refusing a new trial is reversed.

(2 Ga. App. 136)

WILLIAMS v. FAIN & STAMPS. (No. 85.)  
(Court of Appeals of Georgia. June 19, 1907.)

JUSTICES OF THE PEACE — PROCEDURE — CONTINUANCE.

In a justice's court a suit upon an unconditional contract in writing may be tried at the first term, although a plea be filed, if the plaintiff be present and willing to proceed to trial. Even at the first term the defendant cannot continue the case as a matter of right.

Russell, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County;  
H. M. Holden, Judge.

Action by Fain & Stamps against George Williams. Judgment for plaintiff was af-

firm on certiorari, and defendant brings error. Affirmed.

I. T. Irvin, Jr., for plaintiff in error. Jas. M. Pitner, for defendants in error.

POWELL, J. This decision is conversant merely about the meaning of one word—the word “consenting.” The plaintiff sued in a justice’s court upon an unconditional contract in writing. The defendant’s counsel appeared at the first term and filed what amounted to a plea of the general issue. The plaintiff insisted upon an immediate trial of the case, and the court, over objection of defendant’s counsel, allowed him to proceed. He obtained a judgment, and the defendant sought by certiorari to set the same aside, on the ground that under the law the case was not triable, over his objection, at the first term. The judge of the superior court overruled the certiorari, and error is assigned to that ruling.

Civ. Code 1895, §§ 4133–4135, governing the practice in such cases, are as follows:

“Sec. 4133. All cases before a justice of the peace stand for trial at the time and place designated in the summons, and shall be then and there tried, unless continued according to law.

“Sec. 4134. Whenever the defendant in the justice’s court on an unconditional contract in writing makes defense, he shall make such defense at the first term.

“Sec. 4135. When such defense is thus made, the cause shall stand for trial at the next term (subject, however, to continuance as provided by law): Provided, that said cause may be tried at the term when said plea is filed, if the plaintiff or his attorney is present consenting thereto.”

The original plaintiff says that he was present and consenting to a trial at the first term, and that the case is within the proviso of section 4135. The defendant says the word “consenting,” *ex vi termini*, connotes the concurrence of another volition with that of the plaintiff; that the plaintiff’s willingness to try at the first term is not sufficient, but that there must be also, on the defendant’s part, a willingness to try before consent can exist; that one person cannot consent until there is another willing person to consent with. It is insisted that the individual action of a single mind may be called “assent,” but not “consent.” To this proposition the majority of this court cannot assent, whether we view it from a philological or from a judicial standpoint. The synomic discrimination between the words “assent” and “consent” is not based on the distinction between single and joint volition; but, according to the authority of the Standard Dictionary, Webster’s International Dictionary, and Crabb’s English Synonyms, “assent respects the judgment, consent respects the will.” The word “consent,” as is true with most of our English words, has many shades of meaning; and it is frequently used to express the notion of “a voluntary

accordance with or concurrence in what is done or proposed by another.” From an etymological standpoint the prefix “con” does imply joint action; but in the interpretation of statutes we look to the ordinary, not the etymological, signification of words. Loosely, the word “consent” is used interchangeably with the words “assent,” “acquiescence,” “concurrence,” “agreement,” “approval,” and “permission.” However, best usage always distinguishes it from “assent” and kindred words, according to the shade of meaning just pointed out; “consent” connoting individual volition, and “assent” individual judgment. As an act of judgment we may assent to the necessity of a surgical operation, but from lack of fortitude may not have the will power to consent to it. Thus, Shakespeare makes the poor apothecary, whom Romeo tempts with money in order to induce him to furnish the poison for the contemplated suicide, reply, “Poverty, but not my will, consents.” This same writer also, in the opening verses of Henry VI, in lamenting the death of the former Henry, uses the word “consent” to express the idea of individual volition, when he calls upon the comets to scourge “the bad revolting stars, that have consented into Henry’s death.” The power of the colonial legislature to permit or to refuse—its unilateral volition—is implied by the use of this word as it appears in the excerpt from the Declaration of Independence: “He has kept among us, in times of peace, standing armies, without the consent of our Legislature.” In the biblical usage of the word the same idea of the action of the individual will, as distinguished from judgment, is preserved. The murderers of Stephen laid down their clothes at the feet of a young man named Saul (Paul); and, though he took no part with them, his wish and will in the matter is expressed by the words, “And Saul was consenting unto his death.” Acts, viii, 1. Certainly there is no intention to intimate that there was an agreement among the guests who were invited to the marriage feast, and yet it is said of them, “All, with one consent, began to make excuse.” Luke, xiv, 18. Note the use of the word “one” to complete the sense in this quotation. The last phrase of Rom. i, 8, which, according to the translation of 1611, reads, “Who knowing the judgment of God, that they which practice such things are worthy of death, not only do the same, but have pleasure in them that do them,” is rendered in the revised version of 1881, “But also consent with them that practice them,” and thus “have pleasure in” and “consent with” are recognized as interchangeable terms. Compare with this last extract Pa. i, 18, “When thou sawest a thief, thou consentedst with him.” To express the individual action of his spiritual volition Paul says (Rom. vii, 16): “If, then, I do that which I would, I consent unto the law that is good.” The king of England is always said to assent, not to consent, to an act of

Parliament; for theoretically he has no personal will or choice, and merely expresses his judgment as to whether the law is for the people's good.

When we come to the law we find this shade of meaning still preserved, though not always so closely as in literature, where linguistic precision receives more care. For example, the expression "age of consent" stands in close legal relation to the phrase "against her will." In that topic of criminal law in which these expressions are most familiar, the volition, not the judgment, of the female, is considered. Her judgment may oppose the act; and yet if, as in the case of the fair young woman of Byron's poem who, "swearing she would ne'er consent, consented," her will does not oppose, the crime is not complete. When we desire to express the meeting of the minds of the parties to a contract, it is not customary to use the word "consent" alone; but, to insure greater precision, we say "mutuality of consent," or "mutuality of assent"—the former being the more accurate expression. If it had been intended by section 4135 of the Civil Code of 1895 to make such cases triable at the first term only when both parties are willing, some such expression as "mutual consent," or "consent of the parties," would have been used. Compare sections 5126 and 4848. The manifest legislative intent is to give to the plaintiff the right to exercise his own volition as to whether the trial shall be had at the first term or the second, subject, of course, to the right of the defendant to continue for cause. This gives to the plaintiff no undue advantage. It merely protects him against the legal surprise which may arise from the filing of the plea, and affords him the time, if he needs it, to make preparation to meet the matters set up in defense. The defendant has already had 10 days' notice of the plaintiff's demand, and is, therefore, ordinarily expected to be ready for trial at the first term. If the plaintiff is also ready, there is no need for further delay. The law may justly extend to the plaintiff, if he wishes it, further time to meet a plea just filed, without affording the defendant further delay when he is or should be ready for trial. Of course, if the defendant is not ready, and can make a proper showing for a continuance, the magistrate may grant it.

Judgment Affirmed.

RUSSELL, J., dissents.

(2 Ga. App. 60)

**CARROLL v. HUTCHINSON.** (No. 255.)  
(Court of Appeals of Georgia. May 24, 1907.)

1. PLEADING—FACTS OR CONCLUSIONS—ALLEGATIONS OF FRAUD—SUFFICIENCY.

A plea alleging fraud, but not alleging specific acts constituting fraud, should be stricken on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Pleading, §§ 12, 28½.]

2. EVIDENCE—PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—VARYING TERMS OF WRITTEN CONTRACT.

One who, in the absence of fraud, knowingly gives his promissory notes for a sum of money for the purchase price of land, for which he accepts from the payee of the notes a bond for title, conditioned upon the payment of that sum, cannot defeat the collection of the notes by showing an antecedent executory agreement on the payee's part to give him the land, or a part of the purchase price, or to sell it to him at a price different from that stated in the written contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2043.]

3. SAME—SUFFICIENCY.

The evidence demanded a verdict for the plaintiff.

(Syllabus by the Court.)

Error from City Court of Thomasville; C. P. Hansell, Judge.

Action between Timothy Carroll and E. P. Hutchinson. From the judgment, Carroll brings error. Reversed.

M. Baum, W. C. Snodgrass, and E. P. S. Denmark, for plaintiff in error. Theo. Titus, for defendant in error.

PER CURIAM. Judgment reversed.

(3 Ga. App. 71)

**GRESHAM et al. v. HEWATT.** (No. 314.)  
(Court of Appeals of Georgia. May 24, 1907.)

CONTRACTS—LEGALITY OF OBJECT AND CONSIDERATION—SUPPRESSION OF CRIMINAL PROSECUTION.

This case is controlled by the decision of the Supreme Court in *Jones v. Peterson*, 43 S. E. 417, 117 Ga. 58, and the cases therein cited. (Syllabus by the Court.)

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by William Hewatt against J. M. Gresham and others. From the judgment, defendants bring error. Affirmed.

Gresham, having been arrested on a bastardy warrant, made the following contract: "The State v. Joseph Gresham. Warrant for Bastardy. Miss L. D. Hewatt, Pros. It is agreed by the parties to the above-stated matter that William Hewatt, father of Miss L. D. Hewatt, take said child born of the said Miss L. D. Hewatt, and care for and maintain said child and support same; that said Joseph Gresham agrees, for and in consideration of the support of said child and the dismissing of said warrant against him, to pay to said William Hewatt the sum of three dollars per month, to be paid as follows: [The payments to be made are set out.] This shall be in full liberality [of the liability] on the part of said Joseph Gresham for the support, maintenance, or education of said child or its mother, and, if he complies with the payments when they become due, shall be a bar to any further prosecution as to said matter. But, should said Joseph Gresham fail to pay any of said payments when they become due, then said

prosecution is at liberty to have another warrant issued for said Joseph Gresham for said charges. Then the same is to be a bar and release of any further liberality [liability?] of said Joseph Gresham to said William Hewatt on this contract, or any liberality [liability] of his securities on same for any further sum, or any part of same. Should said child die at any time, then said payments on same shall cease, except what is then due on same, or the proportion of the amount due on same, except the \$18 due December 25, 1901, which is to be paid in any event. This contract is to be nonnegotiable and nontransferable. The said Monro Gresham and Sam Ewing and [?] bind ourselves to said William Hewatt for the amounts of each of the payments of \$3 per month for said ten years, and agree to see the same paid when due. And each of us hereby waive all exemptions of the homestead against the payment of any part of said sums which will become due on this contract. It is understood and agreed that there shall be no further prosecution of said Joseph Gresham for said offense, or any other offense arising out of same, provided said Joseph Gresham complies with his part of this contract. Witness our hands and seals this the 20th day of September, 1901. J. J. Gresham. [L. S.] J. M. Gresham. [L. S.] S. J. Ewing [L. S.] Executed in the presence of E. T. Nix." The sureties having been sued on default of payment of certain of the installments, and a judgment having been rendered against them, they sought to avoid it on the following grounds: That the contract is illegal, because the consideration is the suppression of a criminal prosecution; that the contract is also illegal for the reason that, under Pen. Code 1895, §§ 1248-1250, the only mode of requiring a putative father to support and maintain a bastard child is that set forth therein; that the contract is merely an optional one on the part of the defendants; that under the contract a suit thereon and a criminal prosecution might be maintained at the same time. One of the sureties also set up that he signed the contract under duress, to prevent his son, the putative father of the bastard, from going to jail; that the son was under arrest, and incarceration was immediately threatened.

O. A. Nix, for plaintiffs in error. F. F. Juhan and M. D. Irwin, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 57)

TURNER v. WARE. (No. 239.)

(Court of Appeals of Georgia. May 24, 1907.)

1. CONTRACTS—ACTIONS—DEFENSES—FRAUD.

Where a party has been induced to enter into a contract by a willful fraud on the part of the other party, calculated to deceive and which does deceive, the defrauded party may set

up the fraud in his defense to an action on the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 420.]

2. BILLS AND NOTES—ACTIONS—DEFENSE—FRAUD.

In a suit on a promissory note against the maker thereof, the defense was that the maker had been induced to sign the same by a misrepresentation of a material fact, made willfully to deceive him by the holder thereof. *Held*, it was error to exclude the testimony in proof of this defense and to direct a verdict for the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 233.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by A. D. Ware against J. D. Turner. Judgment for plaintiff, and defendant brings error. Reversed.

R. Douglas Feagin, for plaintiff in error. L. D. Moore, for defendant in error.

HILL, C. J. Ware sued Turner in a justice's court on a note for \$65 for rent of a store on First street, in the city of Macon. Turner pleaded that he was induced to sign the note by fraudulent misrepresentations made to him by Ware, and pleaded set-off and recoupment against Ware of \$85. The facts of the transaction between Ware and Turner were substantially as follows: In March, 1906, Turner was renting a store on Second street, in Macon, and was paying \$60 per month, and his rent notes were outstanding until October 1, 1906. Ware was renting a store on First street, under a lease to October 1, 1907. Turner did not know what rent Ware was paying. Ware wanted to exchange stores with Turner, and they agreed to make an exchange of stores, and, as both parties had rent notes outstanding, it was agreed that, in order to avoid the trouble of making new notes, each would continue to pay his outstanding notes for the rent of the store each had been occupying, and they would adjust between themselves the difference in the rent; and each took the other's word as to what rent he was paying. Turner told Ware that he was paying \$60 per month for his store, which was the truth. Ware told Turner that he was paying \$65 per month for his store, which Turner relied upon as being the truth; but in fact Ware was only paying \$50 per month for his store, and his notes for this amount were outstanding. Under these representations, which each accepted as true, and which each acted upon, the exchange of stores was made. Under this contract Turner gave his notes to Ware for \$65 for the monthly rent which Ware said his store had been costing him; and it was agreed that Turner should pay these notes each month by taking up his own notes for \$60 for the rent monthly of the store he had occupied on Second street, and pay Ware the \$5 difference in the rent of the two stores

in money. Turner, relying upon the truthfulness of Ware's statement and having no cause for suspecting any deception or fraud, paid and took up his \$50 notes each month for six months after the exchange of stores was made. This payment covered the rent of the store which Ware had moved into, and which had been occupied by Turner from April 1, 1906, to October 1, 1906, and, in addition, Turner paid to Ware the \$5 per month for five months, thereby taking up, in pursuance of the agreement, five of his \$65 notes which he had given to Ware. Turner having thus paid his six \$60 notes, and in addition the \$5 difference in the rent of the stores to Ware, he was only due, at the time the suit was brought on the \$65, the sum of \$5, assuming that there had been no misrepresentation or fraud, and that Ware's contention, as claimed, was correct. Ware's suit was for the full amount of \$65 and interest, and Turner claimed that he had paid rent, when Ware sued, \$85 more than the aggregate rent of the First street store according to what Ware was actually paying therefor when the exchange of stores was made; this \$85 being composed of the \$5 difference in the rent of the two stores for the five months, which Turner had paid to Ware, and the \$10 per month, which Turner had paid as the difference in rent, relying upon the statement of Ware that his monthly rent was \$65, instead of \$50. The evidence for the defense clearly established the truth of Turner's contention; it being shown that Ware as a matter of fact was only paying \$50 per month for his store, and not \$65, as was represented. The court, however, ruled out all the testimony for the defense, and directed the jury to return a verdict for the plaintiff Ware on the note of \$65 for the full amount, with interest. The defendant made a motion for a new trial, based on the usual statutory grounds and the judgment of the court excluding the testimony in support of his defense and in directing a verdict for the plaintiff.

We think, under the evidence submitted by the defendant, the court erred in excluding this testimony and in directing a verdict for the plaintiff, and erred in not granting a new trial. Civ. Code 1895, § 4026, defines legal fraud as "misrepresentation of a material fact, made willfully to deceive, \* \* \* and acted on by the opposite party." The evidence submitted by the defendant shows that Ware did make a misrepresentation to Turner as to the amount of rent paid monthly for his store. It cannot be assumed otherwise than that this misrepresentation was made willfully to deceive. Of course, Ware knew what amount of rent he was paying for his store, and such misrepresentation was acted on by Turner under the belief that it was the truth. This leaves for consideration only the question as to whether such misrepresentation was of "a material fact." Under the contract made between the parties, the exact amount of rent each was paying for his

store was a material fact, as determining the amount each was thereafter to pay on the exchange of stores. It was understood that the man whose rent was the less of the two was to pay to the other the difference. If, therefore, Ware had not made the misrepresentation to Turner, to wit, that his store cost him \$65 rent per month, but had told him the truth, to wit, that his store was only \$50 rent per month, instead of Turner paying Ware \$5 per month as the difference in rent, Ware under the terms of the agreement would have paid Turner \$10 per month as the difference in rent. This misrepresentation, therefore, took out of Turner's pocket \$5 per month that he paid to Ware as the difference in the rent as represented by Ware, and kept out of Turner's pocket \$10 per month which Ware should have paid him as the difference in the actual rent of the two stores. If these facts were true, and the evidence submitted by the defendant gave him the right to have that fact determined by a jury, then the plaintiff was not only guilty of legal, but actual, fraud. If either party to a transaction conceals some fact which is material, which is within his own knowledge, and which it is his duty to disclose, he is guilty of actual fraud. Civ. Code 1895, §§ 4025, 4026, 4027; *In re Tappan*, 22 Pac. 257, 5 L. R. A. 428, 13 Am. St. Rep. 174. In *Epps v. Waring*, 93 Ga. 765, 20 S. E. 645, Mr. Justice Lumpkin says: "It is a universally recognized doctrine, supported by all respectable text-writers, and upheld in every well-considered case, bearing upon this subject, that where a party has been induced to enter into a contract by willful fraud on the part of the other party, calculated to deceive and which does deceive, the defrauded party may set up the fraud in his defense to an action upon the contract." Under these decisions, the defense set up in this case was good, and the evidence submitted by the defendant entitled him to a verdict, unless such evidence was controverted; and we think that our learned brother of the trial court erred in excluding the testimony of the defendant, and in directing a verdict for the plaintiff, and in refusing to grant the defendant a new trial.

Judgment reversed.

(2 Ga. App. 84)

THOMPSON v. BEACHAM. (No. 337.)

(Court of Appeals of Georgia. May 24, 1907.)

1. JUSTICES OF THE PEACE—REVIEW—CERTIORARI—ANSWER OF MAGISTRATE—SUFFICIENCY.

While the answer of the trial magistrate to a writ of certiorari must verify the fact that a final judgment has been rendered, yet an answer which merely verifies the rendition of a final judgment, without more, is entirely insufficient, where the certiorari is brought to correct errors in the proceedings which were had at the trial, and upon which such judgment was rendered. \*

2. SAME—POINTS—VERIFICATION.

Allegations in the petition for certiorari, not verified by the answer, are not to be taken

as admitted, and present nothing for determination, either by the superior or the appellate court. *Landrum v. Moss*, 57 S. E. 965, 1 Ga. App. 216; *Little v. Fort Valley*, 51 S. E. 501, 123 Ga. 503; *Brown v. Gainesville*, 53 S. E. 1002, 125 Ga. 238.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action between E. B. Thompson and J. H. Beacham. From the judgment, Thompson brings error. Reversed.

G. D. Dominick, for plaintiff in error. Jas. M. Smith, for defendant in error.

POWELL, J. Judgment reversed.

(2 Ga. App. 62)

DOWNEY v. FOGARTY. (No. 299.)

(Court of Appeals of Georgia. May 24, 1907.)

ERROR, WRIT OF—EVIDENCE—SUFFICIENCY.

In this case no error of law is complained of, and the verdict was fully authorized by the evidence.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action between M. J. Downey and D. G. Fogarty. From the judgment, Downey brings error. Affirmed.

Saml. H. Myers, and Wallace B. Pierce, for plaintiff in error. D. G. Fogarty, pro se.

HILL, C. J. Judgment affirmed

(2 Ga. App. 62)

BATER v. BATER. (No. 302.)

(Court of Appeals of Georgia. May 24, 1907.)

ERROR, WRIT OF—NONAPPEARANCE OF PLAINTIFF IN ERROR—AFFIRMANCE—DAMAGES.

This case was brought to this court by writ of error, and when called in its order there was no appearance for the plaintiff in error. The defendant in error moved the court to open the record, and asked for an affirmance of the judgment and damages for delay, under Civ. Code 1895, § 5594. In compliance with this motion, the record was opened and the case considered. There is no merit whatever in the exceptions of the plaintiff in error, and this fact, taken in connection with his failure to appear and prosecute, shows that he must have brought the case here for delay only. It is ordered that the judgment be affirmed, and that 10 per cent. on the amount of the judgment in the court below be awarded against the plaintiff in error in favor of the defendant in error as damages for bringing the case here for delay only. *Craton v. Hackney*, 17 S. E. 124, 91 Ga. 192; *Avera v. Vason*, 42 Ga. 234.

(Syllabus by the Court.)

Error from City Court of Savannah, T. M. Norwood, Judge.

Action between William Bater and S. E. Bater. From the judgment, William Bater brings error. Affirmed.

J. E. Myrick, for plaintiff in error. Robt. L. Colding, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

(2 Ga. App. 153)

REED v. STATE. (No. 459.)

(Court of Appeals of Georgia. June 19, 1907.)

HOMICIDE—EVIDENCE—SUFFICIENCY—MANSLAUGHTER.

There was no evidence in this case to authorize a charge upon the subject of manslaughter or a conviction for that offense.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

James Reed was convicted of manslaughter, and he brings error. Reversed.

Thompson & Bell and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen. and F. M. Johnson, for the State.

POWELL, J. The deceased was found mortally wounded. The defendant was accused of murdering him. The evidence was entirely circumstantial. Whoever killed the deceased, if, indeed, his death was not accidental, struck him on the head with some blunt instrument, probably a piece of wood. The record discloses none of the circumstances under which the mortal blow was given. The evidence connecting the defendant with the crime was very slight; but it is manifest that he was guilty of murder, if he was the person who committed the unexplained homicide. While manslaughter may be shown by circumstantial evidence, yet in all such cases enough of the actual details of the killing must appear to relieve the transaction from the presumption that it was unprovoked and malicious.

The wisdom of the rule that manslaughter should not be submitted to juries in cases of homicide, where the defendant is guilty of either murder or nothing, is exemplified in the present instance. It appears from the record that the trial judge at first instructed the jury that there was no manslaughter in the case; that the jury should find the defendant guilty of murder, or else they should acquit him. After three days' deliberation the jury reported that they stood six for acquittal and six for conviction. The judge then, upon a change of mind, gave them instructions upon manslaughter; and in a few minutes the jury returned a verdict finding the defendant guilty of that offense. This verdict was manifestly a compromise, wherein twelve men, widely apart, six believing the defendant a murderer, six believing him innocent, gave up their honest convictions and found him guilty of an offense of which, under the law and the evidence, he could not have been guilty at all, in order to relieve



themselves of further consideration of the case. Under the well-established rule in this state, a new trial results.

Judgment reversed.

(2 Ga. App. 115)

ROUSCH v. GREEN. (No. 338.)

(Court of Appeals of Georgia. May 28, 1907.)

1. JUSTICES OF THE PEACE—APPEAL—DISMISSAL.

An appeal is a de novo investigation, and should not be dismissed because of the absence of either party to the cause. The action may be dismissed for such absence and failure to prosecute the case on the part of the plaintiff, but the appeal cannot be dismissed for that reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 640.]

2. SAME.

Consequently, where judgment in favor of the defendant had been rendered by a justice of the peace, and the case had been appealed to the superior court, it was error, for nonappearance of the plaintiff, to dismiss the appeal, order an affirmance of the judgment in favor of the defendant, and enter judgment for costs against the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Action by J. A. Rousch against Thomas Green. Judgment for defendant before a justice. An appeal therefrom to the superior court was dismissed, and plaintiff brings error. Reversed.

R. Douglas Feagin, for plaintiff in error. Johnson & Johnson, for defendant in error.

RUSSELL, J. Rousch brought a complaint on a note against Thomas Green. Green filed a plea of non est factum, and other pleas in addition thereto. On the trial of the case before the justice, a judgment was rendered in favor of the defendant. The plaintiff appealed the case to the superior court. When the case was called in its order in the superior court, neither the appellant nor his counsel was present. The defendant announced ready and made a motion to dismiss the appeal, and thereupon the court granted the following order and judgment: "Jones Superior Court, October Term, 1906. The within case having been called in its regular order, and there being no appearance for the appellant, it is ordered, upon motion of the defendant, that the appeal be dismissed, the judgment of the lower court be sustained, and that defendant recover of plaintiff all costs of this suit, to be taxed by the clerk." The plaintiff (now plaintiff in error) excepts to this judgment, and alleges that the court erred in entering up the judgment and order above set forth, and in dismissing the appeal, and in ordering the judgment of the justice's court affirmed at plaintiff's cost.

There is but one question presented for adjudication, and that is whether the defendant in a case pending on appeal has the right to dismiss the appeal, or is restricted to a

motion to dismiss the case. The objection of the plaintiff in error is limited to this one question, for the reason that there cannot be any error in the judgment of the superior court in affirming the judgment of the justice's court, if the defendant had the right to dismiss the appeal; for, if so, the law itself would affirm the judgment of the justice's court. This has been held in *Fagan v. McTier*, 81 Ga. 75, 6 S. E. 177; and the same principle is embodied in the concluding portion of section 4470 of the Civil Code of 1895. We think the judge of the superior court erred in dismissing the appeal on the motion of defendant's counsel. Although it is true that the appeal merely suspends judgment, it is nevertheless true that the appeal is a proceeding de novo. So far as concerns the opposite party (the respondent), the present case, when appealed, was an original suit on the promissory note, brought in the superior court. As such original suit, and thus considered, when the plaintiff failed to appear the defendant could do nothing except move to dismiss the action; and, the appeal making the case in the justice's court stand in the same relation to the respondent as if the case had been brought in the superior court and had never been tried, the defendant's rights were no greater than if that had been originally done.

Counsel for defendant in error urges that, if the defendant's only remedy is to dismiss the case on appeal, such a rule would be harsh and unjust, because the plaintiff, in that event, could renew his action, and the judgment of the justice would become a nullity. The learned counsel for defendant in error asks: "How can a defendant in a case like this ever get any benefits from the judgment in the lower court, if he is forced to dismiss the case on appeal?" And he then proceeds to argue: "All the plaintiff would have to do would be to remain away, and thus either force the defendant to dismiss the case on appeal or await his pleasure for trial. The plaintiff can keep on litigating, and worry the defendant until the statute bars him." Even if this be true (though it is not usual for plaintiffs to prosecute fruitless suits), we can only follow the law. By Civ. Code 1895, § 4469: "An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent evidence is admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case." The judgment appealed from is in no legal sense final. Until the appeal was disposed of, the case was undetermined, and there could be no final judgment on the merits. "The appeal opened the case to a full hearing on all the issues made. Its effect was to suspend the first judgment." Had the judgment been for the plaintiff, it would have "bound the property of the defendant to no greater extent than to prevent

its alienation between that time and the signing of the judgment on the appeal." *Williams v. McDaniel*, 77 Ga. 6. By the provisions of Civ. Code 1895, § 4471, "no person shall be allowed to withdraw an appeal after it shall be entered, but by the consent of the adverse party," and, except for defects in the appeal proceedings, this is the only provision for dismissing an appeal. If the appeal is properly in court, and all the requirements of law with relation to appeals have been complied with, and there is no defect as to time, bond, sureties, etc., the appeal cannot be dismissed by the opposite party, except upon the same terms as any other action originating in the court. And we fail to see any peculiar hardship in this. The defendant on the appeal, if he is the respondent, can move to dismiss the case, and it is true it can be brought again. If the cause was an original action, all the defendant could do would be to dismiss the case, and it, too, could be brought again. It is true that, so far as our investigation extends, in all the cases in which the Supreme Court has held it to be error to dismiss the appeal, the defendant was the appellant. But this does not alter the rule. The reason why in any case it is error to dismiss such an appeal is that both parties have the same right (if the case is properly in court) to be heard upon the merits as if it had never been tried.

The only reason the defendant in error gives why it should be otherwise is that if he had moved to dismiss the case, and it had been dismissed, plaintiff could sue again, whereas, if the appeal can be dismissed, he would hold the judgment rendered by the justice in his favor. This would violate the express provision of section 4469, which makes an appeal a new investigation. Without referring to numerous authorities which amply sustain our view of this subject, we think the question is fully settled in the case of *Bateman v. Smith Gin Company*, 98 Ga. 219, 25 S. E. 422: "Where a plaintiff fails to appear and prosecute his case, it is, of course, the right of the defendant to move to have the same dismissed for want of prosecution; and this is the only proper course to be pursued, unless there has been filed a plea of set-off, or some other defense in the nature of a cross-action against the plaintiff. In that event, it might be the right of the defendant to proceed to prove his counterclaim and take judgment thereon; but, even then, the merits of the plaintiff's cause of action would not be affected by the rendition of a judgment in the defendant's favor upon his counterclaim." See, also, *Griffin Marble Works v. Padgett*, 77 Ga. 497, 498; *Central Ry. Co. v. Howard*, 112 Ga. 917, 38 S. E. 338; *Montgomery v. Fouche*, 125 Ga. 43, 53 S. E. 767; *Furniture Co. v. Edwards*, 105 Ga. 240-242, 31 S. E. 161. In *Singer Mfg. Co. v. Walker*, 77 Ga. 649, the exact question was decided, except that the defendant, instead

of the plaintiff, appealed from the judgment of the justice of the peace; but the reason of the decision is stated, and is the same as that upon which we base our judgment.

Judgment reversed.

(2 Ga. App. 228)

**GIRARDEAU v. CITY OF ATLANTA.**

(No. 449.)

(Court of Appeals of Georgia. June 26, 1907.)

**INSURANCE—INSURANCE BROKER.**

One who, by virtue of a contract with a firm of general insurance agents, solicits insurance for their office and for their office alone, and who receives for his compensation a portion of the commissions paid by the insurance companies on the business so solicited, and who does not otherwise engage in any insurance business, is not an insurance broker.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton. Judge.

Action by the city of Atlanta against C. H. Girardeau. Judgment for the city, and defendant brings error. Reversed.

R. R. Arnold and J. B. Ridley, for plaintiff in error. J. L. Mayson and W. P. Hill, for defendant in error.

**POWELL, J.** Judgment reversed.

(2 Ga. App. 209)

**DALTON GROCERY CO. v. TYSON & VICKERS.** (No. 361.)

(Court of Appeals of Georgia. June 26, 1907.)

**WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.**

No error of law is complained of. The verdict is supported by evidence and approved by the trial court. This court has no authority to disturb it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action between the Dalton Grocery Company and Tyson & Vickers. From the judgment, the Dalton Grocery Company brings error. Affirmed.

Hendricks, Smith & Christian, for plaintiff in error. W. G. Harrison and Bule & Knight, for defendants in error.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 204)

**HENRY VOGT MACH. CO. v. BAILEY.**

(No. 346.)

(Court of Appeals of Georgia. June 26, 1907.)

**CHATTEL MORTGAGES—FAILURE TO FILE OR RECORD MORTGAGE—ACTUAL NOTICE.**

A sale of personal property to secure a debt, where the property remains in the possession of the vendor, is inoperative and void as against third persons, unless it is reduced to writing, in which event it will be good as to third persons when recorded, or, when not re-

recorded, as to subsequent purchasers or creditors who have actual notice of such sale. When such sale is not in writing, the personal property must be delivered into the possession of the vendee as security for the payment of the debt, to be valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 372.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by the Henry Vogt Machine Company against W. D. Bailey. Judgment for defendant, and plaintiff brings error. Reversed.

G. R. Ellis, for plaintiff in error. W. A. Dodson, for defendant in error.

HILL, C. J. The Henry Vogt Machine Company filed a materialman's lien against E. D. Ansley on October 6, 1903; said lien being on the real estate in the city of Americus on which the ice plant of E. D. Ansley was situated, and also the buildings, machinery, etc., embracing the whole plant, including the property claimed by W. D. Bailey. The said machine company foreclosed its materialman's lien and obtained a judgment establishing the lien, and also obtained in the same suit a general judgment against E. D. Ansley. The judgment in rem and the judgment in personam were both obtained on January 20, 1905. The *fi. fa.* issued thereon was levied on the property of E. D. Ansley, including a certain "Laidlaw, Dunn & Gordon air compressor, with attachments." This specific property was claimed by W. D. Bailey. On the trial of the claim case the jury found the property not subject, and thereupon a motion for a new trial was made by the plaintiff, which was overruled, and the plaintiff excepted.

The undisputed evidence showed that this property claimed by Bailey was bought by Ansley in July, 1903, from the Latta-Martin Pump Company, of Hickory, N. C. The property was not paid for at the time it was purchased, and Ansley gave four notes for the purchase money, which were indorsed by W. D. Bailey, who subsequently paid these notes. When Bailey paid the notes, Ansley told him that he could retain title to the property until he was repaid. Possession of the property, however, was not delivered to Bailey, but remained in Ansley. Neither did Ansley execute any writing or bill of sale to Bailey for the property. It was simply a verbal agreement between Ansley and Bailey. Before the record of its materialman's lien by the machine company, and when a line of credit was extended by it to Ansley, Ansley informed the secretary and treasurer of the machine company that the property in question belonged to Bailey, that Bailey had paid for the property, and that it was his property, and that the title thereto was to remain in him until he was repaid. The trial judge, in his judgment overruling the motion for a new trial, makes the following statement:

"After consideration, the court is of the opinion that the evidence makes out a verbal conditional sale between Ansley and Bailey, claimant, before the filing of materialman's lien by the Henry Vogt Machine Company. In the opinion of the court, the law requires the recording of conditional sales to protect innocent purchasers. The uncontradicted evidence in this case is that, before the lien was ever filed or sued out, Adam Vogt, the secretary and treasurer and general manager of the plaintiff, was given actual notice by Ansley that the property involved in this claim was the property of Bailey, claimant."

The court tried the case on the theory that the facts showed a conditional sale. We do not think that under the facts a conditional sale was shown. It was at most a sale to secure the payment of a debt. To constitute a valid sale of personal property to secure the payment of a debt, so as to be good as against subsequent creditors, a bill of sale to the property must be executed by the vendor to the vendee, and recorded. If such bill of sale is, however, not recorded, but has been actually executed, and the creditor has actual notice of it, then the title conveyed by it shall be good as against the claim of such creditor, whether he be a purchaser or a junior lien holder. Civ. Code 1895, § 2772. It will thus be seen that there must be constructive notice by the record, or actual notice, before the vendee's title would be protected. There might also be a verbal sale, good against subsequent purchasers or creditors, provided the personal property sold was actually delivered into the possession of the vendee, in which event it would be a pledge or pawn to secure the debt. Civ. Code 1895, § 2956. The facts in this case show that there was neither a written bill of sale nor a verbal sale with delivery of possession of the property as a pledge or pawn. There seems to have been simply a verbal understanding or agreement between Ansley and Bailey, by which the title to the property was to remain in Bailey until he was repaid the money which he advanced for the payment of the property. The question of notice, therefore, to the machine company, which the learned judge seemed to rely upon as protecting Bailey, the claimant, we think was wholly immaterial, for the sale of the property in question to Ansley by the Latta-Martin Pump Company and the delivery of the property to him were absolute so far as the rights of third parties were concerned, and the mere verbal agreement between Ansley and Bailey was inoperative as to all parties dealing with Ansley. It follows, therefore, that the property in question was subject both to the materialman's lien of the machine company and to the special judgment thereon, and was also subject to the general judgment of the machine company against Ansley. We therefore think that the trial court erred in not granting a new trial.

Judgment reversed.

(2 Ga. App. 71)

**HAM v. BROWN BROS. (No. 313.)**

(Court of Appeals of Georgia. May 24, 1907.)

**1. PRINCIPAL AND AGENT—DECLARATIONS OF AGENT—PROOF OF AGENCY.**

Primarily the declarations of an alleged agent are not admissible to prove the agency. If the agency be otherwise prima facie proved, such declarations then become admissible in corroboration. *Jones v. Harrell*, 35 S. E. 690, 110 Ga. 380, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 40.]

**2. SAME.**

If, after the agency is prima facie established, the alleged agent be introduced as a witness and deny the agency, evidence of such declarations are admissible, not only to corroborate the testimony tending to establish the agency, but also, if the proper foundation be laid, to impeach him as a witness. *Jones v. Harrell*, 35 S. E. 690, 110 Ga. 381.

**3. SAME—EVIDENCE OF OTHER TRANSACTIONS.**

Where it is sought to show that the defendant's husband was her agent in transactions with the plaintiff, evidence of transactions with other persons, in which he, with her subsequent ratification, acted as her agent, is not admissible to establish the agency in the transactions with the plaintiff. *Conyers v. Ford*, 36 S. E. 947, 111 Ga. 754.

**4. EVIDENCE—ADMISSIONS.**

Admissions made by the defendant to other persons that her husband was her general agent may be proved against her.

**5. ERROR, WRIT OF—REVIEW.**

Apart from errors of the character indicated in the third headnote, the trial seems to have been fair and free from substantial error.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by Brown Bros. against Mrs. P. H. Ham. Judgment for plaintiffs, and defendant brings error. Reversed.

Sam L. Olive, for plaintiff in error. C. P. Harris, for defendants in error.

**POWELL, J.** Judgment reversed.

(2 Ga. App. 61)

**MORRIS et al. v. DUNCAN. (No. 284.)**

(Court of Appeals of Georgia. May 24, 1907.)

**APPEAL—REVIEW.**

No error appears.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. H. Duncan against C. R. and L. M. Morris, administrators. Judgment for plaintiff, and defendants bring error. Affirmed.

The principal points made by the plaintiffs in error and decided adversely are these: By reason of a default, the law implied, as against the defendants (now plaintiffs in error), a conclusive admission of all the facts alleged in the petition, and he was allowed to contest before the jury only the amount of the damages. The plaintiff testified that the value of the goods taken by the plaintiff was so much, and described the damage done

to the goods. The defendant having died, and his personal representatives being parties, the point was made that the plaintiff was not a competent witness to prove these facts. The suit being for the malicious abuse of legal process, the judge charged the jury that compensatory damages for the plaintiff's wounded feelings (but not punitive damages, the defendant being dead) might be allowed. The point is made that the plaintiff did not testify that her feelings had been wounded; also that under the circumstances damages for wounded feelings were not recoverable. The suit was originally against several defendants, all of whom, the petition alleged, resided in Fulton county. Subsequently all the defendants, except the administrators of Morris, were stricken from the suit. Several terms after this had occurred (the case in the meantime having gone to the Supreme Court and having been remanded to the court below for new trial) the defendants, on the last trial of the case, attempted to prove that neither Morris nor his administrators had ever lived in Fulton county, but had ever been residents of Dekalb county. The trial court refused to permit this to be proved. There was no plea to the jurisdiction. The court charged the jury that they might, in their discretion, add interest to the amount of actual damage they should find in the plaintiff's favor. The point is made that interest during the pendency of the suit should have been excluded, as the delay in getting the case to final trial had been occasioned by the plaintiff's laches.

W. H. Terrell, for plaintiffs in error. Ben. J. Conyers, for defendant in error.

**POWELL, J.** The defendants, through their able and untiring counsel, have made a gallant fight, especially so in the light of the handicap of the default encountered at the beginning of the case. See the reports of the same case, sub nom. *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101, and *Morris v. Duncan*, 126 Ga. 467, 54 S. E. 1045. But the end has come at last; for, after a close and careful examination of the record, we find no error, and therefore affirm the judgment recovered by the plaintiff.

Judgment affirmed.

(2 Ga. App. 83)

**ATLANTIC COAST LINE R. CO. v. HART LUMBER CO. (No. 354.)**

(Court of Appeals of Georgia. May 24, 1907.)

**1. PARTIES—SUBSTITUTION.**

A plaintiff, where it becomes necessary for the purpose of enforcing his rights, may amend his petition by substituting the name of another person, suing for his use.

(a) The right, for the protection of which such amendment is allowable, need not be such a right as is capable of direct enforcement by the original plaintiff, either in law or in equity, provided it be substantial.

(b) Upon such an amendment being made, a cause of action must be shown to exist in favor of the nominal party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 88.]

## 2. PLEADING—RULING ON DEMURRER—WAIVER BY AMENDMENT.

A party who submits to a ruling on pleadings, by filing an amendment to meet the objection, waives his right to except on the ground that the amendment was not necessary. *Brantley v. Southerland*, 57 S. E. 960, 1 Ga. App. 804; *Glover v. Railway Co.*, 32 S. E. 876, 107 Ga. 34.

## 3. SAME—PLEA—CERTAINTY.

An affirmative plea, lacking in certainty and showing no reason why the defendant cannot make it more certain, should, when the defects are specifically pointed out by demurrer, be stricken, unless amended.

## 4. WRIT OF ERROR—REVIEW—SCOPE.

Where the judgment is reversed on account of decisive errors in the initial pleadings, alleged errors occurring on the trial will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3831.]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action by the Atlantic Coast Line Railroad Company against the Hart Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hendricks, Smith & Christian, for plaintiff in error. Buie & Knight, for defendant in error.

POWELL, J. The plaintiff, the railroad company, claimed that the defendant, the lumber company, had obtained some railroad iron under a contract to rent and return it, or, if any portion was not redelivered on demand, to pay the value thereof. These contracts were not made with the plaintiff that brought the suit, but with the Brunswick & Western Railroad Company and with the Savannah, Florida & Western Railroad Company. At the trial the plaintiff offered to amend by striking its name as plaintiff, and by inserting the names of the other two railroad companies as plaintiffs, suing for its use. The court refused to allow this amendment. The plaintiff then tendered amendment striking its name as plaintiff and inserting the name of the Brunswick & Western Railroad Company as plaintiff, suing for its use; and the court also refused this. Among other things, the defendant pleaded that it had rented some iron, but that the same had been checked up and returned. To this plea the plaintiff demurred, on the ground that "it is in the nature of a plea of payment, and the party to whom, the place where, and the date, and the amount of the rail returned on same, is not set forth as required by law," and that "it is so vague and indefinite until it amounts to no plea or defense whatever." The court overruled this demurrer. Upon demurrer to the petition for lack of certainty, the court required an amendment of the plaintiff. The

plaintiff amended to meet the ruling, and now excepts on the ground that the court erred in requiring the amendment. The trial proceeded, resulted in a nonsuit, and several errors are assigned.

1. Ordinarily new and distinct parties cannot be added by amendment; but there are exceptions to this rule. One exception is that provided by Civ. Code 1895, § 5105, which allows a plaintiff, when it becomes necessary for the purpose of enforcing his rights, to substitute the name of another person in his stead, suing for his use. Since such an amendment is allowable for the designated purpose "of enforcing the rights of such plaintiff," some showing should be made to the court that some right of the original plaintiff is connected with the cause of action he desires to assert in the name of the nominal party to be substituted; but this right need not be so perfect as to be capable of direct enforcement, either in law or in equity. It is analogous to the practice in ejectment, where the real plaintiff is allowed to lay demises in the name of any living person, and recover upon any of such demises, though he be unable to connect his title by legal evidence with the title of the person in whose name he recovers, provided that the court is satisfied that he bona fide claims under such person, or has some connection with his title. See *Couch v. Turner*, 17 Ga. 489; *Shanks v. White*, 36 Ga. 432; *Harper v. Wilkes*, 76 Ga. 106; *Kinsey v. Sensbough*, 17 Ga. 540. If the court is satisfied, by the showing made, that the original plaintiff has directly or indirectly bought or otherwise acquired the substituted plaintiff's cause of action, or a substantial interest therein, he should not refuse such an amendment, though, from failure to comply with legal prerequisites, or through absence of formal proof, the plaintiff cannot establish a full legal connection therewith. Usually the statement of counsel, or the oath of the party that he does claim such an interest, in the absence of a counter showing, is sufficient. After the amendment is made, the pleadings must show a cause of action in the nominal plaintiff, and, to authorize recovery, the proof must establish it. Therefore an amendment which would have the effect of substituting as plaintiff a person who, under the pleadings, would not have even an apparent right to sue, should be refused. This is the holding of the Supreme Court in *Mitchell v. Railway Co.*, 111 Ga. 771, 36 S. E. 971, 51 L. R. A. 622 (2), and in *Norwich Union Insurance Co. v. Wellhouse*, 113 Ga. 970, 39 S. E. 397. The contention of the defendant in error that these decisions negative the privilege of an original plaintiff, who has not the strictly legal right to sue, to amend by substituting in his stead and for his use a plaintiff who has the apparent legal right, is not well founded. In this view, the court did not err in refusing the amendment wherein the plaintiff sought

to substitute two separate and distinct plaintiffs, suing for his use, but did err in refusing the amendment offering to substitute the Brunswick & Western Railroad Company alone.

2. The proposition announced in the second headnote, being well settled, needs no discussion.

3. The court ought to have sustained the plaintiff's demurrer to that paragraph of the plea which set up redelivery; and, in the absence of an amendment, that much of the defense should have been stricken. In such a plea the defendant should allege with such reasonable certainty as he may be able to do the time and place of redelivery, the person to whom made, and the amounts delivered in each installment, if the delivery was by installments. If for any reason these facts cannot be set up in detail, the plea should show the court some excuse for failure of strict compliance.

4. Where the reviewing court finds reversible error in the rulings of the trial court as to the initial pleadings, it is not usual to look further into the record for the consideration of errors assigned to rulings upon the trial, since a new trial necessarily results. See *Cagle v. Shepard*, 1 Ga. App. 192, 57 S. E. 946, and cases cited. Counsel for defendant in error in their brief have argued as to what they consider errors made against them by the court in ruling on the demurrer to the plaintiff's petition; but, in the absence of a cross-bill, these matters are not properly before this court.

Judgment reversed.

(2 Ga. App. 91)

**AUSTIN v. M. FERST'S SONS & CO.**  
(No. 356.)

(Court of Appeals of Georgia. May 24, 1907.)

**1. PLEADING—PETITION—DEFECTS—WAIVER.**

All exceptions to petitions and pleas shall be taken at the first term. If a plaintiff's petition is insufficient in law, or for any reason is not sufficiently full to enable the defendant to plead thereto, the defendant must make his objections at the first term, or he will be held to have waived any objection which can be cured by amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1360.]

**2. SAME—AMENDMENT.**

There was no error in allowing the plaintiff's petition to be amended by adding the name of his counsel. *Currie v. Deaver*, 57 S. E. 897, 1 Ga. App. 11; *Gillis v. Atlantic Coast Line R. Co.* (Ga.) 56 S. E. 1003.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 676.]

**3. MOTIONS—ORDER ALLOWING AMENDMENT—FAILURE TO PASS—EFFECT.**

The failure to pass an order allowing an amendment was immaterial, when the trial judge, in his order overruling a demurrer, used the language: "The demurrer is overruled after amendment allowed"—the amendment proposed being clearly stated in writing, fully entitled in the cause, and signed by counsel, and the only omission being the signature of the judge. When the paper containing such an amendment has

been entered upon the minutes, and such minutes have been approved and signed by the judge, the writing is fully identified, and the amendment authorized.

**4. PLEADING—AMENDMENT—PETITION.**

There was no error in allowing the petition to be amended by adding thereto the name of the plaintiff's attorney, nor by alleging that the account was due and unpaid, and that the defendants were a partnership composed of named individuals. *Perkins Co. v. Shewmake*, 48 S. E. 832, 119 Ga. 617. The words "M. Ferst's Sons & Co." do not import a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2053.]

**5. EVIDENCE—STATEMENTS IN PLEADINGS.**

Evidence that the defendant admitted that the account sued upon was correct is not rebutted by the defendant's plea, although sworn to. The pleadings only form the issue. Admissions therein contained may be used against the party making them, but affirmative statements made by him in his own behalf have no probative value, when in conflict with sworn testimony delivered on the trial. The proof submitted was sufficient to prove the correctness of the plaintiff's account.

**6. TRIAL—INSTRUCTIONS—SUFFICIENCY.**

The charge of the court was not, for the reasons assigned, erroneous.

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peebles, Judge.

Action between L. J. Austin and M. Ferst's Sons & Co. From the judgment, Austin brings error. Affirmed.

Hendricks, Smith & Christian, for plaintiff in error. J. O. Sirmans and Bule & Knight, for defendants in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 146)

**DENNEY v. STATE.** (No. 437.)

(Court of Appeals of Georgia. July 19, 1907.)

**CHATTEL MORTGAGES—SALE OF MORTGAGED PROPERTY—EVIDENCE.**

The gist of the offense under Pen. Code 1895, § 671, is the fraudulent sale or disposition of mortgaged personal property, and loss thereby sustained by the mortgagee. The statute requires proof of both elements of the offense. Loss, in its legal sense, was not shown, where the only evidence on the subject was the general statement by the prosecutor that he had lost "a good deal of valuable time, and had to employ a lawyer to foreclose the mortgage," without stating the value of such time, or the amount paid or promised the lawyer for his services.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

R. J. Denney was convicted of a sale of mortgaged personalty, and brings error. Reversed.

W. S. Paris, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

HILL, C. J. The plaintiff in error was convicted in the superior court of Rabun county of the wrongful sale of mortgaged property, in violation of Pen. Code 1895, § 671. There was no conflict in the evidence on

the trial, and the following facts were shown: The prosecutor indorsed a note for the plaintiff in error for \$150 to enable him to borrow this sum from one Hilliard York. To indemnify the prosecutor as surety on the note the plaintiff in error executed a mortgage to him on two mules. The prosecutor testified: "I took the mortgage to indemnify me and save me harmless from loss in the event I had to pay the note we gave to York." The plaintiff in error failed to pay the note at maturity, and York brought suit thereon, recovered a judgment against both principal and surety, and had an execution issued and levied on the property of the plaintiff in error, who was the maker of the note, and sold it; but the amount realized failed to satisfy the execution in full. Thereupon the prosecutor foreclosed his mortgage, and, the sheriff failing to find the mortgaged property, the prosecutor indicted the plaintiff in error. After the indictment had been returned by the grand jury, the plaintiff in error paid off the balance of the debt for which the prosecutor was liable as surety. The only evidence as to the prosecutor's loss was the following statement made by him: "I suffered loss by the sale of the mortgaged property. I lost a good deal of valuable time, and I had to employ a lawyer to foreclose the mortgage." The proof failed to show the value of the prosecutor's time in dollars and cents, or that he paid a lawyer anything to foreclose the mortgage.

It may be remarked, as illustrating the question of intent, that the defendant told the prosecutor that he had sold the mules. We think that under this evidence the conviction of the defendant was wholly unsupported, and therefore contrary to law. The gist of the offense, under this section of the Code, is the fraudulent sale or disposition of mortgaged personal property, and loss thereby sustained by the holder of the mortgage. In other words, there must be a fraudulent sale, and consequent loss, before this offense exists. The first element of the offense might have been inferred in this case from the fact that the sheriff failed to find the property which had been mortgaged to indemnify the surety against loss; but the evidence utterly fails to show that the sale of the mortgaged property resulted in any loss to the surety. If the evidence shows that the prosecutor, as such surety, incurred any pecuniary loss in prosecuting his remedy against the mortgagor, or in protecting himself as such surety, this would be such loss as would be covered by the statute; but the general statement that the only loss incurred by him was that of his valuable time, and the employment of a lawyer to foreclose the mortgage, where the proof fails to show definitely the pecuniary loss in some amount to the prosecutor, such general statement of loss is entirely too indefinite, vague, and uncertain to constitute proof of loss as in-

tended by this penal statute. Under the undisputed evidence, the mortgage in this case was given to the surety to indemnify and save him harmless from loss in the event he had to pay the note upon which he was surety; and the evidence showed that this contingency never happened, for the entire debt was fully paid by the maker of the note, and the surety incurred no loss whatever in connection with his suretyship.

For the reasons above stated, we conclude that the court erred in not granting the defendant a new trial.

Judgment reversed.

(2 Ga. App. 73)

### CABLE CO. v. HANCOCK. (No. 317.)

(Court of Appeals of Georgia. May 24, 1907.)

#### 1. SALE—OFFER TO PURCHASE—APPROVAL.

If a traveling salesman, who has no authority to close a sale, takes from a prospective purchaser a written contract agreeing to buy an article on named terms and conditions, but by stipulations in the writing the contract is subject to the approval of the agent's principal, the writing amounts to a mere offer, and is unilateral, until the approval contemplated has been duly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 46.]

#### 2. FRAUDS. STATUTE OF—CONTRACT—APPROVAL IN WRITING.

In such a case, if the contract relates to "goods, wares or merchandise to the amount of \$50 or more," and is therefore within the purview of the statute of frauds, the approval contemplated must be in writing before the contract becomes mutual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 195.]

#### 3. SALES—OFFER TO PURCHASE—WITHDRAWAL.

In such a case the offer may be withdrawn at any time before the contract becomes mutual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 45.]

(Syllabus by the Court.)

Error from City Court of Athens; Howell Cobb, Judge.

Action by the Cable Company against A. O. Hancock. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff's traveling salesman induced the defendant to buy a piano, but the salesman did not have the authority to make a binding contract of sale. He took, however, a written instrument, signed by the defendant, reciting that the plaintiff had agreed to sell him a described piano for a given sum, to be paid at a named date in the future; the condition being annexed that the title should remain in the seller until paid for. It was expressly recited, however, that the contract was subject to the approval of the plaintiff. The piano was already in the defendant's custody, having been previously left with him on trial. The salesman carried the contract at once to the plaintiff's office, and turned it over to the manager in charge, who stated that it was satisfactory; that the company would accept it. The contract was then de-

livered to the bookkeeper, who entered it on the books. Afterwards, on the same day, the defendant by telephone told the plaintiff's manager, at its office, that he had decided to cancel the order. The manager replied that he had already placed the contract on the books, and that he could not accept a cancellation. No written approval or acceptance of the contract was shown. The defendant tendered back the piano, refusing to recognize the contract. The plaintiff sued on the contract. The piano was worth more than \$50. The trial judge directed a verdict for the defendant, and the plaintiff excepted.

Jno. J. Strickland and Thos. F. Green, for plaintiff in error. Erwin & Erwin, for defendant in error.

**POWELL, J.** (after stating the foregoing facts). The usual and implicit power of a traveling salesman is merely to take orders, offers to buy, and not to make completed contracts of sale. Such was the fact in this case. Even in the absence of a condition in the written instrument itself requiring approval or acceptance by the principal, the law would have implied such a condition in the transaction. The writing (although in form, save only for the clause requiring approval, a binding contract) needed something to make it complete, viz., the acceptance of its terms by the opposite party; for, until the opposite party agreed to sell on the terms in the writing mentioned, the promisor's agreement to buy and to pay was without consideration. Until the owners of the piano made a valid promise to sell, the consideration contemplated for the promise to buy and to pay was unilateral, and amounted only to a mere offer. This principle is now so well established by a large volume of authority as not to require specific citations.

2. The price of the piano was more than \$50, and therefore the transaction was within the purview of the statute of frauds, and no oral approval or acceptance of the contract by the seller would render it binding on him. Until the seller became bound to the contract by a writing, or by some act which would take the transaction out of the statute of frauds, the buyer could not have held him to its terms; and it therefore was lacking in the essential element of mutuality. *Sivell v. Hogan*, 119 Ga. 171, 46 S. E. 67. Delivery of the piano under the contract, and acceptance thereof by the buyer, would have been sufficient to make the contract complete. The buyer's custody of the piano under the circumstances stated, however, did not have this effect. Compare *Loyd v. Wight*, 20 Ga. 574, 65 Am. Dec. 636; *Id.*, 25 Ga. 215; *Brunswick Gro. Co. v. Lamar*, 116 Ga. 1, 42 S. E. 368.

3. Until the contract became mutual, the buyer had the right to withdraw his assent. Therefore he had the right to withdraw it at any time before the seller entered his written approval. He exercised this right, and the

verdict directed in his favor was therefore demanded. See *Sivell v. Hogan*, 119 Ga. 173, 46 S. E. 67; *Atlanta Buggy Co. v. Hess Spring Co.*, 124 Ga. 338, 52 S. E. 613, 4 L. R. A. (N. S.) 431.

Judgment affirmed.

(2 Ga. App. 107)

**BEDINGFIELD & CO. v. BATES ADVERTISING CO.** (No. 303.)

(Court of Appeals of Georgia. May 23, 1907.)

1. **PLEADING—ANSWER—STRIKING.**

While it is error to strike an entire plea when any portion thereof is good, still an answer of the defendant may properly be stricken when the denials contained in the answer to a petition filed in orderly and distinct paragraphs are entirely inconsistent with the admissions made by him in the same connection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1093-1094.]

2. **SAME—CONSTRUCTION.**

Where a defendant denies the allegation of indebtedness on an account sued on, but at the same time admits all of the averments of the plaintiff's petition necessary to constitute such indebtedness, the admission, and not the denial, must prevail, as pleadings are to be taken most strongly against the pleader.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 66.]

3. **SAME.**

Where a petition sets forth a cause of action in orderly paragraphs, and the plea and answer thereto set up no ground of defense, the court may, at any stage of the trial, give the case such direction as will disregard the plea.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Bates Advertising Company against Bedingfield & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Nottingham & Cabaniss, for plaintiffs in error. Steed & Ryals, for defendant in error.

**RUSSELL, J.** The Bates Advertising Company sued Bedingfield & Co. for a balance of an account arising upon a written contract. The defendants except to the striking of their answer on demurrer; and the only question for our consideration is whether the judge of the city court erred in sustaining the demurrer.

The Bates Advertising Company, in its petition, averred that Bedingfield & Co. were indebted \$135 and interest, upon an account and contract. Attached to the petition were a bill of particulars and the contract relied upon. The bill of particulars specified that Bedingfield & Co. was indebted for "services rendered on mail service work (cancellation clause at the rate of \$15 for each piece), \$180," and were entitled to credit for payments of \$15 December 30th, January 30th, and February 27th, respectively, making \$45 in all, and leaving a balance due of \$135. The plaintiff also attached, as part of its petition, three letters received from the defendants, inclosing the above payments, in one of which



the inclosure is referred to as "being this month's payment for services rendered," in another as "being second payment of our account," and in the third and last letter the inclosure is described as "third payment on our contract." The cause of action was predicated upon the contract, which was especially pleaded and attached to the petition, together with a letter from the defendants, availing themselves of a conditional release provided for in the contract. The order or contract relied upon by the plaintiff (and admitted by the defendants in their answer) is as follows:

"Macon, Ga., Oct. 24, 1904.

"The Bates Advertising Company, Spruce and Williams Sts., New York City—Gentlemen: You may enter our order for a special advertising service to be sent out 12 times during a period of 12 months to a list of 3,000 names. This service is to consist of a special business-getting plan covering 12 mailings; all these mailings to be fac-simile type-written letters, large illustrated cards, or special illustrated folders, at your discretion. The price of service to be \$80 per month for a period of 12 months. It is understood that the order of mailing and the character of matter is to be whatever in your own judgment will produce the best results. It is understood that all reading matter, sketches, designs, and dummies are to be submitted at one time for our approval or criticism. Should we for any reason decide at this time not to proceed further with the work, we are to be released from this order, on condition that we return all matter and designs to you within 10 days and pay for the work at the rate of \$15 for each form of letter, card, or folder. It is understood that the above price includes the formulating of the business-getting plan, the preparation of reading matter, making designs, making necessary electrotypes, printing all matter, folding (in the case of letters, inclosing in envelopes and sealing), addressing and fixing of stamps (but does not include postage), and mailing. If matter is to be mailed from our office, these prices are f. o. b. cars, New York. This price does not include letterheads and envelopes, which will be furnished from our regular stock, but does include inserting individuals' names at the heads of the letters.

"Yours truly,

"[Signed] Bedingfield & Co."

Under the clause allowing a conditional release, the defendants, on December 6, 1904, wrote the plaintiffs: "We fear that the expenditure involved in getting out the circulars as contemplated by you in the sketch submitted to us would be larger, after figuring the postage, etc., than we feel warranted in expending. We will therefore pay you for the sketches submitted at the price stipulated in the contract."

The defendants denied indebtedness in any

sum, but admitted that they entered into the contract above set forth. They specially pleaded that the plaintiff did not furnish them with letters and advertising matter specially designed for them, or specially designed by Mr. Charles Austin Bates. The answer insisted that the matter furnished the defendants was of like character and kind with that furnished to other parties with whom the plaintiff had contracted. The defendants further admitted that they decided and elected not to proceed further under the contract, and averred that the forms submitted to them were of such nature and character that they did not feel warranted in expending the large sum necessary to mail them to their customers. They averred that on December 6th at the time they declined to proceed further with the advertising scheme, they had not had opportunity to thoroughly investigate the character of the matter submitted to them by the plaintiff, other than to see that the same was of poor quality and not the work the plaintiff had contracted to furnish. The defendants admitted the contract, the submission of specimen, and the payments, and admitted writing all the letters attached to the plaintiff's petition, but insisted that the letters were not special letters prepared for their exclusive use, and especially that they were not prepared by Charles Austin Bates, and asked to recoup the \$45 paid by them. The only ground of defense set up by the defendants, then, was that the plaintiff failed to comply with the terms of the contract, in that the form submitted had not been specially prepared for defendants by Charles Austin Bates.

The plaintiff demurred to this defense, as variously repeated in the fourth, fifth, sixth, seventh, ninth, and twelfth paragraphs of the answer, on the ground that the provisions embodied in the defense, not being expressed in the written contract and being in conflict with it, constituted an attempt to add to, vary, and contradict by parol the terms of a valid written instrument. Upon inspection of the pleadings we think there can be no question that this ground of the demurrer was well taken and properly sustained. The answer does not seek to reform the contract (and, indeed, the city court had no jurisdiction to do so); nor does it set up that there was any fraud, accident, or mistake; nor does it allege that the provisions sought to be added were embodied in a written contemporaneous agreement or in a subsequent parol agreement, or that the written contract is either incomplete or ambiguous. The provisions which the answer sought to add are in conflict with the written contract, which distinctly provides that the character of the matter is to be whatever in plaintiff's judgment will produce the best results, and there is nothing in the contract providing that "matter of like character and kind" should not be furnished by plaintiff to others, nor

that the matter furnished to the defendants should be the work of Charles Austin Bates. These new and distinct provisions were limitations on the rights of plaintiff under the contract, and could not be added without reforming it.

The plaintiff also demurred on the ground that the answer distinctly admitted that the reading matter and sketches for designs were submitted to the defendants for approval, and the work was approved and accepted and agreed to be paid for at the less price under the contract; the defendants electing the smaller price on account of the expense, and thereby waiving any defects which had been discovered. In the seventh paragraph of the answer, notice at the time of submission of the character of the work is admitted, because it is averred that the defendants saw that the work was of poor quality, and not of the kind the plaintiff had contracted to furnish. We think, therefore, that as to this ground the demurrer was properly sustained. It is true that the answer denies acceptance, but it clearly admits all the facts necessary to constitute an acceptance, to wit, the submission of the matter for approval and the writing and sending of the letter making the election and giving the reason why they preferred to pay \$180, rather than \$960. The defendants' denial of acceptance being inconsistent with the facts admitted by them, there was no error in striking on demurrer that portion of defendants' plea. "Where a defendant, in his answer to a petition filed in orderly and distinct paragraphs, \* \* \* does not undertake to deny allegations in the petition which are entirely inconsistent with the truth of the denial set up in the answer, and the plaintiff moves to strike the answer on this ground, it is not error for the court to strike the answer after giving the defendant ample opportunity to amend the same." *Burns v. Condon*, 108 Ga. 794, 33 S. E. 907. "The defendant could not both admit and deny its allegation of its indebtedness to the plaintiff on the account sued on; and, as its pleadings are to be taken more strongly against it, it is the admission, and not the denial, which must prevail." *Williams Mfg. Co. v. Warner Refining Co.*, 125 Ga. 411, 54 S. E. 96.

The plaintiff further demurred to the answer, as we think properly, upon the ground that the defendants, after admitting the writing of the letter of December 6th, attempt in their answer to set up other reasons for declining to go on with the service than that expressed in their letter. It seems to us that the reason why they agreed to pay the very amount for which they are being sued would be immaterial in any view of the case; but, however this may be, as they admit the letter, they are estopped from setting up other reasons not assigned in that letter. *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Cowdery v. Greenlee*, 128 Ga. 786, 55 S. E.

918 (1). "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted to thus mend his hold. He is estopped from doing it by a settled principle of law." 2 *Herman on Estoppel*, 947.

The demurrer to the answer on the ground that the defenses that the sketches submitted were not made by Charles Austin Bates, and were not specially made for the defendants, were insufficient in law, was properly sustained, because the defendants' admission showed that under the election made by them the sketches submitted were to be returned to the plaintiff at the end of ten days, and under the election it was immaterial whether these sketches were the work of Bates, or whether they were similar in character to other sketches sent out by the plaintiff. We see no error in sustaining the special demurrers to which we have referred; and when the special defenses had been thus stricken, as there was nothing left in the answer except denials inconsistent with the admissions, these, too, could properly be stricken, under the principles so clearly announced in the *Williams Case*, 125 Ga. 408, 54 S. E. 95, to which we have previously referred, and the judgment rendered was an inevitable consequence.

We find no error in the rulings complained of. Neither rescission nor recoupment was properly pleaded; and, indeed, neither could be pleaded, under the admissions made by the defendants. The defendants, according to the answer, got nothing for their money; but, if they were bitten by an empty scheme, it was their own fault. They admit the contract, the submission of the sketches, and the letters confirmatory of the first contract and affording evidence of the second. They expressly accepted the work at the price stipulated in the contract. They filed no plea of failure of consideration. The litigation reached its only legitimate termination.

Judgment affirmed.

(2 Ga. App. 126)

**VIRGINIA BRIDGE & IRON CO. v.  
CRAFTS. (No. 42.)**

(Court of Appeals of Georgia. June 19, 1907.)

**1. TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

In no trial should the scope of the court's instructions to the jury be more limited or more extensive than the range of the relevant evidence properly submitted therein. The charge of the court should be pertinent and applicable to the issues presented by the evidence, and it is error to charge the jury upon a theory which is not sustained by evidence.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 46, Trial, § 596.]

**2. SAME.**

Where one of the issues was no contract, or a certain definite contract, charges applicable to

the nature of a contract which had not been shown to exist were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

### 3. CONTRACTS—CONSTRUCTION—LEGALITY OF OBJECT.

A contract will be construed as made for a legal, rather than for an illegal, purpose; and the more especially when such contract is attacked by a party thereto who has been benefited thereby.

#### 4. SAME.

"Courts hold themselves bound to the observance of rules of extreme caution, when invoked to declare a transaction void, on grounds of public policy; and prejudice to the public interest must clearly appear before a court will be warranted in pronouncing transaction void on this account. It is not to be lightly inferred from facts and circumstances of doubtful import and meaning, or which may admit of different construction, one consistent with, and the other opposed to, unquestioned policy." *Smith v. Dubose*, 3 S. E. 314, 78 Ga. 415, 6 Am. St. Rep. 260.

### 5. SAME—LEGALITY OF OBJECT—PREVENTION OF COMPETITIVE BIDDING.

"Where the government offers contracts for public works to the lowest bidder, the public is deeply interested in free competition in the bidding; and as a general rule any agreements among contractors to suppress the bidding, and thereby to acquire the contract from the government at a higher figure than could otherwise be obtained if the competition was left untrammelled, are held to be illegal." 15 Am. & Eng. Enc. Law (2d Ed.) 953.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 659-661.]

#### 6. SAME.

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. \* \* \* The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service." "In all contracts secured in such a manner, the courts should never hesitate to protect parties in their agreements with each other and compel them to comply with the terms thereof." *Hoffman v. McMullen*, 83 Fed. 377, 28 C. C. A. 183, 45 L. R. A. 410. "The rule rendering illegal contracts suppressing competition in the letting of public constructions does not render illegal bona fide partnership agreements for bidding for such contracts, or other bona fide arrangements between prospective bidders, whereby a bid for the entire contract is put in and the parties to the agreement are each to do a part of the work; the object of the parties not being to suppress competition." 15 Am. & Eng. Enc. of Law (2d Ed.) 953.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 659-661.]

#### 7. SAME.

The judgment refusing a new trial is not, for any reason assigned, erroneous.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Virginia Bridge & Iron Company against George H. Crafts. From the judgment, plaintiff brings error. Affirmed.

Arthur Heyman, Dorsey, Brewster, Howell & McDaniel, and Francis L. Eyles, for plaintiff in error. Westmoreland Bros. and Hamilton Douglas, for defendant in error.

RUSSELL, J. The Virginia Bridge & Iron Company brought their action against George

H. Crafts in the city court of Atlanta to recover a balance of \$2,850.66 alleged to be due on an account for structural material furnished to the defendant, who was a contractor and builder of bridges. Defendant admitted the correctness of the account, but pleaded a counterclaim, by way of set-off (averring that the plaintiff had no office or place of business, or assets, in Georgia), that the plaintiff "is indebted" to defendant in the sum of \$3,836 for failure to comply with certain agreements made between plaintiff and defendant as to sharing in the work of building certain bridges in the Vicksburg National Military Park, in the state of Mississippi, let out under competitive bids by the United States government.

The defendant, in his extended answer, avers that in 1903 and 1904 both plaintiff and defendant were in the business of taking contracts to build both substructure and superstructure of bridges; that plaintiff, in addition to being a contractor, was also a manufacturer of structural steel superstructures; that defendant made a special feature of building substructures, such as excavations, concrete bases, brick piers and walls, etc., commonly called the "substructure"; that this fact was known to plaintiff, who often let out the substructure work of bridges let to it by entire contract; that in January, 1903, when the United States called for bids looking to the construction of certain bridges in the Military Park, negotiations were entered into between plaintiff and defendant that they should so arrange their bids as that defendant should put in the only bid, with the understanding and agreement that plaintiff should have the steel work, or superstructure, and defendant the other work, or substructure, on whatever contracts might be awarded by the United States government to defendant; that the bid so made by defendant was partly for the use and benefit of plaintiff and at prices for the respective portions agreed on by the parties before the bid was submitted; that on February 12, 1903, the contract to build three bridges was awarded to defendant, and he at once placed an order with plaintiff for the steel work, in accordance with their agreement, but subsequently (February 18, 1903) the government, through its officers, decided to reject all the bids and call for new ones, and specified that the estimate of cost for building both superstructure and substructure should be made separately, in each bid, these second bids to be opened April 16, 1903, in Vicksburg.

It is further averred that on March 16, 1903, the president of the plaintiff company addressed a letter to defendant, saying, "If it is your desire to take the matter up along the lines we worked together before, \* \* \* we know of no special objection;" and asked what method of procedure defendant would advise; the meaning of said letter (defendant avers) being to arrange some

plan by which plaintiff and defendant could co-operate in securing one or more of the dozen bridges to be let by the government, so that one could furnish the substructure and the other the superstructure. Defendant had extended negotiations with Vernon H. Smith, the representative of plaintiff, and submitted to Smith the figures and calculations which were the basis of the bids made by plaintiff at the second letting, and under which plaintiff, in his own name, finally obtained the contracts and erected three of the bridges let by the government. Defendant avers that on the night of April 15, 1903, before submitting bids next day, in Vicksburg, plaintiff and Smith met, had a long interview, examined plans, estimates, figures, and prints; that Smith made an agreement with defendant to take defendant's estimates, submit a bid in plaintiff's name, and that defendant should have the substructure work at the figures submitted, and plaintiff the superstructure of whatever contracts might be awarded to plaintiff. Defendant, being on the ground with all equipments and implements for work (having just finished some similar work), could do the work cheaper than other contractors, and this fact was a mutual inducement for plaintiff and defendant to work in concert; and defendant then and there disclosed and turned over to the plaintiff's said agent his estimates, prices, calculations of quotations, etc., to be used by plaintiff in preparing his bid. He says, further, that immediately on said contract being made with the United States government by plaintiff to construct three bridges, known as Nos. 4, 5, and 8, in said park, defendant offered to perform his part of said contract, and demanded his right to do the substructure work at the price named for same in plaintiff's bid, all of which was denied and refused by plaintiff, who awarded the substructure to another contractor (Rubush) at a cheaper price, all to his injury and damage as aforesaid. To the defendant's answer were attached tabulated statements showing how he would be entitled to damages, and for which he prays set-off, amounting to \$3,856, besides interest from October 1, 1903.

The jury found for the plaintiff \$837.75, upon which judgment was entered. Plaintiff moved for new trial on the several grounds stated in the record. At the hearing of the motion the trial judge passed the following order: "Defendant having voluntarily written off the sum of \$144.23 from the set-off found in his favor, leaving the amount due the plaintiff the sum of \$981.98, the motion for new trial is hereby overruled and denied."

In the voluminous record there is evidence for the defendant that the first letting, which was afterwards rejected by the government, took place as alleged; that afterwards, on the night of April 15, 1903, before the second letting next day, plaintiff's agent, Vernon H. Smith, and the defendant, met in the latter's

room at the hotel in Vicksburg to confer as to methods of submitting bids; that plaintiff's agent said his principal was chiefly a manufacturer of steel structural work and did not care for foundation work, though it did not refuse it; that defendant had figures made out in detail on substructure, and Smith some detailed figures on superstructure; that Smith stated that he had compared certain figures he had from his company, on both substructure and superstructure work, with the plans of the engineer on substructure work, and did not consider them reliable; that, if defendant would show him his estimates on quantities and prices, he (Smith) would use those prices in bidding on the substructure, and, if he got any contract on any of the subwork of the bridges, he would turn the subwork over to the defendant. In bidding for the entire bridge Smith agreed to put his separate bid for the subwork 1 per cent. higher than the defendant's bid, and the defendant was to put his price for superstructure higher than the plaintiff's. Both submitted bids. There was no agreement as to what should be done in the event defendant got the award for superstructure and substructure. If defendant got the award for superstructure, then he was to do it; and there was nothing said as to where he should get the superstructure materials. "I was not presumed to get the superstructure work, as I was to bid above him." Some time afterwards the defendant and Smith met in Atlanta, and for the first time the defendant learned that the plaintiff had given the contract to Rubush. When pressed for an explanation, he said that the bid had named 4 months as the time for completion of the work, and that he had to make the contract in such a time as that the substructure work must be done in 2½ months, and that he did not know that the defendant could do it in that time; that the other party had agreed to do it in 2½ months, and he had given him the contract.

The plaintiff, in its testimony, through its representatives, denied that any such agreement as defendant alleged ever took place in Vicksburg, and testified that the first agreement, governing the first bid, came to an end with the rejection by the government of the first letting; that the naked suggestion in the first letter of its president (Robertson) to Crafts was a suggestion only, and no subsequent negotiations ever ripened it into a contract; that, after the bids had been formulated and submitted, Vernon Smith, agent of plaintiff, was informed by the government officer superintending construction that, if the time mentioned in plaintiff's substructure work bid were shortened, he could recommend acceptance as to three bridges; that said officer told him that Rubush could do it in less time; that Smith immediately went to see Rubush, and was assured that the latter could do the substructure in 2½ months; that he then shortened the time in his bid to corres-

pond, and his bid was then recommended and finally closed by contract with the government. He (Smith) did not give the contract to Rubush at that time, but merely got a basis to rely on; had not closed with Rubush at time of meeting with Crafts at the latter's house in Atlanta, but did afterwards; was willing at that time to give the work to Crafts, if the latter had proposed to do the work in the same time as Rubush; and had also lessened his calculation as to quantities. There was some agreement among the bridge builders and contractors in the line and intendment of allowing certain work to go to certain individuals without underbidding on the part of others. Defendant did not participate in this scheme. After the rejection of the first bids there was correspondence between Crafts and Smith about certain changes in tracings and estimates which Crafts wanted to use at the second letting. Smith erased the name of Virginia Bridge Company on blue prints, and substituted the name of George H. Crafts; this because, says Smith, "I took my tracings to our draftsman and notified him, at Crafts' request, of certain changes to be made in them." The parties differed in respect to the size and amount of steel joists, and perhaps in other respects.

The business Crafts had with the witness (Smith) when they met at the Vicksburg hotel was "to get the blue prints we had prepared for him." In turning over these plans to Crafts, he was simply carrying out the agreement of the previous letting. In case this was arranged, he (Crafts) was to use these plans in the bidding; and, in case it was so agreed, Crafts was to have this work as at previous bidding, with the understanding that he was to give "us" the steel work for the superstructure at a pound price. The pound price was not fixed by witness and Crafts that evening. It remained the same as at former letting. Smith looked at Crafts' estimates and adopted his unit of prices. His estimates did not check relatively with Smith's. The greater variance was as to bridge 5, in which there was decided difference. Witness told Crafts that he would place plaintiff's bid on substructure above Crafts', so that, in event the work was let separately, it would go to him. Witness said nothing in regard to what was to be done as to Crafts getting subwork in the event the government did not let bids separately and plaintiff got awards. "I had no contract with Crafts at all with reference to his getting the substructure at the price I bid to the government for it, in the event I was successful in my bid." It was not agreed that witness was to get any interest out of Crafts' bid, or "he out of mine," in the event Smith put in a bid. Crafts bid at the second letting, and did not use plans of the Virginia Bridge & Iron Company. Smith, for plaintiff, bid at the second letting. Crafts did not give Smith anything definite as to the time he could "do this work," except what was contained in his

bid to the government. Plaintiff got the letter that Crafts wrote, after contract with Rubush, about May, agreeing to do the work in 2½ months. He refused to make that bid in Atlanta at time spoken of. The president of the plaintiff company, C. E. Michael, testified that Crafts bought other orders for bridges and paid for them without making demand for claim on account of the Vicksburg affair. As he paid for those, the plaintiff sold him still another order, the one now sued for. It also appeared in testimony that the Virginia Bridge & Iron Company and George H. Crafts were competitive bidders for the work on the bridges in controversy.

After a careful examination of the very voluminous record in this case, we are unable to find any reason for reversing the judgment of the trial court in refusing a new trial. Omitting the general grounds of the motion, we come to consider the grounds contained in the amendment thereto. The plaintiff in error insists that the court should not have charged the jury that the contract set up in defendant's plea, if proved, was a legal, enforceable contract, with sufficient consideration to support it, for the reason that the evidence did not authorize the charge, and that the evidence, if it showed anything, proved an agreement in restraint of trade and in violation of the laws relating to fair competition, and was unilateral, not mutual, and because there was no authority in the plaintiff to transfer the contract or any part thereof to any other person. We see nothing in the evidence offered by the defendant showing that the agreement was illegal or contrary to public policy. The plaintiff denied any agreement at all. The defendant's testimony only proved that, without any intention to defraud or overreach the government, the plaintiff, who did not desire the substructure work, agreed, in consideration of the use of the defendant's carefully prepared estimates on the substructure, to allow the defendant to do that portion of the work under any contract the plaintiff might receive. The contract was not unilateral, because the plaintiff (if the agreement was really made) could have compelled the defendant to do the substructure work, though at a loss; and the contract, as appears in the record, forbids the transfer of the contract or any interest therein, and does not forbid the contractor from having any portion of the work done by any other person, as, for instance, by subcontract.

The next insistence of the plaintiff in error is that the court erred in submitting to the jury the question as to whether the defendant was damaged. We think, from what has been already stated, that the jury were authorized to find that a legal agreement was entered into by which Crafts was entitled to do the substructural work on any bridges contracted for in the Vicksburg Military Park; and if the evidence satisfied the jury that a profit would have resulted to Crafts

by reason of that agreement, and of compliance therewith by the plaintiff company, the defendant was entitled, as damages, to any profits which would thus have accrued to him. For this reason we think there is no merit in the seventh, eighth, and ninth grounds of the motion for new trial.

In the tenth ground of the motion it is insisted that the court erred in not charging the jury upon a material issue in the case, to wit: It is contended by plaintiff that, if there was a valid contract giving the defendant the substructural work of bridges 4, 5, and 8, it was based upon estimates as to the actual cost of the construction of said substructures submitted by defendant to plaintiff, and claimed by the defendant to be accurate, and upon a certain percentage added by defendant as his profit for doing the work; and plaintiff contends that it offered to let defendant do this work, provided he would do it on the percentage of profit specified by him at the time the agreement was entered into, and that the defendant refused to accept this offer of plaintiff. The plaintiff insists that the court erred in not instructing the jury that if they found that the plaintiff offered to let the defendant do the work for this certain percentage of profit, and the defendant refused to accept this proposition, the plaintiff would be relieved from liability. There is no merit in this ground of the motion, for the reason that the instructions of the court must be predicated upon evidence, and there was no evidence to authorize such a charge. In its last analysis the issue was clear-cut between the plaintiff and the defendant; the plaintiff insisting that there was no contract at all by which it was bound to let the defendant have the substructural work, and the defendant insisting that in consideration of having prepared proper estimates for the plaintiff, which estimates were of advantage to the plaintiff in securing the contract for superstructure, he was entitled to erect the substructure and receive whatever profits might accrue from the bid thus submitted by the plaintiff in reality as his agent. There was no evidence from any source that there was any agreement that the defendant should only receive a certain per cent. of profit on the actual cost, and therefore it was immaterial that the plaintiff offered to let defendant do the work upon that basis.

The request to charge, which the court refused, and which is embodied in the eleventh ground of the motion, is as follows: "I charge you, if you believe from the evidence that an arrangement was made by which the bids of the plaintiff for substructure, if successful, were to be turned over to defendant, that such an arrangement was not binding on the plaintiff, because, under the contract entered into between the government and plaintiff, such agreement was impossible of performance." We think this request was properly refused. An examination of the

contract shows that there was nothing in its terms which prevents the contractor from procuring any portion of the work to be done by others. It is merely the manifest purpose of the United States government to recognize no one, in so far as its liability is concerned, except the original contractor, and to hold such contractor solely liable for any breach or nonperformance. This, too, without question, is the construction placed upon it by the government; for the evidence in this very case discloses the fact that the plaintiff, upon the suggestion of the agent of the government who signed the contract in its behalf, procured one Rubush to erect the very substructures which the defendant claimed the right to build. The same complaint substantially is made in the twelfth ground of the motion for new trial, and, for the reasons just stated, is without merit.

In the thirteenth ground of the motion the plaintiff contends that the court should have submitted to the jury the contention that the reduction of the time, in its bid, from 4½ months to 2½ months, was the making of a new contract, and that, even if the agreement between plaintiff and defendant had been a legal and valid one, the new agreement was not binding on defendant, and defendant had no interest therein. The court properly refused plaintiff's request upon this subject. If the defendant had any agreement with the plaintiff, it was that he was to do the substructure work under any contracts made by the plaintiff with the government for bridges in the Vicksburg Military Park—not on any bids made by the plaintiff. The bids might never materialize into a contract, and the defendant testified that the agreement reached to the contract. When the chairman of the government commission declined to accept the plaintiff's bid unless the time was reduced to 2½ months, it was the duty of the plaintiff to inform the defendant of the change; and this the plaintiff did. Good faith required this. As no contract had yet been entered into, the defendant might then either decline to undertake the labor in the lessened time or accept the modification of the proposal. In this case the defendant, by his letter of April 28, 1903, offered to do the work in the 2½ months; and the contract was not entered into until May 11, 1903. This testimony is undisputed. There would be point in the plaintiff's request to charge, if the evidence had shown that defendant was only to receive the substructure under certain bids, instead of the substructural work of such bridges as the plaintiff might get to build, or if he had delayed in notifying the plaintiff that he was still ready to do the work in conjunction with the plaintiff, according to their agreement, regardless of the reduction of time to 2½ months.

After a very painstaking review of the evidence, we are unable to sustain the plaintiff's contention that the amount of damages

awarded as a set-off to the defendant is excessive. We have expended much labor and time in the consideration of the tremendous record in this case, only to find, after several successive readings of the evidence, a plain conflict in the testimony, which it was the duty of the jury to settle. The charge of the court, when considered in connection with the evidence, is a clear and forcible presentation of the law applicable to the case, and is free from error of any kind.

Judgment affirmed.

(2 Ga. App. 41)

**FIELDS v. STATE. (No. 199.)**

(Court of Appeals of Georgia. May 24, 1907.)

**1. RAPE—ASSAULT WITH INTENT TO RAPE—EVIDENCE—CORROBORATION OF FEMALE.**

In the charge of assault with intent to rape, the credit to be attached to the testimony of the injured female is a matter wholly for the jury. If such witness is credible to the jury, corroboration of her testimony is unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 83.]

**2. SAME.**

It is not error, in a case of assault with intent to rape, to refuse to charge that the accused should not be convicted upon the testimony of the woman alone, unless she made some outcry or told of the injury promptly, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other circumstances which tend to corroborate her story. The particular circumstances which may tend to corroborate a witness, and the number of such circumstances necessary to produce that result, are wholly matters for the jury; and the jury may believe the witness without corroboration.

**3. SAME—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE.**

On the trial of an indictment for assault with intent to rape, where the evidence is such that the jury may be authorized to find that the assault was committed by the accused with the intention of gaining the woman's consent to have sexual intercourse with him, without any intent to overpower her will and commit the crime of rape, it is error to refuse to give in charge the law of assault, or assault and battery, as the indictment may authorize.

**4. CRIMINAL LAW—INSTRUCTIONS—DEFENDANT'S STATEMENT.**

In charging upon the prisoner's statement, a trial judge can employ no better language than that embodied in Pen. Code 1895, § 1010. Omission to instruct the jury that they may believe the defendant's statement in preference to the sworn testimony is reversible error.

(Syllabus by the Court.)

**Error from Superior Court, Muscogee County; Wm. A. Little, Judge.**

James Fields was convicted of assault with intent to rape, and he brings error. Reversed.

Carson & McCutchen, for plaintiff in error.  
S. P. Gilbert, Sol. Gen., for the State.

**RUSSELL, J.** The defendant was convicted of assault with intent to rape. His motion for a new trial was overruled, and he assigns error on the judgment refusing a new trial. The plaintiff in error relies upon three assignments of error, all predicated upon the charge of the court.

He insists that the court erred in refusing a written request to charge the jury as follows: (a) "I charge you, gentlemen of the jury, that in a case where rape, or assault with intent to commit rape, is the charge against the defendant, that he shall not be convicted upon the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence. In this respect the offense of rape seems to be an exceptional one, and the accused should not be convicted upon the testimony of the woman alone, however positive it may be, unless she makes some outcry, or told of the injury promptly, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other circumstances which tend to corroborate her story." (b) "In rape cases the testimony of the party alleged to have been raped should always be scrutinized with care." In our opinion the court properly refused to instruct the jury as requested. The request seems to be almost a literal quotation of some of the language used in the opinion of the majority of the court in the case of *Davis v. State*, 120 Ga. 435, 48 S. E. 180; and, while it is a statement of the considerations which controlled the judgment of the majority of the Supreme Court, "there are many things said by this court, both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury." *Savannah Ry. Co. v. Evans*, 115 Ga. 318, 41 S. E. 631, 90 Am. St. Rep. 116. (2) This must naturally be true, for the reviewing court can analyze and discuss the evidence in a case with a freedom absolutely forbidden trial judges by Civ. Code 1895, § 4334; nor does it follow that the charge requested, even if it should be proper in a case of rape, was appropriate to a case like this, of assault with intent to rape.

The decision of the majority of the court in *Davis v. State* does not accord with our individual views, and seems to us to be an invasion of the constitutional prerogatives of the jury. We shall be bound by it, in view of the legal requirement to that effect, as applicable to cases of rape; but we shall not extend the principle therein embodied to cases of assault with intent to rape. The dicta of Judge Hale, upon which the decision in the *Davis Case* rests, refers only to cases of rape, and the reasoning is based upon the necessity for protection of the defendant from that speedy and uncontrollable indignation aroused by as heinous a charge as that of rape. This is recognized in the *Davis Case*. Rape, unless the accused be recommended to mercy, is a capital felony, and the dicta of Lord Hale seems to recognize the ghastly fact that there can come no remedy to the defendant after he has paid, with his life, the penalty of perjury on the part of the prosecutrix. On the other hand, the penalty

for assault with intent to rape cannot at most exceed 20 years imprisonment in the penitentiary, and if, by any chance, the truth should develop that the accused was the innocent victim of a feigned charge and false accusation, some reparation, however late, could be afforded the defendant unjustly accused. We would be bound by the decision of the Supreme Court, if this court had jurisdiction to correct errors on convictions for rape; but we do not apprehend that the decision in *Davis v. State* was intended to apply to cases of assault with intent to rape, but rather that the ruling in that case, as drawn from the language of the decision, was based upon the exigencies arising from the gravity of the charge and the enormity of the penalty. We are the more impressed with this view by the fact that at the time Lord Hale wrote, assault with intent to rape was a mere misdemeanor, as, indeed, it was in our own state until 1817; and from 1817 to 1833 it was only punished by imprisonment from one to five years. The amount of corroboration, if any, required to support the testimony of a witness in a case of assault with intent to rape is a question, not for the court, but for the jury; and for the judge to instruct the jury that the accused should not be convicted, no matter how positive the testimony of the woman may be, unless she made some outcry or told of the injury promptly, or unless her clothing was torn or disarranged, would be for the judge, and not the jury, to measure the credibility of such witness.

In our opinion the testimony of the prosecutrix in a prosecution for the offense of assault with intent to rape needs no corroboration. Her testimony alone is sufficient to authorize conviction, if it is credible to the jury. Pen. Code, § 991, declares that the testimony of a single witness is generally sufficient to establish a fact. The only exceptions to this rule enumerated in our Code "are made in specified cases, such as to convict of treason or perjury, and in any case of felony where the only witness is an accomplice. In these cases (except in treason) corroborating circumstances may dispense with another witness." It is clear, therefore, as the crime charged in this case is neither treason nor perjury, the only way the offense could be brought within the exception provided in section 991, *supra*, is by holding that the female assaulted is an accomplice; and the mere statement of that proposition is sufficient to expose its fallacy, for, to say that the female assaulted considered, consented, and willingly participated, as an accomplice must do in the commission of the offense, is to destroy the charge and acquit the accused. Assault with intent to rape is an assault made with intent to have carnal knowledge, not only forcibly, but against her will; and if the female is not to be deemed an accomplice, and therefore required to be corroborated, she must produce an eyewitness.

From the nature of the case this is generally impossible. The protection of female virtue is far too priceless to be thus jeopardized.

The learned trial judge was right in refusing the request, not only for the foregoing reasons, but especially upon the ground that the request, as a whole, was not a correct statement of the law applicable to the case. "If a request to charge be not all proper, the court need not give any part of it in charge." *Atlanta v. Buchanan*, 76 Ga. 585. And, furthermore, the request was argumentative. Regardless of these two latter defects, and even if the request had been properly framed, the court did not err in refusing to instruct the jury as requested. In the earliest decision of our Supreme Court upon this subject (*Camp v. State*, 3 Ga. 421) the court laid down the rule as to the testimony of the injured female in cases of assault with intent to rape, and it is controlling until expressly reviewed and overruled. The learned trial judge presented the principle therein affirmed (and which we now follow) with unequalled clearness and impartiality. In the *Camp Case*, above referred to, Judge Nisbet, delivering the opinion, after quoting from Blackstone and his reference to Lord Hale, says: "The degree of evidence which in this case ought to satisfy the jury of the defendant's guilt depends upon the circumstances of each case, and cannot be reduced to specific rule. 3 Chitty, Criminal Law, 572." The trial judge left the credibility of the little girl in this case to the jury, and we do not see, under the ruling in the *Camp Case*, how he could have done otherwise. When Lord Hale wrote: "If the witness be of good fame, if she presently discovered the offense," etc., "these and the like are concurring circumstances give greater probability to her evidence"—it was simply an illustration of the practical effect of the rule he had previously stated, and which, in different language, was charged by the judge in this case. It was no more applicable to be given in a charge to a jury than his oft-quoted reminiscent reasoning: "Rape is an accusation easily to be made, hard to be proved, and harder to be defended by the party accused, though never so innocent." But antecedent to the illustration and the reasoning is the rule: "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony." The request to charge embodied words of caution to be applied in measuring the admissibility of the evidence, which is a function of the court. It sought to apply them to the weight of the testimony, the determination of which is a question for the jury.

It is alleged that the court erred in failing to charge upon the subject of assault and



assault and battery. It is well settled that where a charge of graver character includes minor offenses, if the evidence will justify or require a verdict finding the defendant guilty thereof, it is the duty of the judge to instruct the jury as to the principles of law applicable to the lesser offense, and that the defendant may be convicted thereof if in the opinion of the jury he be guilty of such lesser grade of the same generic offense. This general rule is to be qualified to the extent that the lesser offense must either necessarily be included in the greater by a charge in the indictment, or, if it may or may not be, then the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to describe the lesser offense. The whole subject is discussed in *Watson v. State*, 116 Ga. 607, 43 S. E. 32, and the cases of *Willson v. State*, 53 Ga. 205, *Hopper v. State*, 54 Ga. 389, *Bard v. State*, 55 Ga. 319, *Trowbridge v. State*, 74 Ga. 431, *Malone v. State*, 77 Ga. 767, *Jenkins v. State*, 92 Ga. 470, 17 S. E. 693, and *Bell v. State*, 103 Ga. 401, 30 S. E. 294, 68 Am. St. Rep. 102, are there cited as authority. The jury should in all cases be instructed that the defendant may be convicted of the lesser offense, where the evidence submitted, under any view thereof, will authorize conviction of the lesser grade. *Sutton v. State*, 123 Ga. 125, 51 S. E. 316. Otherwise, though the jury may have doubts as to whether the defendant may be guilty of the graver or of the lesser charge, if satisfied that the defendant is guilty of one or the other, they will be misled into the opinion that conviction can only be had in the particular case for the greater offense, and thereby injustice will result to the defendant. Inasmuch as the indictment in this case not only alleged an assault, but the evidence might have authorized an inference that the defendant intended to cajole or persuade the female into consent to yield to his desires, and thus to effect intercourse without force, the jury should have been instructed that if they found, from the evidence, that it was not the intention of the defendant to have carnal knowledge of the female forcibly and against her will, but that the intention of the defendant was to arouse the passions of the female or otherwise induce her consent, and that, if the circumstances were such as to lead them to believe that the defendant would have desisted short of force and violence, then the defendant might be convicted of the offense of an assault. We cannot tell what was the opinion of the jury upon this subject; but the omission of a charge upon the subject of assault excluded from the consideration of defendant's intention as a whole, and forced them to the conclusion that the assault made by defendant was made with no other intention than to rape. The evidence seems to us to strongly sustain this conclusion, and no doubt

the learned trial judge entertained the same view; but in view of the publicity of the place where the assault was alleged to have been made, and the fact that it was at the home of the female, where the defendant was not an intruder, but a frequent visitor, the jury might have taken an entirely different view, if they had been told that they could consider another aspect of the question and might find the defendant guilty of assault, instead of being instructed, as they were, that they should find him guilty of assault with intent to rape, or acquit him.

We think, too, that the court erred in the instructions given the jury with reference to the defendant's statement. The jury should have been instructed, especially in this case, that they had the right to believe the statement of the prisoner in preference to the sworn testimony, if they chose so to do. In this particular case the omission was harmful, for the reason that the statement of the defendant and the evidence of the little girl (totally antagonistic to each other) were the only evidence in regard to the commission of the crime. The statement of the defendant was in material conflict with the evidence offered against his plea, and for that reason it was the duty of the court, without request, to instruct the jury fully upon that subject. The court did give a very full charge with reference to the defendant's statement, but omitted to tell the jury, what they should always be informed, that they had the right to prefer the statement, if they chose, to the sworn testimony. It is possible (considering the very able charge of the learned trial judge upon this subject as a whole) that the jury may have understood that they had the right to believe the statement if they saw proper; but in our opinion this does not dispense with the necessity of their being unequivocally so instructed. Decisions of our Supreme Court upon the defendant's statement are almost without number; but, after all, the proper course is pointed out in the case of *Ozburn v. State*, 87 Ga. 185, 13 S. E. 247, in the following language: "In this connection we will state that it would be a much wiser and safer practice for our brethren of the circuit bench, in charging concerning statements made by defendants, to confine themselves to the language of the statute upon this subject, and not to indulge in extended comments upon the effect to be given such statements. This course on their part will relieve them and this court of much embarrassment and difficulty arising from a contrary practice."

Judgment reversed.

(3 Ga. App. 171)

PYLANT v. WEBB. (No. 315.)

(Court of Appeals of Georgia. June 20, 1907.)

1. FRAUDS, STATUTE OF—ORIGINAL PROMISE.

A. rented to B. certain land for \$40 upon which to make a crop. After planting his crop

B. was taken sick. C. paid B. \$25 for his crop, and agreed to pay A. the \$40 rent. A. consented to the substitution and accepted C. as his tenant. *Held*, that the agreement of C. to pay A. the \$40 rent is an original undertaking, and is not required to be in writing under the statute of frauds. *Cuesta v. Goldsmith*, 57 S. E. 983, 1 Ga. App. 48; *Evans v. Griffin*, 57 S. E. 921, 1 Ga. App. 327.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 47-49.]

## 2. JUSTICES OF THE PEACE—CERTIORARI.

The evidence in this case demanding the verdict rendered in the justice court, the judgment of the superior court on certiorari, granting a new trial, was erroneous.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by Jesse Pylant against J. W. Webb. Judgment for plaintiff before a justice. From an order on certiorari in the superior court granting a new trial, plaintiff brings error. Reversed.

F. F. Juhan and M. D. Irwin, for plaintiff in error. N. L. Hutchins, Jr., for defendant in error.

HILL, C. J. Judgment reversed.

(2 Ga. App. 99)

## ADAMS v. HAIGLER et al. (No. 75.)

(Court of Appeals of Georgia. May 28, 1907.)

### 1. CONTRACTS—CONTRACTOR'S BOND—ACTION—PLEADING.

No error appears in the rulings of the court on the demurrers to the pleas, except as pointed out in the opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 12.]

### 2. SAME—EVIDENCE.

The allegations of the petition were proved by the evidence introduced in behalf of the plaintiff, assuming it to be true, and the judgment granting a nonsuit was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 338.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by D. D. Adams against J. V. Haigler and others. Judgment for defendants, and plaintiff brings error. Reversed.

Hardeman & Jones, for plaintiff in error. M. Felton Hatcher, for defendants in error.

HILL, C. J. Adams brought suit on a contractor's bond against Haigler and Frey as principals and Bazemore as surety. Demurrers were filed by the defendants to the petition, and were sustained by the trial court. On exceptions to this judgment, the Supreme Court reversed the judgment, and held that the "allegations in the original petition and the amendment seem to set forth a complete cause of action upon the bond" and that "the petition was not subject to any of the objections set forth in the demurrers." *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638. The opinion of the Supreme Court is comprehensive, and

fully settles the law of the case relating to the allegations of the petition. We do not think any profitable purpose would be accomplished by making an extended statement of the case, as that has been done by the Supreme Court. The case is now before this court on exceptions to the refusal of the court to strike certain pleas and to the granting of a nonsuit.

The defendants filed separate answers, denying the allegations of the plaintiff, except as to the execution of the contract. Haigler pleaded: (3) That at the time of entering into that contract another contract was made by Frey and himself with the plaintiff, in which it was agreed that the plaintiff should purchase the lumber and other things necessary in the construction of the house; (4) that after the signing of the original contract it was agreed between the plaintiff and himself that they would not carry out all its terms, and it was not carried out in all its terms, in that the plaintiff agreed to buy and to furnish to him certain lumber, and the plaintiff instructed him that it was not necessary to live up to paragraph 5 of the contract, and not necessary for him to see the architect and get a written estimate, but that he (Haigler) could come to him (the plaintiff) when in need of money; (5) that it was agreed between the plaintiff and himself that paragraph 3 of the contract should not be carried out; (6) that it was agreed between them that no written direction from the architect was necessary for alterations in the plans or for extra work; (12) that in good faith he (Haigler) performed his work as far as possible, and the plaintiff was not damaged in any amount, for he was not subjected to any loss, and he got more than his money's worth. Other parts of Haigler's pleading were stricken on demurrer. The demurrer as to the foregoing paragraphs was overruled.

Frey, in his answer, repeated the foregoing averment of Haigler as to the agreement that the plaintiff should furnish lumber, etc., and set up further: (4) That after the signing of the contract he (Frey), with the consent of the plaintiff and of Haigler, withdrew from "said partnership" and the contract, and was released from any further interest or connection therewith; and (5) that up to the time of said withdrawal he had not failed or refused to carry out his contract, and it was at the suggestion of the plaintiff (he has learned since his withdrawal) that he gave up the contract, and it was admitted by the plaintiff as being satisfactory that he should withdraw. A demurrer to each of these paragraphs, as well as to the entire answer of Frey, was overruled.

Bazemore pleaded: (3) That at the time the contract attached to the petition was made he "knew of no other contract being signed between the parties thereto, and he never consented in any way to the change, abrogation, or alteration of said contract in

any way, nor to the signing of any other contract in reference thereto"; (4) that "he is discharged by law from any liability on said bond, for the reason that said averments in the declaration admit said contract was abrogated, altered, and changed by the parties thereto by mutual consent, and without the knowledge and consent of" this defendant; (5) that "he is discharged from liability on said bond as surety, for the further reason that said changes, alterations, and abrogations of said contract increased the risk of said defendant as surety, and exposed the defendant to greater liability thereon, without his knowledge or consent"; (6) that he is discharged as surety because the plaintiff purchased the material used in the construction of the building, in violation of the contract, defendant being willing to risk the judgment and experience of the parties whose faithful performance he guaranteed, but unwilling to accept and risk the judgment of the plaintiff in purchasing material, owing to the plaintiff's lack of experience in that line; (7) that he is discharged because the plaintiff violated paragraph 7 of the contract, "in that he purchased said material without giving five days' notice as required thereby, and without any notice or consent to or of this defendant"; (8) that he is discharged because the plaintiff failed to have the said lumber delivered at the proper times, which delay increased the cost of the building several hundred dollars, and which delay and purchases above set out increased the risk and liability of this defendant as surety, and since the filing of this suit he has learned that the plaintiff admitted that there were such delays, and put in a claim against the parties from whom the material was purchased for a certain sum as damages for the delay; (9) that he is discharged because the plaintiff, without his knowledge or consent, paid out money in a different way and mode from that required by the contract; (10) that he is discharged because, without his knowledge or consent, the plaintiff consented to Frey's withdrawal from the contract, which consent increased the risk of the surety and exposed him to greater liability; (11) that he is discharged because the plaintiff accepted the house from the contractors; (12) that he is discharged because the plaintiff, in his declaration, avers that the said additions and alterations in the plan of work were made without being directed in writing by the architect, and without the consent or knowledge of the surety, as required by the contract, which likewise increased the risk of this defendant as surety; and (13) that he is not liable to the plaintiff in any amount, for the reason that the plaintiff has not been damaged, but has received more than his money's worth for every expense incurred. The plaintiff demurred generally and specially to Bazemore's answer, and the demurrer was overruled.

1. We will consider the pleas and demur-

ers in so far as we think the judgment of the court was erroneous thereon. The demurrer to paragraph 3 of Haigler's answer should have been sustained; the alleged change of the contract in the particular mentioned having been the result of an agreement by all the parties thereto, as stated in this paragraph. Such consent novation could not be set up as a sufficient and valid defense by the contractors. The demurrer to paragraph 4 of Haigler's answer should have been sustained. It was wholly immaterial from whom Adams, the plaintiff, purchased the lumber to be used in building the house; it having been agreed, as alleged in paragraph 3, that he should purchase the "lumber and other things necessary in the construction of the house." Paragraph 5 of the contract provides how the contractors shall be paid, to wit, that the architect shall make an estimate of the material and labor put into the building during the preceding month, and this estimate shall be paid by the owner, deducting 15 per cent. to be paid on the completion and acceptance of the work. This clause of the contract was changed by the owner and Haigler, the contractor, who continued the work under the contract, and the change was for the benefit of the contractor. A change for the benefit of the contractor and with his consent certainly could not be pleaded as a defense to his failure to complete the contract. The demurrer to the sixth paragraph of Haigler's answer should have been sustained; it being alleged that the matter therein referred to was the result of an agreement between the parties to the contract. The twelfth paragraph of Haigler's answer sets up no issuable fact, but is a conclusion of the pleader, and constitutes no defense. This paragraph should have been stricken.

The third paragraph of the answer of the defendant Frey should have been stricken, for the same reason that the demurrer to paragraph 3 of Haigler's answer should have been sustained.

The demurrer to paragraphs 4, 5, 6, 7, 9, 10, 12, and 13 of Bazemore's answer should have been sustained. The questions made by these paragraphs of the surety's answer are fully covered by the decision of the Supreme Court overruling the demurrers to the petition. These allegations of the petition were held by the Supreme Court not to constitute a novation of the contract so as to increase the risk of the surety and to release him from the contract. "The act of Haigler in carrying on the work was, under the allegations of the petition, not a novation, but in pursuance of the original contract. \* \* \* Bazemore's risk as surety was not increased by any act of Adams, and \* \* \* the condition of the bond was broken by Haigler's failure to comply with the terms of the contract." "Haigler was allowed, with the knowledge of Bazemore, the surety, to continue the work which Frey had failed to com-

plete. Both Haigler and Frey were under an obligation to complete the work, and it was immaterial to the plaintiff which one actually did the work. Bazemore, the surety, was surety for both, and he was alike responsible for the failure of either." *Adams v. Haigler*, 123 Ga. 659, 664, 51 S. E. 638.

The decision of the Supreme Court, we think, reduced the defenses that could be made by the defendants (1) to showing that the delay in completing the work was due to the alterations and additions made by the plaintiff, and not by the fault of the contractors; (2) to any material changes in the contract not embraced in the admitted changes set out in the petition, and which were not consented to by the defendant Bazemore, and which increased his risk as surety. (3) The separate answer of Frey averred that the plaintiff had, with the consent of Haigler, released him from compliance with the contract. This made a sufficient defense as to him, if true. Except as herein ruled, we think the judgment of the trial court in overruling the demurrers to the pleas was right.

2. We think the court erred in sustaining the motion to nonsuit. The question on the nonsuit is, not whether the plaintiff was entitled to recover, but whether his evidence supported the case made by the allegations of his petition. An examination of the evidence will show that the plaintiff substantially supported the allegations of his petition. The damage claimed under the contract was composed of three items: (1) The sum of \$426.03, besides interest, expended by the plaintiff in excess of the contract price in the purchase of material and in the payment of labor; (2) \$40, the rental value of the house between the date fixed in the contract for the completion of the house and the date when it was sufficiently completed for occupation; (3) \$33.60 for additional work necessary to be done, and the material therefor, in order to complete the house in accordance with the contract. In support of these items the plaintiff introduced the contract and bond sued on, and showed, by his own testimony and that of his architect, that the contractors commenced work under the contract. In a few days one of the contractors, Frey, abandoned the work without the consent of the plaintiff, and the other contractor, Haigler, continued under the contract. He could not get credit for the material, nor could he pay for the labor, unless Adams would agree to be responsible. It was agreed between Adams and Haigler that Adams would furnish the money to meet the pay rolls and would pay the bills for the material whenever they were approved by Haigler. The payments made by Adams for material and labor, according to the evidence, exceeded the contract price by \$426.03. There seems not to have been any proof submitted by the plaintiff in support of his claim for \$40 as the rental value of the house for the month he was delayed in getting into it. The item of \$33.60, covering

additional work and materials necessary to complete the house in accordance with the terms of the contract, was proved by the testimony of the architect and the plaintiff. The evidence introduced in behalf of the plaintiff, assuming it to be true, proved his case as laid, except as to the item of \$40 above mentioned; and it was error to grant the nonsuit.

Judgment reversed.

(2 Ga. App. 173)

#### CAVENDER v. ATKINS. (No. 327.)

(Court of Appeals of Georgia. June 20, 1907.)

##### CONTINUANCE—ABSENCE OF PARTY.

There is no abuse of discretion in refusing a continuance upon the ground of the absence of a party to a cause, where it is not made to appear that such party is at the time of the trial unable to be present.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 10, Continuance, § 41.]

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Attachment in a justice's court by D. J. Atkins against J. W. Cavender. From a judgment of the superior court dismissing a petition for certiorari to review the judgment in the justice's court for plaintiff, defendant brings error. Affirmed, with direction.

Taylor & Jolly and McHenry & Porter, for plaintiff in error. F. W. Copeland and J. M. Bellah, for defendant in error.

RUSSELL, J. The defendant in error caused to be issued against the plaintiff in error an attachment, upon the ground that he was not a resident of the state of Georgia, which was returned to the justice's court of the 962d district, to the February term, held February 4, 1906. Prior to the court day the plaintiff in error spoke to the justice of the peace about a continuance of the case, in order that he might attend the superior court of Murray county. Upon his return to his home in Chattanooga, Tenn., he inclosed the following certificate in the letter which follows:

"Mr. J. W. Cavender is ill with la grippe, and unable to attend to business.

"C. Holzclaw, M. D.

"State of Tennessee, County of Hamilton.

"Sworn to and subscribed before me this the 1st day of February, 1906.

"W. S. Weltzell, N. P. [Seal.]"

"Chattanooga, Tenn., Feb. 1st, 1906.

"Esquire Geo. O. Ramsey, Subnigna, Ga.—  
Dear Sir: I returned home sick, and, as I am not able to come down Saturday, I send you my doctor's affidavit, which is proper showing for you to continue the case. Hope the continuing of it won't disconcert any one. I am sorry I am not able to come.

"Your friend,

J. W. Cavender."

Upon this showing the judge, in the exercise of his discretion, refused to continue the case and rendered judgment in favor of the plaintiff. As appears from the answer of the justice, no plea had been filed in the case, and no point is made that evidence sufficient to authorize the judgment was not adduced. The defendant carried the case to the superior court by certiorari, where the petition was dismissed; and exception is taken to the judgment dismissing the certiorari.

The only question in the case is whether the justice of the peace abused his discretion in refusing a continuance of the case upon the showing made. We agree with the judge of the superior court in holding that the magistrate was not required to continue the case upon the showing presented. The certificate of the physician purported to give the condition of the party on February 1st. The court did not sit until February 4th, and the certificate contained no statement which could inform the court as to the duration of the movant's illness, or from which the court could absolutely infer that the movant's ailment would continue until the day upon which court was to be held. We think every facility should be afforded each and every party in every case for fairly presenting his side of the issue, and that the law of continuance should be given a liberal construction; but we are not prepared to say that the trial judge in this case abused the discretion with which he is vested by law. The mere absence of a party has nowhere been held to be of itself enough to authorize the continuance of the case. A meritorious reason existing at the time of the trial, which prevents his presence, must be made to appear; and it should further be shown that the presence of the party would be likely to cause a different result from that obtained, before the judgment should be set aside and a new trial ordered. "The law's delay" is one of the most serious impediments in the administration of substantial justice in the courts. We do not mean to say that in any case there should be unseemly, undue, or unjust haste; but hope deferred makes the heart sick, and many a case is killed by continuance.

Though constrained to affirm the judgment in this case, for the reason that the showing made did not require a continuance, because it did not cover the date of trial, this judgment is not to preclude or prevent the plaintiff in error from proceeding by equitable petition to have the judgment rendered set aside, if as a matter of fact he has a meritorious defense and was really physically unable on the day of trial to attend court. The judgment is affirmed, with direction that this judgment shall not operate to prejudice the right of plaintiff in error to proceed accordingly.

Judgment affirmed, with direction.

(3 Ga. App. 38)

**SOUTHERN RY. CO. v. JOHNSON.**  
(No. 193.)

(Court of Appeals of Georgia. May 24, 1907.)

**1. CARRIERS—CARRIAGE OF GOODS—ACTIONS—QUESTION FOR JURY—DELIVERY.**

Delivery of freight to a common carrier, where an action is brought to recover for loss of articles alleged to have been delivered, is a question of fact for the determination of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 596.]

**2. SAME—CONTRACTS FOR TRANSPORTATION IMPLIED.**

Where the evidence authorizes a finding that certain goods were delivered to the agent of a railroad company, who received them and was made acquainted with their destination, a contract of carriage may be implied, although no bill of lading or receipt for the goods be issued and delivered to the shipper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 202.]

**3. SAME—ACTIONS—PERSONS ENTITLED TO SUE.**

While, in the absence of a contract, a person who has no property, general or special, in goods, cannot sue in his own name, in tort, for the destruction of such goods by a carrier, nevertheless the contract need not be in writing, but may be implied from delivery and acceptance of the goods for shipment, and the consignor may sue for the loss or nondelivery, though he be but a bailee. "He has such a special property in the goods as to give him a right of action." *Great Western R. Co. v. McComas*, 33 Ill. 185. The shipper, if not the owner, holds the recovery in trust for the true owner.

**4. SAME.**

"The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects." *Hooper v. Railway Co.*, 27 Wis. 81, 9 Am. Rep. 439.

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Action by Mrs. Johnson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Mrs. Johnson having died pending the writ of error, J. O. Johnson, her administrator, was made party defendant in error. Affirmed.

De Lacy & Bishop and H. A. King, for plaintiff in error. J. H. Thomas, for defendant in error.

**RUSSELL, J.** Mrs. Johnson, the plaintiff in the court below, agreed with Krauskoff Bros. & Co., of Savannah, Ga., to take a certain shipment of hats to her store; they insisting that she keep or buy all the hats in the shipment, but allowing her the privilege of returning to them such of the goods as she did not want. She took the goods on these conditions to her place of business and kept them for some time, but finally decided to ship back to them the larger portion of the goods, packed them in boxes, and had them marked "K. B. & Co., Savannah, Ga.," and delivered them to a drayman to take to the depot. The drayman swears that he delivered the

goods to the agents of Krauskoff Bros. & Co. at the depot, and that he delivered them as he was accustomed to deliver such goods. The evidence of the plaintiff showed that she delivered the goods to the agents of Krauskoff Bros. & Co., and that these agents accepted them for shipment, but failed to furnish her with a bill of lading, receipt, or other evidence of delivery. Krauskoff Bros. & Co. not having received any of the goods, or any bill of lading or receipt of shipment, naturally insisted on payment for the entire shipment, and Mrs. Johnson, having failed in her effort to return a portion of the goods, paid for them. She then sued the railroad company in a justice's court for the value of the goods delivered to the company. This suit was appealed to the superior court, and a verdict was rendered for the plaintiff. The original defendant in error, Mrs. Johnson, having died pending the writ of error, J. C. Johnson, her administrator, was made a party defendant in error.

Learned counsel for plaintiff in error insists that this action is a suit in tort, and that for that reason the plaintiff was not entitled to recover, because it appears that she had no title to the goods that were lost. While particularity of pleading is not required in justices' courts, we think it very clear that the suit is one on a contract of carriage arising from the transaction between the plaintiff as bailee and agent for Krauskoff Bros. & Co., and the defendant as common carrier. In the summons it is alleged that "all the articles named in said bill of particulars \* \* \* were turned over to said company by petitioner to be transported," etc.; "said railway company being a common carrier for hire," etc., and "said railway company having failed to deliver the goods as agreed between them and the shipper, the said Mrs. J. C. Johnson, at their destination, Savannah, Ga., as aforesaid." We think that this alleges a contract, and asks recovery only for the breach of such contract; and it is only upon the theory that a contract was proved that the verdict can be sustained, for the plaintiff failed to show that she had title to the goods in question, and, of course, no one but the owner can recover damages in tort.

The plaintiff in error claims that there was no contract; and the evidence certainly discloses that there was no written contract to carry the goods in question. It is insisted that the goods were never received; that the evidence fails to show proper identification of the goods sued for, or their delivery to the company. The plaintiff in error further contends that the defendant in error had no right to her recovery in the court below, because she had no title to the goods sued for. As to whether or not there was delivery and identification of the goods, and proof of their delivery to the carrier, these are questions of fact; and the evidence admitted, so far as this portion of the case is concerned, authorized the finding of the jury. Mrs. Johnson

testified that she packed the hats in two boxes and saw her husband mark them "K. B. & Co., Savannah, Ga." She herself delivered these boxes to the drayman. The drayman swears that he delivered these boxes to the agents of the company, and called their attention to their presence in the depot; and to show that they were the same two boxes, the plaintiff's husband testifies that he saw them at the depot after the drayman carried them there, and called the attention of the company's agent to the marking or lettering he had placed on them. If the jury believed plaintiff's witnesses, there could be no doubt as to the identification of the goods sued for, and of their delivery to the company. While we agree with counsel for plaintiff in error that the testimony fails to show that Mrs. Johnson was the owner of the goods (although she did pay for them after their loss), still, if we are right in our construction of the nature of this suit, it becomes immaterial that Mrs. Johnson was not the owner; for by delivery of the goods to the carrier for shipment to the place marked upon the boxes, to wit, Savannah, Ga., and their acceptance by the railroad company for that purpose, a contract to carry arose by natural implication, and the ownership of no person other than Mrs. Johnson is disclosed, and it is not sought to enforce the rights of any other person. Mrs. Johnson, although not the true owner, can maintain the action, and could hold the recovery in trust for the true owner. Construing the decision in *Carter v. Southern Railway Company*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354, with the *Lockhart Case*, 73 Ga. 472, 54 Am. Rep. 883, it may be stated that a bailee may sue for the breach of a contract of carriage made with him. It is distinctly decided in *Carter v. Southern Railway Company* that a person who has in charge, as agent, the goods of another, and who makes with the common carrier a contract to ship the goods, in which the agency is not disclosed, may maintain an action in his own name for the breach of the contract. Such a plaintiff being the consignee of the goods shipped, the contract is made with him, and he is primarily liable for the charges for carriage. The carrier, having treated him as the owner of the goods, cannot dispute his title, unless the title of the true owner is sought to be enforced against the carrier. It is equally well settled that, where a plaintiff has no interest in the property and no contract with the carrier, he has no cause of action. *Lockhart v. Railroad*, 73 Ga. 472, 54 Am. Rep. 883. We are of the opinion that under the evidence Mrs. Johnson was such a bailee of the goods in question that, if she had made a contract with reference to their transportation, she could have maintained an action for the breach of the contract.

The real question in this case, then, is. Was a contract of carriage entered into between Mrs. Johnson and the carrier? No bill

of lading, freight receipt, or other written evidence of a contract, was put in evidence, and we must therefore determine from the circumstances appearing in evidence whether the defendant company made a contract to transport the goods in question. The evidence of the plaintiff discloses nothing on this subject. She delivered the goods to a drayman, and she never received a bill of lading, and had no knowledge of what the drayman did with the goods after she turned them over to him. Her husband testified that the goods were delivered to the company's agent, for he saw the boxes containing them at the depot, and called the attention of the company's agent, Lee Patterson, to the marking on the box, "K. B. & Co., Savannah, Ga." The drayman testified that he delivered two boxes, marked "K. B. & Co.," to the depot agent at Baxley. He did not get a bill of lading at that time, because he was in a hurry. It appears, therefore, that there was evidence to authorize the jury to find that the two boxes of hats were delivered by the plaintiff to the company for shipment, and accepted by them. They were plainly marked "K. B. & Co., Savannah, Ga.," and the testimony is undisputed that the goods for whose loss the suit is brought were contained in boxes marked "K. B. & Co., Savannah, Ga." According to testimony which the jury was authorized to believe, there was nothing lacking to show an implied contract, and the terms of the contract. The point of destination was plainly marked on both boxes, and when the railroad company received the goods, without objection, under the evidence that it was quite usual not to make out bills of lading immediately, the company tacitly agreed to deliver them, either at destination or to a connecting carrier, to be transported to destination. The course of dealing evidenced a contract. The jury could well imply a contract from the acceptance of the goods for shipment, and that it was only through oversight that a receipt or bill of lading was not issued. So we do not think that the contention of plaintiff in error that this is an action in tort is sustained. In any event a common carrier cannot dispute the title of the person delivering the goods for shipment, by setting up adverse title in himself or in a third person, which is not being enforced against him. *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473. Payment to the administrator of Mrs. Johnson will be full protection against payment to any one else.

Judgment affirmed.

(2 Ga. App. 192)

DICKS v. STATE. (No. 490.)

(Court of Appeals of Georgia. June 20, 1907.)

1. WITNESSES—EXAMINATION BY COURT.

While the court has a right to question a witness during the trial of a case, the examination must be carefully guarded so as not to violate the inhibition of section 4334, Civ. Code

1895. The examination of the witness by the court in this case was not so guarded, and amounted to a clear violation of that section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 852.]

2. CRIMINAL LAW—APPEAL—OBJECTIONS WAIVED.

Exceptions not insisted on in the argument, or covered by the brief, will be treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4256.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

John Dicks was convicted of burglary, and brings error. Reversed.

A. L. Franklin, for plaintiff in error. J. S. Reynolds, Sol. Gen., and John M. Graham, for the State.

HILL, C. J. Plaintiff in error was convicted for a violation of section 184 of the Penal Code of 1895, upon an indictment charging that he did break and enter a certain railroad box car of the Augusta Southern Railroad Company with the intent to steal valuable goods therein, and, after having so entered, did wrongfully and fraudulently take and carry away, with intent to steal the same, two boxes of raisins, the property of the said railroad company. His motion for a new trial was overruled, and the case is before this court for review. Exceptions to the judgment of the court in overruling a plea in abatement, and in admitting certain testimony over the objection of the defendant, are not alluded to in the brief filed in this court, and will therefore be treated as abandoned. Two points are presented for the decision of this court.

1. It is complained that the presiding judge erred, in that he intimated to the jury his opinion of the defendant's guilt and what had been proved, as follows: During the progress of the trial and after the defendant had made his statement, the detective who made the arrest and who discovered the stolen property was recalled, and after he had been examined by counsel for both the state and the defendant the court continued the examination as follows: "Q. Was he told what he was being arrested for? A. We carried a search warrant, and told him we had a search warrant for his place and for him; and he never did make any explanation as to where the goods came from or why he was in possession of them. Q. Did he make any denial? A. No, sir. Q. Did he see these raisins? A. Yes, sir. Q. Said nothing about Aaron Skinfeld at that time? A. No, sir; he did not. Q. Were you present at the preliminary hearing? A. I was. Q. Did he make any denial there? A. Not that I heard. Q. Have you ever heard of Aaron before in connection with this case? A. No, sir; I think not." Then the witness was cross-examined, and the court asked him the following questions: "Q. Explain to the ju-

ry where John Dicks was when you and the gentleman with you discovered this first box of raisins in his house. A. He was there in the room. Q. Did he or not see you put your hands on the box of raisins and take them into your custody? A. I don't see why he couldn't. He was right there in the room, dressing. Q. Did he see you with the two boxes of raisins? A. Yes, sir. Q. Did he see you remove them from his house? A. I can't say that he did, because we ran him right off to jail. Q. Did he see you with these boxes of raisins at the time? A. Yes, sir. Q. Did he offer you any explanation? A. No, sir. Q. Did he say he got them from Aaron Skinfeld? A. He did not. Q. Were those raisins at the magistrate's office? A. Yes, sir. Q. Did he say there at the magistrate's office that he got them from Skinfeld? A. No, sir; he did not. Q. Have you ever seen him where those boxes of raisins were, at police headquarters or anywhere else, when he was being charged with this crime? A. Yes, sir; they were at the magistrate's there, and he was faced with them there. Q. Did he offer any explanation? A. No, sir. Q. Did he offer the explanation that Skinfeld had come to his house and asked permission to leave them there? A. No, sir. Defendant's counsel continued to cross-examine the witness, and when he finished the court asked the following questions: "Q. How long did John Dicks stay in jail before he had a preliminary and went out on bond? A. I don't remember how long. I think he was there probably three weeks. Q. Did you see him during that time? A. Yes, sir. Q. Did he offer you any explanation? A. No, sir; none at all. He told me to go to his lawyer."

To illustrate the pertinency of the foregoing examination it is only necessary to state that the only evidence of the defendant's guilt was the presumption arising from the possession of the stolen property soon after the commission of the crime, without a satisfactory explanation of such possession. This detective, three days after the raisins were stolen from the car, found them in the defendant's house. Neither at that

time, nor on the subsequent occasions alluded to by the court, when he had an opportunity to do so, did he ever make any explanation at all of his possession. He delayed his explanation until he made his statement to the jury on the trial; then stating that one Aaron Skinfeld left them at his house the night they were stolen. The iteration and reiteration by the court of this strongly incriminating omission on the part of the defendant must have forcibly impressed the jury with the idea that in the opinion of the judge the explanation of his possession of the stolen goods, as then given by the defendant, was a fabricated afterthought. The emphasis which the judge by his questions gave to this significant failure of the defendant on the repeated occasions before the trial, when it was to his interest to have promptly made an explanation, and when it was reasonable to think that he would have done so, indicated that the judge had very grave doubts of the truth of the one made. This question has been fully covered by the recent decision of this court in the Sharpton Case, 1 Ga. App. 542, 57 S. E. 929. We can only repeat what we said then—that while the court can with propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case, such practice is imprudent and unsafe, and will invariably result in the imperative grant of a new trial when such examination is at all extended and on the vital points of the case. The rather lengthy examination of the witness above set out, calling repeated attention to the weak point in the defense, was a clear, though doubtless an unconscious, violation of the right of the defendant to have his guilt determined by the jury without the slightest assistance from the court.

2. It is insisted that there was no evidence of a "breaking" of the car. We have carefully examined the brief of evidence, and we find that, while the evidence on this point is weak and not entirely satisfactory, yet there is some evidence to support the verdict as to this fact, and the trial court was satisfied.

Judgment reversed.



(77 S. C. 473)

**ACKER v. ANDERSON COUNTY.**

(Supreme Court of South Carolina. Aug. 5, 1907.)

**CORONERS—INQUEST—FEES—LIABILITY OF COUNTY.**

An inquest over a dead body is a proceeding essentially criminal in its nature, and falls within the term "criminal proceedings," for which salaries are provided in lieu of fees given by Civ. Code 1902, § 3117—section 1006 providing for salaries of magistrates in Anderson county, and section 994 providing that magistrates shall receive annual salaries in lieu of fees in criminal cases or proceedings—and a magistrate in Anderson county holding an inquest cannot collect fees from the county therefor.

Appeal from Common Pleas Circuit Court of Anderson County; Watts, Judge.

Controversy without action between R. V. Acker and Anderson county. Judgment for defendant. Plaintiff appeals. Affirmed.

J. E. Breazeale, for appellant. Bonham & Watkins, for respondent.

**JONES, J.** This was a controversy in the circuit court without action upon an agreed statement of facts. The plaintiff is a magistrate for Anderson county, and in the year 1905 held two inquests over dead bodies, for which services he presented a claim for \$17 to the county commissioners of Anderson county. The inquests were held more than 15 miles from the courthouse and upon the request of two reputable citizens. The county commissioners refused to pay the claim, upon the ground that the statutes make no provision for the payment of such fees to magistrates in Anderson county. The circuit court sustained this view and dismissed the proceedings.

We concur with the circuit court. Costs and fees are never allowed to an officer unless some statute, strictly construed, confers the right. *Lancaster v. Barnwell*, 40 S. C. 446, 19 S. E. 74; *Green v. Anderson Co.*, 56 S. C. 411, 34 S. E. 691. We find no statute authorizing such costs.

The authority of a magistrate to hold an inquest is derived from section 888, Code of Laws 1902, which provides that "any magistrate of the county, except in the county of Charleston, is authorized and required to exercise all the powers and discharge all the duties of the coroner in holding inquests over the body of deceased persons and taking all proper proceedings therein, in all cases where the coroner of the county is sick, or absent or at a greater distance than fifteen miles from the place for such inquiry, or when the office is vacant." Section 3117, 1 Civil Code 1902, among the fees and costs of magistrates for civil and criminal matters, provides a fee of \$8.50 for "proceedings on coroner's inquest as prescribed by law." But section 1006 of that volume and amendatory statutes provide for salaries of magistrates in Anderson county, and section 994 expressly provides that the magistrates "shall re-

ceive annual salaries in lieu of all fees and costs in criminal cases or proceedings." An inquest over a dead body is a proceeding essentially criminal in its nature, and must fall within the meaning of the term "criminal proceeding," in lieu of fees for which the salary is provided. Cr. Code 1902, §§ 701-729, regulates the procedure, and by section 890, 1 Civ. Code 1902, the inquisition and evidence must be returned to the clerk of the court of general sessions. This would be conclusive if the coroner were allowed fees for holding inquests in Anderson county, but by act of 1904 (24 St. at Large, p. 418) the coroner of Anderson county is paid a salary in lieu of all costs and fees. Hence there is no statute authorizing the payment of fees for holding an inquest in Anderson county, whether the service is rendered as magistrate or as coroner.

The judgment of the circuit court is affirmed.

(77 S. C. 467)

**GERMAN-AMERICAN INS. CO. v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina. Aug. 3, 1907.)

**RAILROADS—FIRES SET BY LOCOMOTIVES—LIABILITY.**

Where cotton is deposited on the premises of a railway company under an agreement that it remain on the premises of the company without its consent at the sole risk of the shipper until tendered and accepted for shipment, the carrier is not liable for its loss by fire from its locomotive under Civ. Code 1902, § 2135, making every railroad company responsible for property destroyed by fire from its engines, unless the property was placed on the right of way unlawfully and without its consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1665.]

Gary, J., dissenting.

Appeal from Common Pleas Circuit Court, Fairfield County; Prince, Judge.

Action by the German-American Insurance Company, the Royal Insurance Company, and Millett & Co. against the Southern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Defendant appeals on following exceptions:

(1) "That his honor, the presiding judge, erred in refusing the motion to direct a verdict in favor of the defendant, upon the ground that it appeared from the undisputed evidence in the case that the property destroyed had been placed on the defendant's right of way by Millett & Co., the owners, with knowledge that the defendant did not consent to its being so placed before it should be tendered for shipment, and that it was never so tendered.

(2) "That his honor, the presiding judge, erred in refusing to direct a verdict for the defendant, for the reason that there was no testimony tending to show that the property which was destroyed while upon the defend-

ant's right of way had been placed on such right of way with its consent.

(3) "That his honor, the presiding judge, erred in refusing to direct a verdict for the defendant, for the reason that it appeared from the evidence that there was a misjoinder of parties plaintiff and of causes of action. The rights of the plaintiffs being several, and not joint, the evidence could not sustain a verdict in favor of the defendants jointly.

(4) "That his honor, the presiding judge, erred in refusing the defendant's motion for a new trial, for the reason that there was no testimony tending to show that the cotton destroyed had been placed upon the defendant's right of way with its consent.

(5) "That his honor, the presiding judge, erred in refusing the defendant's motion for a new trial, on the ground that the verdict, being for a single sum in favor of the defendants jointly, was not supported by the evidence, which showed the rights of the plaintiffs to be several, and not joint.

(6) "That his honor, the presiding judge, erred in charging the jury, with reference to the cotton on the right of way: 'Now, if you find it was there with the knowledge of the defendant company, then the inference, in the absence of other testimony, the inference might be drawn that it was there with the consent of the company; and that inference arises only in those cases where the property of one is placed upon the lands of another, who has a right to object to its being there. But I charge you that a railway company has a right to object to the storing of cotton on its right of way that is not placed there for the purpose of shipment on the railroad'—in that he thereby instructed the jury, in effect, that an inference of consent on the part of the company to the placing of property on its right of way arose from the fact, if shown by the evidence, that the property was placed upon such right of way with its knowledge, in the absence of any other testimony, and was a charge on the facts, in violation of section 26, art. 5, of the Constitution of this state, and said charge was in violation of the provisions of section 2135, 1 Code of Laws of South Carolina 1902, which required the plaintiff to affirmatively prove consent on the part of the railway company to the placing of the property on its right of way.

(7) "That his honor, the presiding judge, having charged the jury that 'the statute exempts the railroad company from liability for the destruction by fire of property placed upon its right of way without its consent, and recognizes the right of the company to withhold its consent when any property is placed thereon, and such consent must be affirmatively shown,' erred in also charging the jury that the inference that the company consented to the property being placed on its right of way arose, if the jury should find that it was placed there with the knowledge of the

company, it having a right to object, in the absence of any other testimony, the charge being contradictory, and making proof of knowledge equivalent under the statute to proof of consent.

(8) "That his honor, the presiding judge, erred in construing the written notice, Exhibit F, introduced in evidence, and in charging the jury in reference thereto, as follows: 'By this notice the railway says it doesn't consent. It is for you to say whether it did or not. It says the cotton is there at the risk of the owner. I charge you that, if the railroad consented for that cotton to be there, the railroad couldn't limit its liabilities under that statute. The question is: Did the railroad company consent for it to be there? If it consent for it to be there, it can't say: 'I consented for it to be there, but it must be at your risk.' I charge you that under that statute the railroad company can't do that; and, if the railroad company consented for it to be there, why, then, it was at the risk of the railroad if it burned it. Now, that is my interpretation of the law in connection with this notice that has been placed in evidence'—whereas, it is submitted that the railroad company was under no obligation to permit property to be placed or to remain on its right of way until it should be tendered for shipment, and could, in the exercise of its rights, attach to its permission that property be placed or remain on its right of way before being tendered for shipment, a valid condition that should be there without its consent, and at the risk of its owner until tendered for shipment."

B. L. Abney and W. H. Townsend, for appellant. J. E. McDonald, for respondents.

JONES, J. The plaintiff insurance company seeks to be subrogated to the rights of Millett & Co. to recover under section 2135 of the Civil Code of 1902. This statute makes every railroad corporation responsible in damages to the owner whose property may be injured by fire, communicated by its locomotive engines or originating within the limits of the right of way, in consequence of the act of its authorized agents or employes, except in any case where the property shall have been placed on the right of way of such corporation unlawfully or without its consent. It was shown that the cotton of Millett & Co. was destroyed by fire while on defendant's right of way, but not tendered for shipment, by a spark communicated from defendant's locomotive engine; but the vital question is whether the cotton was on defendant's right of way by its consent, as contemplated by the statute.

The undisputed testimony was that Millett & Co. placed the cotton on defendant's right of way under an agreement stipulating: "This cotton is deposited on the premises of the Southern Railway Company and the same remain upon the premises of this company without its consent and at your [Millett &

Co.] sole risk, until tendered and accepted for shipment." Now, it is contended that, notwithstanding this express stipulation, the cotton was on defendant's right of way by its consent before it was tendered for shipment. We cannot think so. Millett & Co. and those in privity with them should be estopped to assert a fact which is contrary to their agreement that until tendered for shipment the cotton remains upon the right of way without defendant's consent. It is said that such an agreement is void on the ground of public policy. As it subverts a very high public policy to enforce contracts between parties sui juris, courts should not nullify contracts as against public policy unless the case is free from all reasonable doubt. The rule is that "a contract is not void as against public policy unless it is injurious to the interest of the public or contravenes some established interest of society." What interest of the public is injuriously affected by the agreement in question? Millett & Co. had no right as a member of the public to place cotton on defendant's premises, unless tendered for shipment, except by agreement with defendant, and defendant owed no duty to the public or to Millett & Co. to allow cotton to be placed on its right of way, except for shipment. A different question would be present if Millett & Co. had the right as a member of the public to place cotton on defendant's right of way, independent of an agreement. The status of the cotton on the right of way, being fixed by the agreement alone, must be determined by the agreement alone. If it be true that the cotton was on defendant's premises by its consent on condition, the owner cannot cling to the consent and repudiate the condition upon which it was given, for that would be like a consent obtained by fraud or deception which is no consent.

The authorities generally hold that a contract by a railroad corporation is not against public policy because it exempts from liability for fires, even negligently communicated by its agents or defective instrumentalities to property placed by the owner upon railroad premises, not as a patron dealing with the company as a common carrier, but by virtue of the special agreement. *Griswold v. Illinois Central R. R. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Id.*, 20 Sup. Ct. 33, 175 U. S. 91, 44 L. Ed. 84, following the rule established by the state court in the *Griswold Case*. *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *Greenwich Ins. Co. v. Louisville & Nashville R. R. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; *Osgood v. Central Vermont R. Co.*, 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721. These cases combat the view that the public has an interest in the contract, because it tends to

induce negligence in the equipment and operation of the locomotives. The contract in this case is not to do an act prohibited by statute or which is contrary to the public policy as declared by a statute, but is the admission by both parties of a fact which takes the case out of the statute, viz., that the cotton was not upon the right of way with the consent of defendant until tendered for shipment.

Under the foregoing views, it was error to refuse to direct a verdict for defendant and to refuse the motion for new trial.

The judgment of the circuit court is reversed.

GARY, A. J. (dissenting). This is an appeal from a judgment recovered by the plaintiff against the defendant, under section 2135 of the Code of Laws, for loss of, or damage to, 37 bales of cotton by fire from a locomotive of the defendant, which cotton, it is alleged, had been placed upon the platform and right of way of the defendant, at its depot in Winnsboro, S. C., on the 22d of September, 1904, by its consent.

The cotton had been purchased by Millett & Co., who took out two policies of insurance—one in German-American Insurance Company and the other in Royal Insurance Company—each of said policies being in the sum of \$1,000. The loss under the policies, if any, was made payable to the Winnsboro Bank, as its interest might appear, by virtue of an agreement between the insurance companies and Millett & Co. The insurance companies and Millett & Co. joined as plaintiffs in the action, although it was alleged in the complaint that the insurance companies had paid the loss which had been adjusted between them to Millett & Co. and the Winnsboro Bank. It was, however, alleged that Millett & Co. were made parties plaintiff, as a matter of form, by reason of their former interest, to which the insurance companies were subrogated.

The defendant demurred to the complaint, and also filed an answer. The grounds of demurrer were: (1) "That it appeared upon the face of the complaint that no cause of action was stated in favor of the plaintiffs Millett & Co." (2) "That it appeared on the face of the complaint that there was a misjoinder of causes of action, in that the plaintiffs insurance companies each had a separate claim against the defendant, and not a joint cause of action." The demurrer was overruled. At the close of the testimony, the defendant's attorneys requested his honor, the presiding judge, to direct the jury to find a verdict in favor of the defendant, upon grounds hereinafter mentioned, which was refused. The defendant did not introduce any testimony. The jury rendered a verdict in favor of the plaintiffs for \$1,560.84. The defendant's attorneys also made a motion for a new trial upon the same grounds as those upon which they requested the presid-

ing judge to direct a verdict. The appellant's exceptions will be set out in the report of the case.

The first question that will be considered is whether there was any testimony tending to sustain the allegation of the complaint that the cotton was placed upon the defendant's platform with its consent.

We reproduce the testimony touching this question. E. Millett, a witness for the plaintiffs, testified as follows: "Q. What is that platform used for, Mr. Millett? A. At that time it was to store cotton on principally. Q. Store cotton on principally? A. Yes, sir. Q. For what purpose? A. Until they got a bill of lading for it, or put it in a warehouse. Q. Was cotton generally put there for shipment? A. Yes, sir; but not absolutely. Q. Mr. Millett, you had just bought this cotton from wagons, as they came to town? A. Yes, sir. Q. And it was taken down there and weighed, and just left on the platform? A. It was. Q. You have not tendered it for shipment at all? A. No, sir. Q. Now, as to this notice, can you state whether or not for every bale of cotton you put there you got a notice? About when were these notices sent—once a week, or once a month, or how? A. Well, almost all the time, almost every time I sent one bale or more there, more or less. Q. Sir? A. Once in a while he wouldn't stamp them. He would overlook stamping them, but as a general thing it was on all the notices. Q. You accepted that notice as the terms upon which the cotton was accepted by the railroad company, did you not? A. I paid no attention to it at all. Q. Did you understand that it was not there with their consent? (Mr. McDonald: We object to that.) A. No, I didn't. (Mr. McDonald: Well, I will let that come out. I will withdraw my objection.)"

T. J. Cureton, a member of the firm of Millett & Co., testified as follows: "Q. About this time how was cotton put on that platform for what purposes? A. Well, it was put there for shipment, and also the convenience of the parties. Q. Who weighed the cotton? Q. Who was the weigher there? A. Mr. Creight. Q. Well, captain, will you state whether or not during the cotton season, I mean about this time, along in September, 1904, all the cotton that was bought here, that was not stored in a warehouse, was put there on that platform? A. I think it was, when they could get it on it. Sometime they couldn't get it on. Q. Why couldn't they get it on? A. Sometimes there would be more on the platform than it would hold, and they would have to put it on the ground contiguous. Q. Do you know who controls that platform there? A. I suppose the railroad—the railroad agent. Q. The railroad agent? A. Yes, sir. Q. How near does that platform come up to the depot? A. Comes right up. Q. It is joined to the depot? A. Yes, sir; joined to the depot,

and surrounds it. That is, the depot cuts it off rather. Q. Well, there is a platform on all sides, one next to the track, and one the side next to your house? A. Yes, sir. Q. Captain, what did you say about this at the last trial? A. I don't remember. Q. Didn't you say they were there at your risk? A. I considered it there at the risk of my insurance. I wouldn't have taken a policy otherwise. Q. You accepted this as showing that the railroad company didn't consent to that cotton being there, did you not? A. Yes, sir, not on those terms—at their risk. Q. And this cotton was never tendered for shipment? A. Not that I recollect of. Most of it had been bought that day. Q. Captain, were these notices sent every day or every week, or every month, or how? A. It was generally on every lot of cotton bought. Q. Captain, what did you do with these notices? A. I filed them on my file. Q. Did you pay any attention to them? A. I didn't pay any attention to them. Of course, I knew that that was the terms."

W. H. Flenniken, another witness in behalf of the plaintiffs, testified as follows: "Q. Mr. Flenniken, when cotton is bought here from wagons, what is done with it? A. It is hauled to the depot down there, weighed up by the public weigher, and the tickets are sent here for settlement. Q. Who is the public weigher there? A. Mr. Creight—W. D. Creight. Q. Where is the cotton left after it is weighed? A. On the platform, sir. Q. For what purpose? A. For shipping; that is as far as I know, of course."

The following instrument of writing was introduced in evidence, under the admission that, while it is not the notice given to Millett, it is similar:

No. —	Winnsboro, S. C., —, 190—
Bought by —	from —
Cotton as listed.	(—) Bales.
Weight.	This cotton is deposited on premises of the Southern Railway Company, and the same remain upon the premises of this Company without its consent and at your sole risk until tendered and accepted for shipment.

W. B. Creight, Agt.  
Weigher.

This testimony shows that the platform was used by the public generally as a place for storing cotton, preparatory to shipment, by consent of the defendant; that, as the railroad company had control of the platform, the cotton was in its possession as soon as it was deposited thereon; that, while the mutual benefits contemplated by the public and the railroad company may not have created the relation of temporary warehouseman on the part of the defendant, nevertheless it became a gratuitous bailee; that the conduct of the defendant was not only calculated to affect the rights of Millett & Co.,

but likewise of the public generally, who, in effect, were invited to place cotton on the platform.

Our construction of the writing containing the notice is that the defendant consented for the cotton to be deposited on its platform, but attached a condition to its consent.

The testimony shows that the exceptions raising this question cannot be sustained.

The next question for consideration is whether the condition is valid. Section 2135 of the Code of Laws is as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or property may be injured by fire communicated by its locomotive engine, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where the property shall have been placed on the right of way of such corporation unlawfully, or without its consent, and shall have an insurable interest in the property upon its route for which it may be held responsible, and may procure insurance thereon in its own behalf." This statute was construed in the case of *McCandless v. Railroad*, 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440, and declared to be constitutional, and in every state adopting a similar statute it has been construed with the same result. The Supreme Court of the United States has sustained the constitutionality of these statutes, and in the case of *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, ably and elaborately discusses the reason for this conclusion, which is that they are a legitimate exercise of the police power. See, also, *Atchison T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, and *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845. Statutes prohibiting certain acts on the ground that they are against public policy stand upon a different footing from others, inasmuch as contracts entered into between parties contrary to the provisions of such statutes are null and void. *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950. As this statute has been declared valid as a police measure, it necessarily follows that the public has an interest in its provisions, which cannot be abrogated by private agreement. It is this reason that prevents us from following the principle announced in the cases cited by the appellant's attorneys. In determining the question under consideration, we are not controlled by the decisions of the Supreme Court or the United States, as that court decided in the case of *Hartford Ins. Co. v. Railroad Co.*, 175 U. S. 91, 20 Sup. Ct. 83, 44 L. Ed. 84, that such questions arise under statutory local laws and the decisions of the state courts will be followed, by the courts of the United States, in the construction of these statutes.

These views practically dispose of all ques-

tions presented, except those mentioned in the third and fifth exceptions, which have not been argued by the appellant's attorneys, and we deem it only necessary to state that, upon examination, it has been found they cannot be sustained.

To recapitulate, it thus appears (1) that the testimony shows the cotton was placed on the platform by consent of the railroad company; (2) that the statute was enacted as a police regulation; and (3) that the contention of the appellant that a valid condition was attached to the notice cannot be sustained, for the reason that the condition limited the operation of the statute as a police regulation and was against public policy.

For these reasons, I dissent.

(77 S. C. 486)

# THOMPSON v. PIEDMONT MUT. INS. CO.

(Supreme Court of South Carolina. Aug. 5, 1907.)

## 1. INSURANCE — ADDITIONAL POLICIES — KNOWLEDGE OF AGENT.

In an action on an insurance policy, evidence held to show that the soliciting agent of the company had notice that the property was insured in two other companies at the time of the application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1716.]

## 2. SAME—MUTUAL INSURANCE—RIGHT TO SUE.

A mutual assessment insurance policy provided that no suit should be brought thereon until an assessment had been made, or until insured had taken such steps as were necessary to compel the assessment. After loss the company denied all liability. Held, that insured could sue on the policy before bringing an action to compel an assessment.

Appeal from Common Pleas Circuit Court of Chesterfield.

Action by John Thompson, as trustee for J. E. Williams, against the Piedmont Mutual Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carlisle & Carlisle, for appellant. R. T. Caston, Edward McIver, and Stevenson & Matheson, for appellee.

GARY, A. J. The following statement is set out in the record: "This is an action brought by the plaintiff as the trustee of the bankrupt estate of J. E. Williams against the Piedmont Mutual Insurance Company. The complaint is based upon a policy of insurance in the sum of two thousand (\$2,000.00) dollars, and alleges the compliance with all the terms and conditions of the policy and loss of twelve thousand (\$12,000.00) dollars on storeroom and goods in Chesterfield county. The complaint further alleges that J. E. Williams, the insured, was adjudged bankrupt by the United States court before this suit commenced. In the prayer for judgment, demand is made against the defendant for the sum of two thousand (\$2,000.00) dollars and costs." The answer admits the exe-

cution of policy sued on, and sets up several affirmative defenses, all of which were abandoned at the trial, except two, as follows: "First. In that after the issuance of the policy, without the knowledge or consent of this defendant, plaintiff took out additional insurance upon the property covered by this policy, in other companies, which said policies were in force at the time of the fire. Second. In that insured agreed in said policy that no suit or action against this company, for collection of any claim against it, should be sustainable in any court of law until assessment had been made against the policies then liable for their pro rata share due on each policy to pay said claim, and that he would assume the burden of proving affirmatively, as part of his case in chief, that said assessment had been made, and that all the other conditions and requirements of the policy had been complied with, or that he had taken such legal steps as may have been necessary to compel said assessment, if the company should refuse to pay the same; and the defendant had refused, and did refuse, to make an assessment to pay the claim of plaintiff's assignor, J. E. Williams, and that no steps were taken before this suit was brought to compel them to do so." The jury rendered a verdict in favor of the plaintiff for \$2,000. The defendant made a motion for a new trial, upon grounds which were overruled, and afterwards made the basis of its exceptions.

1. The first assignment of error is as follows: "Because the verdict was totally without evidence to sustain it, under the charge of his honor 'that a mere soliciting agent of the company, without the power to write or deliver a policy, would have no power to receive notice for the company, except as the same would relate to a policy of insurance which he was soliciting at that time; that is, notice of additional insurance,' and also because the said verdict was without facts and evidence to sustain it under the charge of his honor 'that a mere soliciting agent, who does nothing but go around and ask people to insure, and take their application, any incidental knowledge he may acquire would not amount to notice to insure company itself—the error being that all the testimony showed that agent mentioned was merely a soliciting agent, and did not obtain knowledge of additional insurance while soliciting or delivering the policy sued on, but that such information, if received at all, was received months afterward."

J. E. Williams, the party insured, testified in behalf of the plaintiff as follows: "Q. You didn't get this insurance policy from Mr. Clark? A. I think the same man. Q. Did not the policy come by mail? A. Of course. Q. Do you mean you got the paper from Mr. Clark? A. I took the insurance from Mr. Clark, and the policy came through the mail. Q. What other insurance was there on that property at the time of the fire? A. One in Philadelphia and one in New York.

Q. When Mr. Clark was there the last time, did you tell him about the other insurance you had? A. Yes. Q. What was Mr. Clark doing? A. He was talking up for the Piedmont. Q. Did he solicit insurance with you? A. Yes; he said he could let me have a little more insurance, that they did not hardly ever go further than \$2,000, but they could put a few hundred more. I told him I had \$6,000 in insurance, and he said he could give a few more hundred, a little amount, he didn't say the amount, in his company. Q. Did you take it or not? A. No; I told him I would see him later. Q. You paid assessments after Mr. Clark and you were talking that summer? A. Yes. Q. After the fire? A. No; I sent a check after the fire, and it was returned. Q. Was that the only one you paid after your last talk? A. No; I paid until the fire and after the fire. Q. When they sent the check back that you sent, was there a letter or anything with it? A. Yes; they said they had sent it through mistake. Q. What reason did they assign for sending it back? A. They said I was not due it; that they had sent it through mistake; that I was not due them any, as my store was burnt." When recalled for the defendant, he testified as follows: "Q. After you took out this additional insurance, is it not a fact that Mr. Clark came there representing the same company that you had insured in? (Defendant objects to witness proving agency of Clark by the declarations of Clark himself.) Q. Is it not a fact that he had the applications of this same company along? A. Yes. Q. And undertook to get you to take insurance in the same company that you had it in before? A. Yes. Q. That was after you took the other insurance? A. Yes. Q. You told him that fact? A. Yes. Q. He solicited insurance for this very company? A. He did. Q. Had you had any notice that he was not representing that company from the company itself? A. No. Q. You made your application through him? A. Yes. Q. And the company issued you a policy? A. Yes. Q. You dealt with him while he was there representing the company? A. Yes. Q. Without any notice that he was not representing the company? A. No." Opposite the signature of J. E. Williams to his application for insurance, in pursuance of which the policy herein was issued, are these words: "Witnessed and approved by J. B. Clark, agent."

From the foregoing it will be seen that there was testimony to the effect that J. B. Clark was the agent of the insurance company who solicited insurance from the plaintiff, and through whom he made his application, which was approved by Clark; also, that he not only then, but afterwards, exercised powers other than those of a mere soliciting agent, and apparently within the scope of his employment; and that he received notice from J. E. Williams, while soliciting additional insurance, and exercising the right to determine, in the first

instance, whether it was a desirable risk, that Williams had insured the property in two other companies. There was no testimony tending to prove that J. E. Williams had notice of any change of the relations existing between the insurance company and Clark. He therefore had the right to presume that they still continued. *Wilson v. Assurance Co.*, 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700. The information which Clark received had a direct connection with the transaction in which he was attempting to negotiate additional insurance, and notice of such facts was, therefore, imputable to the insurance company.

In the case of *Gibbes Machinery Co. v. Roper*, 77 S. C. 39, 43, 57 S. E. 667, 669, J. A. Pate, an agent of the plaintiff, while negotiating the sale of certain machinery, received notice of a deed from L. B. Roper to Pocahontas Roper, and of the mortgage of the land from Pocahontas Roper to C. S. McCall, but failed to communicate such notice to his principal. The question was whether the Gibbes Machinery Company was a creditor for value without notice as to the land conveyed by the deed. The court thus ruled upon this question: "Pate unquestionably had authority as agent to enter into the agreement for the sale of the machinery subject to the approval of his principal, and, in this instance, the sale of the machinery was ratified by the principal. The contract showed upon its face that a due regard for business methods made it the duty of the agent to take into consideration the financial responsibility of the purchaser, in the absence of a limitation upon the authority of the agent, of which the purchaser had notice. And it appears from the testimony that the agent, in discharging said duty, considered the fact that the land had been conveyed to Mrs. Roper, and by her mortgaged to C. S. McCall, in determining whether the credit of L. B. Roper was thereby affected. As the financial condition of L. B. Roper was an element necessarily entering into the sale of the machinery by the agent, in the first instance, unless the purchaser had been notified that the agent was not authorized to consider this question, the fact that Roper had conveyed the land and that it had been mortgaged was material, and had a direct bearing upon the contract. Under such circumstances notice communicated to the agent will be imputed to the principal. *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702; *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340; *American Co. v. Felder*, 44 S. C. 478, 22 S. E. 598; *Blackwell v. Mortgage Co.*, 65 S. C. 105, 43 S. E. 395. Therefore there was error in the ruling that the plaintiff was a purchaser for value without notice." This exception is overruled.

2. There are several other exceptions, but they simply present, in different form, the question whether "his honor erred in charging the jury that plaintiff did not have to

bring an action to compel assessment against the policies then liable for their pro rata share, before suit could be brought at law on the policies of insurance, when the company denied liability on the policies." The rule is thus stated in *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113, 119: "Two other questions were discussed before us, namely, whether, if it should be held that the contract contained an agreement to make an assessment, the plaintiff's remedy is at law, or whether she must first go into a court of equity to compel the defendants to make the assessment; and, if an action of law can be sustained, what is the rule of damages. As to the first, we think an action at law can be sustained. Neither circuitry nor multiplication of actions is favored by our practice. If there is a contract to make an assessment, a breach of which is alleged and damages demanded therefor, and a rule of damages can be provided, why should not an action at law be sustained? Both Niblack and Bacon, recent writers upon the subject of Mutual Benefit Societies, after examining a great number of cases, come to the conclusion, with which we fully agree, that the decided weight of authority is to the effect that an action at law will lie for damages for breach of a contract to make an assessment." See, also, *Bentz v. N. W. Aid Ass'n*, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784; *Jackson v. N. W. M. R. Ass'n*, 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786.

When the insurance company denies all liability and refuses to make the assessment, it has no just ground to complain if the party insured brings an action at law, and recovers the amount of damages to which he would have been entitled if the company had performed its part of the contract.

These exceptions are also overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 460)

LEE v. UNKEFER et al.

(Supreme Court of South Carolina. Aug. 2, 1907.)

#### 1. PARTIES—DEFECT.

Where a defect of parties plaintiff appears on the face of the complaint, the objection must be raised by demurrer, otherwise by answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 123, 125.]

#### 2. SAME—WAIVER.

Where a defect of parties plaintiff is not raised by demurrer or answer, it is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 167.]

#### 3. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—NEW CONSIDERATION.

A promise to pay the debt of another on forbearance to enforce a subsisting lien is not within the statute of frauds, where the release is a damage to the creditor or a benefit to the party making the promise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 50-58.]

#### 4. DISMISSAL AND NONSUIT—GROUNDS.

Admission of improper evidence is not ground for nonsuit.

#### 5. TRIAL—EVIDENCE—MOTION TO STRIKE.

Where no objection is made to evidence when offered, a motion to strike it out is properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

#### 6. NEW TRIAL—GROUNDS—VARIANCE.

A new trial should be granted on material variance between the proof and the pleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1300.]

Appeal from Common Pleas Circuit Court of Spartanburg.

Action by J. M. Lee against J. G. Unkefer and others. Judgment for plaintiff, and defendant Unkefer appeals. Reversed.

Simpson & Bomar, for appellant. Sanders & De Pass, for appellee.

GARY, A. J. This is an action to recover the balance alleged to be due on a promissory note.

The questions presented by the exceptions render necessary reference to the complaint, the allegations of which are substantially as follows: That the defendants were partners doing business, as plaintiff is informed and believes, under the firm name of McIlwain, Unkefer Company. That on or about the — day of —, 1900, the plaintiff herein, being then the owner of a note, dated the 19th of December, 1895, for \$7,500, due on or before the 1st of January, 1901, signed by James C. Johnston, and secured by a mortgage of real estate, and being also the owner of a note dated the 18th of November, 1896, due December 18, 1896, for \$3,964, signed by James C. Johnston, and secured by mortgage of real estate, commenced an action to foreclose said mortgages. That at the time of the commencement of said action the Central National Bank held a note of James C. Johnston, indorsed by this plaintiff, dated June 10, 1898, for \$6,129.23, with interest thereon at 8 per cent. per annum from the 4th of April, 1900, and to secure said note this plaintiff had assigned and delivered, as collateral security, the notes and mortgages to said bank. That the defendants, having formed a corporation, or being about to form one, with James C. Johnston, and being desirous of purchasing the land covering said mortgages, for the purpose of quarrying stone, in order to obtain a clear title to said land, contracted with this plaintiff that, if he would stop said suit and assign Samuel B. Goucher the said mortgages and notes, they would pay the amount due the Central National Bank by the said James C. Johnston, for which this plaintiff was security, and, in addition to that, would pay the plaintiff in cash the sum of \$2,000, and would pay the balance due on the note by James C. Johnston to the Central National Bank, for which this plaintiff was security, which note was to be assigned by the Central

National Bank to this plaintiff. Said payments to be made as follows: \$1,000 of said balance to be paid on the 1st of November, 1901, the balance to be paid on April 1, 1902, the interest in the meantime to be paid semiannually. That, in consideration of said agreement, this plaintiff did stop said suit for the foreclosure of said mortgages, and did assign the same to Samuel B. Goucher, which assignment this plaintiff alleges was for the benefit of all the defendants herein; it being understood, as plaintiff is informed and believes, that these defendants were to take stock in the corporation then recently formed, or about to be formed, to be known as Keystone Granite Company, in payment and satisfaction of said mortgages. That thereafter the defendant did pay to plaintiff the amount due Central National Bank, and the sum of \$2,000 in cash, and on the 10th November, 1901, the \$1,000 first installment on the balance of said note, as they had agreed to do. That defendants have failed to pay the balance due on said note, and there is now due by defendants to plaintiff the sum of \$3,459.56, interest thereon at the rate of 8 per cent. per annum from the 1st of November, 1901. The defendant, J. G. Unkefer denied the allegations of partnership, also the allegations as to the agreement between the plaintiff and the defendants, and interposed the plea that the said agreement was obnoxious to the statute of frauds. At the close of the plaintiff's testimony, the defendant Unkefer made a motion for a nonsuit, on the following grounds: "(1) That James C. Johnston was a partner also, and there was a failure to join him as a party plaintiff. (2) That the testimony merely showed a collateral agreement to pay the debt of another, and which was not to be performed within a year. (3) That the plaintiff's action was to recover the balance on a note originally given for \$6,129.23, and his own testimony showed that the defendant had promised to pay not the note sued on, but an entirely different note, executed at another time, and for the sum of \$7,500." The motion for nonsuit was refused. The jury rendered a verdict in favor of the plaintiff for \$4,410.72 against J. G. Unkefer (the only defendant who was served). The defendant appealed upon numerous exceptions which, however, may be considered under the following heads:

1. Was there error in refusing the motion for nonsuit on the ground that there was a failure to join James C. Johnston as a party plaintiff? The rule is well settled that if there is a failure to join a necessary party as a plaintiff, and the defect appears upon the face of the complaint, the proper remedy is by demurrer. If, however, the complaint does not disclose the infirmity, then the objection must be taken by answer; but in either case the party raising the objection must point out the defect, in order that the amendment may not cause delay.



If the objection to the nonjoinder of a party is not raised in this manner, it is waived. Pomeroy's Code Rem. §§ 206, 207; 15 Enc. of Pl. & Pr. 747-749.

2. Does the testimony merely show a collateral agreement to pay the debt of another? One of the considerations entering into the agreement was the discontinuance of the suit for foreclosure of the two mortgages, and the cancellation or control of them by the defendants. The case is ruled by the well-settled principle recognized in *Ellis v. Carroll*, 68 S. C. 376, 47 S. E. 679, 102 Am. ~~Est.~~ Rep. 679, that a promise to pay the debt of another, upon forbearance to enforce a subsisting lien, is not within the statute of frauds, when the release is a damage to the creditor, or a benefit to the party making the promise. The exceptions raising this question cannot be sustained.

3. Was the testimony of the plaintiff inadmissible, on the ground that it contradicted the written evidence of the agreement? In the first place, his honor, the presiding judge, was not requested to rule upon any specific objections to testimony supposed to contradict the written evidence of the agreement, and the general objection interposed by the defendants' attorneys was not sufficient to raise this question. The presiding judge, therefore, properly refused to consider this objection in ruling upon the motion for nonsuit, and, even if it was incompetent, it could not serve as the basis of a motion for nonsuit. *Ashe v. Railway*, 65 S. C. 134, 43 S. E. 398. The exceptions raising this question are overruled.

4. Was there a fatal variance between the allegations of the complaint and the testimony, as to the agreement between the plaintiff and the defendants? On the 8th of January, 1900, while the action was pending to foreclose the two mortgages, S. P. Goucher, for McIlwain, Unkefer Company, entered into a written agreement with the plaintiff, whereby Lee was to take no further action in the foreclosure proceedings until April 1, 1900, and in consideration thereof the defendants were to pay the interest on the \$7,500 note from that date, until the 1st of April, 1900, and also the interest on the \$6,129.23 note, and at the expiration of the time mentioned the defendants were to have the option of paying the \$6,129.23 note and of securing to Lee payment of the note for \$8,000 (meaning thereby the \$7,500 note), or of paying that note and of having it assigned to them or some one of them. The testimony shows that Unkefer about the 1st of April, 1900, came to Spartanburg and refused to abide by the said agreement, and that he and the plaintiff entered into another agreement, the terms of which are thus stated by the plaintiff: "Q. What was the trade? A. He was to pay off the bank note and release me of that, and then was to pay \$2,000 to me at that time, and at six months to pay another \$1,000, and at another six

months was to pay the remainder, with interest. Q. Which note was that? A. \$8,000 note. Q. How much did he pay the bank at that time? A. He paid it all up. Q. Paid the \$8,000 all off? A. \$6,000. Q. The \$6,000? A. Entirely off. Q. He paid that to the bank on that date? A. Yes, sir. Q. After he had paid it off, what did he do—what did the bank do? A. Gave it to me, I reckon. Q. What note are you suing on in this action? A. Suing on the note that was given first, as he promised to pay off. Q. What I want to know is which note is it you claim McIlwain, Unkefer Company owe you. Is it this \$6,129, or \$7,500, or the \$3,149 note? A. I reckon it is the \$7,500 note. Q. Don't you know? A. He paid off the bank. Q. Your suit, Mr. Lee, is brought on the \$6,129 note, and the allegation here in the complaint is that they owed you a balance on that note. Is that correct? A. They had two mortgages. Q. Which note is it you are suing on? Which note is it that Unkefer promised to pay? A. It was the \$8,000 note. He promised to pay me first, and then he would not do that. He wanted some changes, and, when I agreed, then he paid the bank off. Q. How much money did Mr. Unkefer pay the bank when he was here the latter part of March? A. He paid them \$6,000. Q. \$6,129? A. Yes, sir. Q. What became of the note for \$6,129? Have you ever had it from that day until this? A. No, sir. Q. And it was paid off that day at the bank, the Central National Bank? A. Yes, sir. Q. After that was paid he paid you in addition \$2,000 in cash? A. That was on that \$8,000. Q. He paid you that day \$2,000 in cash? A. Yes, sir. Q. Didn't he also pay you later a \$1,000? A. Yes, sir; in six months. Q. You say that \$8,000 is still due? A. Yes, sir. Q. Balance of the \$8,000 note? A. Whatever it is." It will thus be seen that the agreement alleged in the complaint and the testimony of the plaintiff to sustain those allegations vary in important particulars. It is stated in the complaint, and seems to be conceded by the plaintiff in his testimony, that the note for \$6,129.23 was paid in full to the Central National Bank by the defendants. If this be true, then a recovery in this action would, to that extent, compel the defendants to pay the note twice, even, too, after it had lost its legal effect. These complications would be avoided, if the plaintiff could recover upon an agreement that the defendants were to pay the balance due on the note for \$7,500. This court, of course, is not to be understood as expressing any opinion upon the facts, but wishes merely to show that there is a vital variance between the allegations and the testimony. The exceptions raising this question are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(128 Ga. 737)

**ROUNTREE et al. v. GAULDEN.**

(Supreme Court of Georgia. July 13, 1907.)

**1. DESCENT AND DISTRIBUTION—SURVIVING WIFE—ELECTION—DOWER—CHILD'S PART.**

When it appears that the widow, who was entitled either to dower or to a child's part in the real estate of her husband, dealt with an interest therein as if she were the absolute owner, such conduct will be sufficient to raise an inference that she had made an election to take a child's part in the time prescribed by law, and cast upon those seeking to show that she had not so elected the burden of showing that such an election had not taken place within such time. And this is true notwithstanding the widow may have made a mistake of law as to the interest she was entitled to, and claimed a one-sixth interest, when she was really entitled to a one-fifth interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 201.]

**2. EVIDENCE—DECLARATIONS AGAINST INTEREST.**

The admissions of a defendant in execution against his interest, before the pendency of litigation, are admissible in evidence in favor of either the claimant or the plaintiff in execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 824-833.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by S. S. Rountree and others against Mrs. Gauden. Judgment for plaintiff. On levy of execution, S. S. Gauden filed a claim. Judgment for claimant, and plaintiffs bring error. Reversed.

The executors of Rountree obtained a judgment against Mrs. Jones, and caused the execution issuing thereon to be levied upon an undivided one-sixth interest in a described parcel of land. Gauden interposed a claim. The case was submitted to the judge, without the intervention of a jury, who heard the same upon certain agreed facts and evidence, and rendered a judgment finding the property not subject. The plaintiffs in execution assign error upon this judgment, and also upon certain rulings upon the admissibility of testimony. It appeared from the evidence that Hardy E. Hunter, who died intestate in the year 1855, was at the time of his death the owner of the tract of land which was referred to in the levy; that he left surviving him a widow and five children; that his widow was appointed his administratrix, and in the year 1856 intermarried with Jones, who became the administrator; that Jones, as administrator, sold all of the lands of the intestate, except the land referred to in the levy, and paid three of the children their interests as distributees in the proceeds of the sale, the receipts for such amounts being dated at different times during the year 1869. The testator of the plaintiffs in execution obtained a judgment against Mrs. Jones, who was the widow of Hunter, in 1881. The execution issued upon this judgment has been kept in life by proper entries, and is the execution levied in the

present case. A witness testified that Mrs. Jones resided on the land described in the judgment when the same was obtained, and lived there during the lifetime of her husband, Jones, and since his death. A deed was introduced in evidence, dated December 31, 1900, in which three children of Hunter and Mrs. Jones were the grantors and Hardy M. Hunter, another child, was the grantee, which recited that the parties to the deed being the heirs at law of Hardy E. Hunter, and the parties of the first part having received their distributive shares of the estate, and the party of the second part not having been settled with, and only a small portion of the estate remaining, in consideration of these facts and the sum of \$10, the grantors quit-claimed to the grantee all of their interest in the lot of land described in the levy. A deed from the grantee in the deed above referred to to Gauden, the claimant, dated January 11, 1901, upon a consideration of \$2,000, conveying the lot described in the levy, was also introduced. J. E. Hunter, a son of the defendant in execution, was examined by interrogatories. One of the interrogatories was as follows: "How much land did your father own at his death? Did she ever claim a child's part in any of those lands? What became of those lands? How much remained unsold by the administrator of your father's estate?" The witness answered: "About 1,500 acres, and my mother never claimed a child's part in any of it. All of this was sold by the administrator, except the 205 acres now held by Dr. S. S. Gauden." This interrogatory and answer were objected to, on the ground that it was sought thereby to introduce secondary evidence as to the facts inquired about, and because the evidence was irrelevant and immaterial. In answer to the question as to why his mother and the children made a deed to H. M. Hunter, the witness said: "Because he had never received anything from the estate." This was objected to on the ground that the evidence was irrelevant. The witness, in answer to another interrogatory, stated that Wm. Jones had bought the land of the estate and badly managed it, and he heard his mother say that her husband had so squandered her first husband's estate that she did not feel that she was entitled to anything. This was also objected to, upon the ground that it was immaterial and irrelevant. The evidence in the answer to the interrogatory above referred to was also objected to upon the ground that the witness admitted, in the answer to the interrogatory, that he derived his information from having heard his mother talk and on account of his familiarity with the matters connected with the estate. The plaintiff in execution offered in evidence the answer of Mrs. Jones to an interrogatory propounded to her in another case, in which she said she had agreed to waive her right to dower and take a child's part in the estate of her first husband. Upon objection

by counsel for claimant this evidence was ruled out. It was shown that the records of Lowndes county, which contained the record of the administration of Hunter's estate, had been destroyed by fire in 1863. Plaintiff in execution tendered in evidence the marriage settlement between Wm. Jones, Martha Hunter, and James West, trustee, dated August 7, 1856, which recited that Martha Hunter was "entitled, as widow and heir" of the estate of Hardy Hunter, to a "one-sixth part of said estate," and, no division having been made among the heirs and distributees, she, in consideration of the intended marriage and of \$1 paid by said Jones, conveyed to West "her interest in the said estate of said Hardy Hunter, deceased, together with its increase, it being a one-sixth part of the property herein specified," but nevertheless upon certain trusts therein referred to. The land referred to in the levy was embraced in the property described in the marriage settlement. The trustee in the marriage settlement was to hold the property therein conveyed "upon the trusts and for the uses of the said Wm. Jones during the joint lives of the said Wm. Jones and Martha Hunter, his intended wife, and, after the death of either of them, then of the survivor during the term of his or her natural life, and, if either of them die having no issue living by the other, then to convey the said property to the survivor, forever, and, if the said Wm. Jones and Martha Hunter should both die having issue living of the said marriage, then in trust to convey said separate property to the said issue living at the time of the death of the survivor of them share and share alike." It appeared from the evidence that Wm. Jones was dead at the time of the levy. The court refused to admit the marriage settlement, and this ruling is assigned as error.

D. W. Rountree and W. H. Griffin, for plaintiffs in error. J. G. McCall and Stanley S. Bennet, for defendant in error.

COBB, P. J. (after stating the facts). 1. Upon the death of the husband, the wife is entitled to dower. She is permitted to take, however, in lieu of dower a child's share in the estate. If she elects to take her dower, she has no further interest in the realty. If she elects to take a child's share, she is entitled to the share which a child would take, unless the shares exceed five in number, in which event she is entitled to a one-fifth part of the estate. Civ. Code 1895, § 3355. Her election to take a child's part of the real estate in lieu of dower must be exercised within 12 months from the grant of letters testamentary or of administration on the husband's estate. Civ. Code 1895, § 4689; *La Grange Mills v. Kener*, 121 Ga. 429, 49 S. E. 300. There is no presumption of law that a widow will elect, or has elected, to take a child's part in the estate of her husband. *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350.

It must affirmatively appear that she elected to take a child's part within the time prescribed by law. This may appear by an election in writing, duly signed, filed and recorded in the office of the ordinary, but this is not the only method of proving the fact of such election. The fact of election may be shown by circumstances establishing the same, as well as by direct evidence. If the circumstances are such as to establish that an election has been made in time, it is as much affirmatively established as if there were direct evidence to that effect. The conduct of the widow in reference to the property of the estate of her husband may be looked to in determining whether an election has taken place. In *Sewell v. Smith*, 54 Ga. 567, it was held that where the widow remained in possession of land in which she was entitled to take either dower or a child's part until long after her right to dower was barred, without making any formal election, there would be a presumption that she had elected to take a child's part, and this is especially true where such a course was most beneficial to her interests. In *Sloan v. Whitaker*, 58 Ga. 319, it was held that where a widow, whose apparent interest was to take a child's part in lieu of dower, was assigned a child's share of her husband's realty as well as personalty, which was accepted and appropriated, there would be a presumption after her death, until the contrary appeared, that she had elected to take a child's share in lieu of dower, and this was true, though no steps for making the division were taken until after the time for making an election had expired. If the widow deals with an interest in the estate as her own, which she would not be entitled to except upon the theory that she had elected to take a child's share, the fact that she so dealt with it is a circumstance to be considered in determining whether she had so elected. We think that the marriage settlement, in which Mrs. Jones dealt with the property in question as if it were her own, and which could not be hers unless she had elected to take a child's share in the estate, was admissible on the question as to whether an election to take a child's share had been made by her. It is true that it does not appear that this marriage settlement was executed within 12 months from the date of the administration upon the former husband's estate, and that it does not appear that the other acts by the widow tending to show an election took place within 12 months; but the fact that she so dealt with it, even if it was after the expiration of such time, indicated that an election had taken place, and the evidence, taken as a whole, both that admitted and that rejected, which could be properly admitted, was of such a character as to at least establish *prima facie* that an election had taken place. It was sufficient to cast the burden upon the claimant to disprove an election. But, it is said, she dealt with a one-sixth in-

terest in the estate as her own, when, under the law, she was entitled to a one-fifth interest. That she made a mistake of law as to her interest does not alter the situation. She was entitled to no interest in the estate except dower or a child's share in fee. She made a mistake as to the quantum of her share in fee, but she was evidently dealing with the property as if she were the owner, and there is nothing in her conduct to indicate that there was any other intention on her part. If she was entitled to a one-fifth interest, and claimed, under a mistake of law, only a one-sixth, she would not lose that which she claimed simply because by the mistake she received less than the law allowed.

2. The admissions of the defendant in execution in a claim case, made after the pendency of the litigation, are not admissible in evidence, but admissions made before the pendency of the litigation are admissible. Civ. Code 1895, § 5189; *Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621; *Van Epps' Notes*; *Smith v. Cox*, 20 Ga. 240. The declaration of a defendant in execution, made at a time when it was against his interest to make it, has been held to be admissible in favor of the plaintiff in execution. *Foster v. Rutherford*, 20 Ga. 676. When a defendant in execution is in possession of the land at the time of the levy, any declaration made by him up to the time of the levy, and while in possession, is admissible in evidence in a claim case. *Rutledge v. Hudson*, 80 Ga. 267, 5 S. E. 93; *Smiley v. Padgett*, 123 Ga. 39, 50 S. E. 927. Any declaration made by Mrs. Jones while she was in possession of the property, which was prejudicial to her interest, would be admissible in evidence against those claiming under her. *Glanton v. Griggs*, 5 Ga. 434. Declarations by Mrs. Jones against her interest, made while she was in possession of the property and prior to the conveyance which passed whatever interest she had therein to her son, would be admissible against a claimant who derived title from her grantee. The declarations made by her, whether against her interest or in her own favor at the time when she was not the owner or in possession of the property, and subsequently to the pendency of the present litigation, would not be admissible. Civ. Code 1895, § 5180. It is said, though, that, even if it was erroneous to refuse to admit in evidence the marriage settlement, the judgment should not be reversed, for, if the marriage settlement had been admitted, it would have shown that Mrs. Jones had no leviable estate in the property, for the reason that the marriage settlement created an executory trust. We will not now pass upon the question as to the character of the estate that Mrs. Jones has in the property, for the reason that this question was not passed upon by the trial judge. The marriage settlement was offered in evidence for the purpose of showing that Mrs. Jones had dealt with what she thought

was a child's share in her husband's estate, and its admissibility for this purpose was the only question passed upon by the trial judge. Whether Mrs. Jones, since the death of her second husband, has an interest in the property which is subject to levy and sale, or whether the marriage settlement created merely an executory trust giving her an interest only in the rents, issues, and profits, we will not now undertake to determine, leaving these questions to be decided on another trial. The evidence was admissible for the purpose for which it was offered—that is, as a circumstance showing an election by the widow to take a child's share—and whether when admitted it will have the effect to entirely defeat the plaintiff in execution we will leave for determination after the evidence is before the court, and the question of the construction of the instrument has been passed upon by the trial judge.

Judgment reversed. All the Justices concur.

(128 Ga. 718)

#### STARNES v. ROBERTS.

(Supreme Court of Georgia. July 13, 1907.)

##### SALE—PASSING OF TITLE—TROVER.

"If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer. *Bergan v. Magnus*, 25 S. E. 570, 98 Ga. 514. Therefore in such a transaction trover will lie to recover the goods or their equivalent in money." *Wilson v. Comer*, 54 S. E. 355, 125 Ga. 500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 545.]

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by J. B. Roberts against U. L. Starnes. Judgment for plaintiff. Defendant brings error. Affirmed.

Roberts brought his action against Starnes to recover two marble monuments. The evidence showed, in brief, as follows: At one time the plaintiff, the defendant, and another were partners, and conducted business under the name of the Roberts Marble Company. Subsequently the plaintiff bought the interests of the other two, and conducted business in the same name. At a later date the defendant purchased from him the two monuments for which suit was brought. The written contract which was signed by the defendant stated that he had made the purchase from the Roberts Marble Company. It provided that the purchase price should be paid in cash; that the property should belong to the Roberts Marble Company until wholly paid for, and that it could be taken possession of by the vendor. The plaintiff testified: "I delivered it [the property] to him with that understanding, that he pay for it

in cash, as soon as he could drive there and set it up and come back, he would pay me for it. I delivered it to him with that understanding." When asked, "Isn't it true you agreed to deliver it to him for him to load on wagon and carry to Mrs. Stephens and deliver it?" he answered, "I supposed it was going there, from the contract. That was not the agreement between me and Starnes. I was not present when they were loaded on the wagon. We agreed to load the stuff for him." He was then asked, "And for him to take them over there to the original purchaser, Mrs. Stephens?" He answered, "There was no agreement about that." At another time he said: "I do not know it is true that at the time Mr. Starnes told me he would take the monuments and set them up and come back and pay me that he was taking them to set up for Mrs. Stephens in Milton county." The defendant took the monuments, but failed to pay for them or to return them on demand. He introduced no evidence. The presiding judge refused to grant a nonsuit or to direct a verdict for the defendant, but directed a verdict for the plaintiff.

N. A. Morris and Chas. H. Griffin, for plaintiff in error. G. I. Teasley and P. P. Du Pre, for defendant in error.

**LUMPKIN, J.** (after stating the facts). The principles set out in the headnote and the authorities there cited control the case. The evidence did not show such a relinquishment or waiver of the plaintiff's right as against the defendant as to prevent a recovery. Had it been sought to recover the property from the person who purchased it from the defendant, a very different case would have been presented; or, if the evidence had shown that the plaintiff agreed for the defendant to sell the property before payment, this might have raised the question whether such sale would have been a conversion. The testimony, however, does not go to that extent.

Some authorities go further than we feel called on to do in this case. Thus in *Dows v. Dennistoun*, 28 Barb. 393, the Supreme Court of New York declared that "an understanding, arrangement, or custom that the possession of the goods shall be intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide the means for the payment of the price, cannot be construed into an absolute transfer of the title to the property, as between the original parties to it, or persons having no greater equities than the original parties." See, also, on the general subject, *Harding v. Metz*, 1 Tenn. Ch. 610; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Fleeman v. McKean*, 25 Barb. 474; 24 Am. & Eng. Enc. Law (2d Ed.) 1065.

The plaintiff in error insists that he was not in possession, custody, or control of the

property when the suit was brought, and therefore there could be no recovery against him. This contention is unsound. If it were sustained, every defendant in a trover suit could defeat a recovery by showing that the conversion was complete before the action was brought. On the contrary, the conversion furnishes a basis for bringing the suit. Apparently the right of a person who has been incarcerated under bail process, and who is neither able to give security nor produce the property, upon showing to the presiding judge satisfactory reasons for the non-production to be discharged from custody, has been confused with the idea of defending against the recovery of a verdict in the main suit. Civ. Code 1895, § 4608, which regulates such a proceeding for discharge, expressly declares that it shall not in any way affect the right of the plaintiff upon the trial of the question of property involved in the suit. If the property has been placed beyond the reach of the plaintiff and defendant, and is in the hands of a third person from whom it cannot be recovered, this may perhaps affect the right to claim a verdict for the property itself, but would not destroy the right to recover a money verdict.

Judgment affirmed. All the Justices concur.

(123 Ga. 778)

## DE LONEY v. HULL.

(Supreme Court of Georgia. Aug. 8, 1907.)

### EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AMONG LEGATEES—DUTIES.

Where an executor holds certificates of stock or certificates of indebtedness issued by a railroad company, which, by the terms of the will, are bequeathed to a person, to go over to another in the event he dies "without leaving a family," and where, in a suit in chancery for an accounting and other relief, it is decreed that the executor "shall at once turn over and deliver" to the legatee the property bequeathed to him to be held by him under the will, the executor has the right, before surrendering the certificate, to indorse thereon memoranda to the effect that the certificates are held by the legatee under the terms of the will.

(Syllabus by the Court.)

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by Thomas C. De Loney against Rosa Hull. Judgment for defendant, and plaintiff brings error. Affirmed.

Strickland & Green, for plaintiff in error. Jos. L. Hull, for defendant in error.

**PER CURIAM.** Mrs. Rosa E. De Loney left a will bequeathing real and personal property to her two children, Thomas C. De Loney and Mrs. Rosa Hull, the wife of Jno. H. Hull. With respect to the bequest to Thomas C. De Loney, the will provided that "all of the property as specified given to my son Thomas C. De Loney (must be invested from time to time as circumstances may require), but can not be spent or invested in any business, except the

Income arising therefrom; but must be used as a support of himself. In the event of his death leaving no family, then this entire share to belong to his sister, Mrs. John H. Hull, and at her death to her children subject to the same directions as the shares belonging to her." The will further provided: "I direct my son Thomas C. De Loney's certificates of stock or bonds, deeds, and all other business papers to be kept in bank safe. I appoint my daughter Rosa, the wife of John H. Hull, executrix of this my last will." After the executrix had qualified and before completely administering the estate, Thomas C. De Loney brought suit in Clarke superior court against her for his part of the property, alleging that she refused to deliver it to him on the ground that she was trustee for him, and as such had the right to hold the property. That suit resulted in a decree, which, so far as pertinent to the question made in the present case, provided "that, under the terms of the will of Mrs. Rosa E. De Loney, a trust was created for Thomas C. De Loney as for the share of said estate left him in said will; that said Thomas C. De Loney is a male of full age and was at the time the will took effect; that since that time the health of said Thomas C. De Loney has improved to such an extent as to vacate said trust under the laws of this state, and said trust is hereby vacated and set aside, and said Mrs. Rosa Hull, executrix, shall at once turn over and deliver to said Thomas C. De Loney the property bequeathed and devised to him in said will, to be held by said Thomas C. De Loney under the will, and in the event of his death, leaving no family, as provided in said will, then his entire share is to belong to Rosa Hull for life, and, at her death, to her children." After the rendition of that decree, the executrix proceeded to deliver to Thomas C. De Loney a certain certificate of indebtedness of the Atlanta & West Point Railroad Company, and likewise certain certificates of stock in the Atlanta & West Point Railroad Company and in the Georgia Railroad & Banking Company, respectively, but upon which she indorsed the following: (a) Upon the certificate of indebtedness, the words: "To be held by him under the terms contained in the last will of Mrs. Rosa E. De Loney, of record in Clarke county, Georgia." (b) Upon each of the two certificates of stock, the words: "Under the will of Mrs. Rosa E. De Loney." In addition to these certificates, there were other certificates to which the said Thomas C. De Loney was entitled. The indorsements by the executrix were unsatisfactory, and Thomas C. De Loney instituted suit, complaining that the indorsements created such limitations as rendered it impossible for him to dispose of the property or handle it in any way whatever, thereby rendering the property worthless to him. The petition contained the following, among other prayers: "That the said Rosa Hull, as executrix of Rosa E. De Loney, be decreed

to carry out the spirit and terms of the decree hereinbefore mentioned, and to that end should be required to have transferred to petitioner his 18 shares in the Georgia Railroad & Banking Company, his five shares in the Atlanta & West Point Railroad Company, and his debenture for \$500 in the Atlanta & West Point Railroad Company, without any terms or limitations in the certificates," and that petitioner "have the right to sell any of said script or property when he thinks advisable and make a good title to the purchaser." The defendant answered at length; but it is not necessary to state any more of the defendant's contentions than that she insisted that inasmuch as she and her children had a contingent remainder interest in the certificates under the will of Mrs. Rosa E. De Loney, and under the former decree of the court, to which reference has been made, it was her right to indorse the certificates in the manner indicated. The case was submitted to the presiding judge, who was authorized by consent to pass upon all questions of law and fact, trying the case upon the pleadings, which were to be taken as true and without the introduction of further evidence. Upon consideration, the judge entered judgment, refusing to grant the relief prayed. Exception was taken to this ruling, and the only question argued by counsel for the plaintiff in error is whether or not, under the facts stated, the executrix had the right to refuse to deliver the certificates of stock without indorsement of the character hereinbefore indicated. We will deal only with that question.

The decree did not undertake to diminish or increase the quantity of interest which Thomas C. De Loney had in the certificates in question. It simply recognized the existence of his interest in the property under the will, and directed that the executrix should at once turn over and deliver to said Thomas C. De Loney "the property bequeathed and devised to him in said will." There was no direction that she should not, in the course of delivery, enter upon the certificates such memoranda as might tend to perpetuate notice of the existence of the limitations in the will. The character of the corpus of the estate was such that it could be wasted by the first taker, and lost entirely to those who might take upon the happening of the condition upon which the first taker held. The entry made on the certificate could only tend to prevent such condition of affairs by certifying to future purchasers the truth as it appears of record. Certainly that could be no wrong to any one. The legatee ought not to deal with the certificates as if there were no conditions attached to his estate therein. For the reasons suggested, the court no doubt intended that he should not deal with them in an unrestricted manner. The decree specifically enjoins that the property is "to be held by said Thomas C. De Loney under the will." It further provides that, "in the event

of his death, leaving no family, as provided in said will, then his entire share is to belong to said Rosa Hull for life and at her death to her children." In *Kollock v. Webb*, 113 Ga. 762, 39 S. E. 339, Mr. Justice Cobb, speaking for the court, on pages 763, 689 of 113 Ga., on pages 342, 343 of 39 S. E., said: "While in our opinion the deed properly construed gives the living children of Mrs. La Pierre a vested remainder subject to be divested upon her death without issue, still, for the purposes of the present case, we think it is immaterial whether the remainder created by the deed for the benefit of the children of Mrs. La Pierre was vested or contingent. A life tenant is entitled to the corpus of the property for his own use, but this possession is subject to the right of the remaindermen to have the property in a state of security to be forthcoming to them upon the termination of the life estate." Numerous authorities are cited for the support of the proposition therein stated. See *Luquire v. Lee*, 121 Ga. 628, 629, 49 S. E. 834. A fair construction of the decree now under consideration at least authorizes the indorsements upon the certificates of which complaint is made.

Judgment affirmed. All the Justices concur.

(128 Ga. 730)

#### ENGLISH v. MARSHALL et al.

(Supreme Court of Georgia. July 13, 1907.)

##### 1. ADVERSE POSSESSION—COLOR OF TITLE.

In 1880 Ogburn executed to Marshall a deed to secure the payment of a debt. Subsequently Ogburn died without having paid the debt. In 1887 the administrator of Ogburn, deceased, without obtaining an order of court, agreed with Marshall that the latter should cancel the evidence of the debt, and be thereafter vested with absolute title to the property. Accordingly Marshall surrendered the notes against Ogburn, deceased, to the administrator, and went into possession of the land, holding the deed thereto which had been executed to him by Ogburn to secure said debt. Held, that Marshall's possession was under color of title, and that after seven years' possession his title to the land became absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 560, 562.]

##### 2. ERROR, WRIT OF—ASSIGNMENTS OF ERROR.

This court cannot consider an assignment of error based upon a refusal to allow a witness to answer certain questions, when it does not appear what the answers would have been. *Manry v. Waxelbaum*, 33 S. E. 701, 108 Ga. 14.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2905.]

##### 3. SAME—EVIDENCE—REVIEW.

The court did not err in directing a verdict for the claimant.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Proceedings by E. G. English, administrator, for the sale of certain real property. T. J. Marshall filed claim, and pending the trial died, and his executors, T. P. Marshall and

C. D. Marshall, were made parties, and; from an order denying a new trial, plaintiff brings error. Affirmed.

On the 29th day of April, 1880, J. L. Ogburn executed and delivered to T. J. Marshall a deed to a certain lot of land in Macon county, Ga., the land in controversy. While this deed was in form an unconditional warranty deed, it is conceded by both sides that it was intended as a deed to secure the payment of a debt, Marshall executing to Ogburn his bond for titles to reconvey the property upon the payment of the debt. Ogburn remained in possession of the premises until his death, which occurred some time during the year 1885. According to the testimony of the plaintiff in error, Ogburn's father remained in possession of the land for two years longer, till 1887. During the latter year, one Glover, administrator of Ogburn, deceased, entered into an agreement with Marshall, the grantee in the security deed, whereby said administrator agreed to surrender the bond for titles to said land, and Marshall agreed to take the land in settlement of the debt which the deed had been given to secure. Accordingly the notes held by Marshall against Ogburn, deceased, were turned over to the administrator, marked, "Settled by purchase of lot of land No. 100 in the 13th district of Macon County, Georgia" (the land in controversy), and thereupon Marshall went into possession of the land. This sale was made without order of court, and no writing was signed except that noted above. Subsequently, in September, 1904, English qualified as administrator de bonis non of said Ogburn, and proceeded, after obtaining an order from the court of ordinary dated December term, 1904, to advertise for sale the land above described as the property of said Ogburn, deceased. Before the land was sold, on December 3, 1904, T. J. Marshall filed a claim to the property. Pending the trial of this claim said Marshall died, and his executors, T. P. Marshall and C. P. Marshall, were made parties and the case proceeded to trial before a jury. At the conclusion of the evidence for both sides, the court directed a verdict for the claimant. The plaintiff moved for a new trial, which motion was overruled, and he excepted.

E. A. Hawkins, Hooper & Dykes, and W. W. Dykes, for plaintiff in error. Greer & Felton, for defendant in error.

BECK, J. (after stating the facts). Marshall, the claimant in the court below, defendant in error here, contended that he had been in possession of the land in controversy since 1887 under color of title, and that his title, therefore, became absolute after seven years' possession. The plaintiff in error denied that Marshall had any color of title upon which to base a prescription, and the issue thus made constitutes the principal question to be decided by this court. Marshall

was the grantee in a deed given to secure the payment of a debt. Ogburn, the grantor, died without having paid the debt secured by the deed. Glover, the administrator of Ogburn, agreed with Marshall that the latter should cancel the evidence of the debt, and be thereafter vested with absolute title to the property. Accordingly Marshall canceled the debt, and went into possession of the land, holding the deed which had been executed to him by Ogburn to secure the debt thus canceled. It is conceded by the claimant, Marshall, that Glover had no authority to make this agreement, and that the deed held by said claimant was color and not title. The plaintiff in error, administrator de bonis non of said Ogburn, contended, on the other hand, that "claimant's possession was not under or by virtue of any color of title, but possession was obtained by virtue of a verbal agreement between the administrator of Ogburn's estate, and claimant, and under this verbal sale or agreement possession was had." It has been held by this court that where the parties to a security deed agree that the grantee shall take the land in satisfaction of the debt, and in pursuance of this agreement the grantee cancels the debt and goes into possession of the property, the deed to him ceases to be a security, and becomes an absolute, indefeasible conveyance. *Irwin v. McKnight*, 76 Ga. 669; *Bullard v. Jones*, 68 Ga. 472. And this is true although the grantor and grantee agreed in parol that the latter should cancel the debt, and be thereafter vested with absolute title to the property. *Carter v. Griffin*, 114 Ga. 321, 40 S. E. 290. Clearly, therefore, when the grantor and grantee make and execute such an agreement, the grantee holds possession of the land, not by virtue of a verbal agreement with the grantor, but by virtue of the deed, which has ceased to be a security, and has become an absolute conveyance. And we can see no good reason for holding in this case that Marshall was in possession of the land merely "by virtue of a verbal agreement between him and the administrator of Ogburn's estate," and not claiming it under the deed, which they had sought to convert into an absolute conveyance. The only thing lacking, necessary to make the deed to Marshall a perfect title, was the authority of the administrator to make the agreement whereby Marshall was given the land in settlement of the debt secured by the deed. If the administrator had been authorized to make this agreement, the deed from Ogburn to Marshall, as soon as the latter canceled the debt and took possession of the property, would have become absolute. And it has been repeatedly held that the lack of authority in a person to make a conveyance, although it may render the paper wholly valueless as title, does not destroy its efficacy as color of title. In the case of *Street v. Collier*, 118 Ga. 470, 45 S. E. 294, it was said: "To hold that

the paper is not color of title, because the persons executing it had not the full authority of law which, if they had, would make it not color but title, would destroy the distinction between color and title." And see cases there cited in support of this view, and the rule announced as to what constitutes color of title. The evidence not only fails to show that Marshall committed or intended any fraud in making the agreement above referred to, but it does show that he paid a fair value for the land, and other circumstances indicating very clearly that both he and the administrator, Glover, acted in perfect good faith during the entire transaction.

The plaintiff in error cites in his brief the case of *Ladd v. Jackson*, 43 Ga. 288, the single headnote of which is as follows: "Where the title to land of a deceased intestate vests in his minor heirs at the time of his death, the statute of limitations or prescription ceases to run against them during their minority." But there is nothing in the record in this case to which this law could apply. There is no evidence that the deceased had any minor heirs at the time of his death, and nothing appears which would prevent the prescription in favor of Marshall from running from the time he went into possession of the land, to wit, 1887.

The only other assignment of error is covered by the second headnote. The evidence demanded the verdict, and the court committed no error in directing it accordingly.

Judgment affirmed. All the Justices concur.

(128 Ga. 785)

#### CENTRAL OF GEORGIA RY. CO. v. BANKS & FORTSON.

(Supreme Court of Georgia. Aug. 8, 1907.)

##### 1. PLEADING—DUPLICITY IN PETITION—ELECTION—CURE BY VERDICT.

A petition contains allegations which are appropriate to an action seeking to enforce a liability against a railway company as a carrier of freight under the statute, as well as allegations appropriate to an action seeking to enforce against the company a common-law liability, and which are sufficient to set forth a complete cause of action under either the statute or the common law, is bad for duplicity, and, upon special demurrer attacking the petition upon that ground, the plaintiff would be put to his election. But, where no special demurrer is filed to such petition, and on the trial of the case, upon the issues made by the petition and answer thereto, a verdict is rendered for the plaintiff, it will not be set aside as being without evidence to support it, if either cause of action as set forth is supported by any evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 134-137, 1457.]

##### 2. CARRIERS—INJURY TO STOCK—SHIPMENT.

In the present case there was no evidence to authorize the jury to find a verdict against the defendant upon either a statutory or common-law liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

(Syllabus by the Court.)



Error from Superior Court, Muscogee County; R. W. Freeman, Judge.

Action by Banks & Fortson against the Central of Georgia Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed.

The plaintiffs, Banks & Fortson, delivered to the Louisville & Nashville Railroad Company a car load of mules, to be shipped from Horse Cove, Ky., to Columbus, Ga., via Birmingham, Ala. The contract of shipment was signed at Horse Cove, Ky., by Lazarus & Altscheler, from whom the plaintiffs purchased the stock. Fortson, a member of the plaintiffs' firm, who was in charge of the mules, arrived in Birmingham in advance of the mules, and immediately called upon the agent of the Central of Georgia Railroad Company, at that place to secure a pass from Birmingham to Columbus; but, because it did not appear from the contract, which had been made with the Louisville & Nashville Company, that the car of mules was routed over the Central of Georgia's road, the latter company refused to issue the pass. Whereupon Fortson signed for his firm an independent contract with the Central of Georgia Railway Company to ship the mules from Birmingham to Columbus over that company's road. This contract recites that in consideration of said company agreeing to transport the car load of mules at the reduced rate of \$56, and a free pass to the owner or his agent on the train with his stock, the owner or shipper assumes certain risks specified in the contract, and releases the carrier from all liability for injury, loss, or damage "which shall not affirmatively appear to have been caused by the negligence of said railway company." The Central of Georgia Railway Company then issued to Fortson a pass over its road from Birmingham to Columbus, and the mules were received by said company, and shipped to Columbus under the contract last referred to. When said car arrived in Columbus, it was found that some of the mules were badly injured and damaged. The plaintiffs brought suit against the Central of Georgia Railway Company, as the last of two connecting carriers, to recover the value of the mules damaged, and also alleged in another count that "the injury and damage to said mules aforesaid was due to the negligence of the defendant, its servants, and agents in the transportation of said mules by it." The defendant denied that "It received the alleged stock from the Louisville & Nashville Railroad Company as a connecting carrier for transportation to Columbus, \* \* \* but, on the contrary, this defendant says that it received said stock from Banks & Fortson \* \* \* on and under a written contract of affreightment signed and entered into by the said Banks & Fortson and by this defendant at Birmingham, Ala." It further answered that, if said stock were injured as alleged, "such injuries were not

occasioned by any negligence upon the part of this defendant, its agents, or servants in handling or in transporting said stock from Birmingham, Ala., to Columbus, Ga., but such injuries, if any they had, were attributable to the inherent nature of the stock, \* \* \* and from the excepted clauses set forth in the contract, for which this defendant is not liable." Upon the trial both sides introduced testimony in support of their contentions, but there was no evidence tending to charge the defendant with any negligence in handling or transporting the mules from Birmingham to Columbus, while the defendant submitted testimony showing that it had been guilty of no such negligence. The jury returned a verdict in favor of the plaintiffs; and the defendant assigns error upon the judgment overruling its motion for a new trial.

Charlton E. Battle, for plaintiff in error.  
Hatcher & Carson, for defendant in error.

BECK, J. (after stating the facts). There are allegations in the petition appropriate to an action seeking to enforce against the defendant a liability under the statute on account of its being the last of a connecting line of carriers, and other allegations appropriate to an action seeking to enforce a common-law liability upon the defendant; and, as against a general demurrer, the allegations sufficiently set forth a good cause of action, either under the common law or under the statute. Such a petition, upon special demurrer pointing out the defects, would have been held to be bad for duplicity. But, there having been no special demurrer to the petition and the parties having gone to trial upon the petition as it stood and the answer thereto, and having introduced evidence relative to the issues raised, we have to determine whether or not there was evidence to support the verdict in favor of the plaintiffs under both of the causes of action as stated in the petition.

The property alleged to have been injured and damaged in transportation was delivered to the initial carrier at Horse Cove, Ky., under a contract of shipment made with the Louisville & Nashville Railroad Company, to be transported from there to Columbus, Ga. Before the property being transported (a car of mules) reached Birmingham, Ala., over the line of railway of the initial carrier, Fortson, a member of plaintiffs' firm, who it appears was in charge of the stock, and who had preceded, upon a passenger train, the freight train to which was attached the car of mules, upon his arrival at Birmingham went to the office of the defendant company in that city to get a pass from Birmingham to Columbus, which it seems it was customary for this railway company to issue to shippers of stock who were in charge of the same. The agent of the defendant company to whom he applied for the pass refused at first to issue it, because the car of freight was not

routed over the defendant's line of railroad. Then, instead of standing upon the original contract of shipment from Horse Cove, Ky., to Columbus, Ga., and having the final carrier to receive the freight from the preceding carrier as in good order, if as a matter of fact they were in good order, Fortson, in order to procure a pass, entered into a new contract of shipment with defendant company, or, as stated in his own words: "I entered into this contract for the shipment on account of this not having been marked in care of the Central of Georgia Railway at Birmingham. I did enter into this contract [exhibit 9] at Birmingham in order to get a pass from Birmingham to Columbus. The defendant charged me local rates of \$56 on the shipment of mules in question from Birmingham to Columbus. \* \* \* In addition to that, defendant issued me free transportation from Birmingham to Columbus." Not only is there an entire absence of direct proof, or proof to show a state of facts from which the presumption would have arisen, that the freight in question was received in good order from the initial carrier, but from the evidence introduced by the plaintiff it is shown that upon an independent contract of shipment, entered into between the plaintiff and the defendant, the car load of stock was turned over to the defendant by the shipper, to be transported under the contract last referred to. There is nothing to support the cause of action seeking to enforce liability against the defendant under the statute; and it remains to determine whether or not there is evidence to support a verdict against the defendant company under its common-law liability. After a careful reading of the record, it appears that this evidence was wanting. Injury to a number of the mules shipped was shown, but every presumption of negligence upon the part of the defendant railway company was overcome by uncontroverted testimony.

In view of the conclusions that we have reached, it is unnecessary for us to pass upon the questions raised by the assignments of error upon the court's refusal to give in charge the written requests submitted by counsel for the plaintiff in error. And the exceptions to the court's rulings upon the admission of evidence seem to have been abandoned.

Judgment reversed. All the Justices concur.

(128 Ga. 801)

#### JENKINS v. JONES et al.

(Supreme Court of Georgia. Aug. 8, 1907.)

#### TRIAL—NONSUIT—PRIMA FACIE CASE.

The evidence made out a prima facie case, and the grant of a nonsuit was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, § 388.]

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by J. C. Jenkins against P. R. Jones and others. Judgment for defendants, and plaintiff brings error. Reversed.

R. J. Bacon, Jr., for plaintiff in error. L. A. Bush & Son, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

(128 Ga. 733)

#### HODGES v. STUART LUMBER CO.

(Supreme Court of Georgia. July 13, 1907.)

#### EXECUTORS AND ADMINISTRATORS—ACTIONS—PRESUMPTIONS.

After the lapse of 20 years from the date of the qualification of the legal representative of an estate, as a general rule it is legitimate to presume that the estate has been fully administered and a distribution had according to law in cases of intestacy, and according to the will where the decedent died testate, and the terms of the will do not negative the inference. This presumption is not conclusive, but the burden in such cases is upon the legal representative seeking to assert a right or title of the estate to show such facts as are sufficient to remove the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1861.]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; A. G. Powell, Judge.

Action by C. S. Hodges, administrator, against the Stuart Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hodges, as administrator de bonis non with the will annexed of Alley Hugueley, brought an action against the Stuart Lumber Company, alleging that a described lot of land was the property of the estate which he represented, and that the defendant entered upon the land and felled and carried away all of the timber thereon; such timber being of the value of \$1,200. The petition prayed for a judgment for the amount above referred to, and for process. The defendant filed an answer, denying all of the material allegations imposing a liability upon it. It also specially pleaded that the title to the lot at the time of the alleged trespass was not in the plaintiff, but in the devisees under the will of Alley Hugueley, and that the executor had assented to the devise. It is further pleaded that they hold the lot under a warranty deed from Walman, and that they took possession in good faith under such deed. The plea then attacked the judgment of the ordinary of Wilkes county, appointing the plaintiff as administrator de bonis non, etc. The trial resulted in a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was granted, and the plaintiff excepted. It appears from the brief of evidence that the parties have agreed that the verdict, so far as the amount is concerned, was demanded by the evidence; and it also appears, from the order of the judge overruling the motion, that he was entirely

satisfied with the verdict as to the amount, but based his grant of a new trial solely upon the point that the plaintiff was not entitled to recover at all. The lot in question is not referred to in the will of Alley Hugueley; and, if it passed at all under the will, it was under the residuary clause, which is in the following language: "I will and bequeath that all the rest and residue of my estate, both real and personal, be sold by my executor as soon as may be convenient and suitable after my death, and that the net proceeds thereof be divided into nine equal shares." The persons to take the shares are the four sons, the three daughters, a granddaughter, and the children of a daughter. The will was executed in 1840. Alley Hugueley died in 1841 or 1842. The record does not disclose when the will was admitted to record.

B. B. Bower and Albert H. Russell, for plaintiff in error. Donalson & Donalson, for defendant in error.

COBB, P. J. (after stating the facts). So far as the attack upon the judgment of the ordinary appointing the administrator is concerned, the case is controlled by the ruling in *Sharpe v. Hodges*, 121 Ga. 798, 49 S. E. 775, which involved the very judgment now in question.

The case turns upon the question whether the administrator with the will annexed is vested with the right to recover the possession of the land. If not, he cannot bring an action of trespass. The administrator with the will annexed has all the power of the executor, except such as arises from personal trust and confidence. Civ. Code 1895, § 3309. When an executor assents to a devise or a legacy, all interest of the estate in the property passes out of him. The assent is generally irrevocable; and this is true, although the remainder of the assets are insufficient to pay the debts. *Watkins v. Gilmore*, 121 Ga. 488, 49 S. E. 598. After the lapse of 20 years, there is a presumption that the executor has assented to a legacy. *Flemister v. Flemister*, 83 Ga. 79, 9 S. E. 724; *Phillips v. Smith*, 119 Ga. 556, 46 S. E. 640. After the lapse of 30 years, it is legitimate to presume that all the debts of the estate have been paid. *Coleman v. Lane*, 26 Ga. 515. Should there not be also, after such lapse of time, a presumption that there has been a distribution, either in kind or in money, if the will requires a sale and a division of the proceeds? The law contemplates that there shall be a final settlement of an estate within 12 months after administration is granted. Civ. Code 1895, § 3439. While there may be no presumption that there has been a final settlement within the 12 months, ought it not to be legitimate to presume, after a lapse of 20 years, that there has been? Presumptions of payment and final settlement have been held to arise from the lapse of time and

defeat legatees in suits to recover legacies. 1 *Woerner's Law of Adm.* (2d Ed.) §§ 538-568; 18 Cyc. 607. Where one is in possession of property once belonging to an estate, and the legal representative seeks to recover the same after the lapse of more than 20 years, ought a prima facie case for recovery to arise merely by proof of title in the deceased and administration granted? Ought there not to be in such a case, in the interest of repose and the quieting of possession, at least an inference of fact that the possessor acquired title either directly or indirectly from those who took under the will? Any other rule would put in jeopardy the title to every foot of land in the state, where the owner is not able to show a perfect paper title or possession for the period required to work a title by prescription. Administration could be obtained on the estate of the original grantee in any given case, and the legal representative thus require an occupant to defend his title, although those under whom he claims might have had a perfect chain of title, but, on account of loss of the original deeds and failure to record the same, destruction of the records, or similar reasons, the chain could not be produced, and on account of the death of witnesses secondary evidence could not be available. Certainly it must be the law that as against a second administration, granted more than 20 years after the death of the decedent and the time for final settlement under the first administration, it is legitimate to presume, in behalf of a possessor, that there has been a final settlement, and that the right of the legal representative to recover had passed out of him, either by assent to legacies or sales in conformity to the provisions of the will, or in some other way known to the law, and cast upon the legal representative, whose appointment was so long delayed, the burden of showing that there has been no final settlement by his predecessor. See, in this connection, *Bullock v. Dunbar*, 114 Ga. 754, 40 S. E. 783; *Woolfolk v. Beatly*, 18 Ga. 520; *Daniel v. Sapp*, 20 Ga. 514. To quiet title such a presumption is absolutely necessary. The law requires an executor to qualify within one year after the will is admitted to record, and also requires that the will be proved as soon as practicable after the death of the testator. Civ. Code 1895, § 3294. When it appears that a will has been admitted to record, but the date when so admitted does not appear, it is legitimate to presume that it was proved within a reasonable time after the death of the testator. A jury would certainly be authorized to raise such an inference, even though there may be no presumption of law. When the case is considered as a whole, we cannot say that the verdict was absolutely demanded by the evidence, and, this being the first grant of a new trial, the judgment will be affirmed.

Judgment affirmed. All the Justices concur.

(128 Ga. 722)

**SPENCE v. MORROW et al.**

(Supreme Court of Georgia. July 13, 1907.)

**1. WRIT OF ERROR—ASSIGNMENT OF ERRORS—SUFFICIENCY—INSTRUCTIONS.**

An assignment of error that the court "omitted any instruction as to the legal nature of fraud, and its indicia and circumstances," is too general to apprise the reviewing court of the nature and character of the particular legal principle which the exceptor complains was omitted from the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3013.]

**2. SAME—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

An exception to an excerpt from the charge because of incompleteness of statement of a particular legal proposition is not good when the incompleteness is supplied in appropriate context by the general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

**3. SAME—RULINGS AS TO EVIDENCE.**

A ground of a motion for a new trial, which assigns error upon the exclusion of certain gin books, without disclosing so much of the contents of the books as to enable the reviewing court to determine the relevancy and competency of the rejected evidence, cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2905.]

**4. FRAUDULENT CONVEYANCES—KNOWLEDGE AND INTENT OF GRANTEE—FACTS PUTTING ON INQUIRY.**

Where the issue in a claim case is the bona fides of a sale by an insolvent debtor, it is not error, of which the execution creditor can complain, to charge: "On the other hand, if you should conclude from the evidence in this case that this was not a voluntary conveyance, but was a conveyance for a valuable consideration, a money consideration, and you should further conclude from the evidence in this case that this sale was not made for the purpose of defrauding, delaying, or hindering the creditors of the grantor, or if you should conclude that it was made with that intention, but that intention was not known at the time the deed was taken to the grantees (the claimants in this case), and could not have been known by the exercise of ordinary and reasonable care and diligence, you should find in favor of the claimants."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 500, 501.]

**5. WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.**

The other assignments of error are without merit. The evidence was conflicting, and the court fairly submitted the issues under proper and appropriate instructions. Under such circumstances, a verdict supported by the evidence and approved by the trial judge will not be vacated.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

An execution in favor of I. N. B. Spence against A. Q. Cheney having been levied upon a tract of land, a claim was interposed by I. J. Morrow and another, alleging the property to be their own. Judgment for claimants, and plaintiff in execution brings error. Affirmed.

E. W. Butler, for plaintiff in error. Williford & Middlebrooks and T. L. Reese, for defendants in error.

EVANS, J. An execution in favor of I. N. B. Spence against A. Q. Cheney was levied upon a tract of land, and a claim was interposed by Mrs. L. J. Morrow and Mrs. Fannie A. Sigman. The claimants were daughters of the defendant in *fi. fa.*, and claimed to have purchased the land prior to the judgment for a valuable consideration. The plaintiff in *fi. fa.* contended that the transaction between the claimants and the defendant in *fi. fa.* was collusive and fraudulent. The contentions of each of the parties found support in the evidence, but the jury decided the issue with the claimants. The plaintiff in execution moved for a new trial, which was denied, and he excepted.

1. An assignment of error is too general where the complaint is that the court "omitted any instruction as to the legal nature of fraud, and its indicia and circumstances," or "to charge the jury the doctrine of close scrutiny of the transaction; it appearing that the subject under review and at issue being an alleged deed from a parent to his children (all of them) and by which the parent rendered himself insolvent." *Smith v. State*, 125 Ga. 300, 54 S. E. 124. The court is not informed, by these references of loose generalizations, as to the precise nature of the legal principles on these subjects which the complaining litigant deemed pertinent to his case. A reviewing court on such general assignment cannot with any degree of accuracy divine the particular principle which the plaintiff in error might have had in mind when the grounds of error were framed. It is a maxim of the law that there should be an end of litigation, and a verdict approved by the trial court should stand when supported by evidence, where no substantial error of law has been committed. The burden is on the losing party to show error, and this can only be done by a specific assignment, wherein it is made to appear that some error of law has been committed, or that the verdict is without evidence to support it.

2. Complaint is made that the court erred in charging the jury that "every sale made with intention to defraud the creditors of the vendor, if such intention is known to the vendee (the claimants in this case), is absolutely void as against such creditors." The exception does not complain of the charge as far as it goes; but it is contended that it is erroneous, because the court should have added, "if such intention is known to the vendee," or "could have been known by the vendee," and "the vendee was without notice or ground for reasonable suspicion." When considered in connection with the entire charge, the criticism of this excerpt loses its force. The court fully covered the law respecting a transfer of property by an insolvent debtor in the general charge.

3. Another exception is that the court erred in excluding the gin books of a certain firm, offered for the purpose of impeaching one of the claimant's witnesses, and to show

the quantity of cotton ginned from the place occupied by the claimant and her husband "during the years under investigation." Neither the contents of the book nor any particular entries were disclosed in this ground of the motion. If a party to a case desires to except to the exclusion of evidence, it is incumbent upon him to set out in substance the evidence, that the court may judge of its competency and relevancy. Unless this is done, the ruling complained of cannot be considered. *Lamar Drug Co. v. Lamar*, 123 Ga. 667, 51 S. E. 584; *Yates v. State*, 127 Ga. 813, 56 S. E. 1017.

4. The court charged the following: "On the other hand, if you should conclude from the evidence in this case that this was not a voluntary conveyance, but was a conveyance for a valuable consideration, a money consideration, and you should further conclude from the evidence in this case that this sale was not made for the purpose of defrauding, delaying, or hindering creditors of the grantor, or if you should conclude it was made with that intention, but that intention was not known at the time the deed was taken to the grantees (the claimants in this case), and could not have been known by the exercise of ordinary and reasonable care and diligence, you should find in favor of the claimants." This charge is alleged to be error, in that it directed the jury to find for the plaintiff unless the claimant had positive knowledge of the intention of the grantor to hinder, delay, or defraud his creditors, or could have acquired such knowledge by the exercise of ordinary and reasonable care and diligence; that the court should have charged that the sale to the claimants must have been without notice or ground for reasonable suspicion. The Code declares that every conveyance of property by a debtor had or made with the intention to delay or defraud creditors, where such intention is known to the party taking, is fraudulent. But a bona fide transaction, on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid. Civ. Code 1895, § 2695 (2). We think the charge as given imposed a greater burden upon the claimants than that required by the Code. This charge was in effect an instruction that the transaction would be deemed fraudulent if the claimants could by the exercise of ordinary and reasonable care and diligence have known of the debtor's intention to defraud his creditors. The law contemplates that the purchaser shall be affected by such facts known to him as would give notice or ground for reasonable suspicion of the debtor's fraudulent intent. He is not necessarily required to exercise diligence in every case to discover the debtor's intent. The law charges him with the consequences of his knowledge of circumstances which afford ground for reasonable suspicion of the debtor's fraudulent intent, and not so much the duty of exercising reasonable diligence

to discover such circumstances which may be unknown to him. Besides, those circumstances which would put a man of ordinary prudence in the exercise of reasonable diligence to ascertain the fraudulent intent of the debtor in the disposition of his property would at least afford a reasonable suspicion of the debtor's fraudulent intent. If there was any error in the charge, it was committed against the claimants, and furnishes no ground for complaint to the plaintiff in *fi. fa.*

5. The amended motion for new trial contains various other grounds. One complains that the court unduly emphasized the contentions of the claimants; another, that the charge as a whole did not fairly and comprehensively present the legal principles controlling the issues in the case; others complain that the verdict is contrary to specific charges of the court. We do not think that any of these assignments of error are meritorious. The charge fully presented the law applicable to the case made by the evidence, and the verdict is supported by the evidence. It has the approval of the presiding judge, and, as no substantial error of law was committed, his discretion in refusing a new trial will not be interfered with.

Judgment affirmed. All the Justices concur.

(128 Ga. 726)

# RUSHIN v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 18, 1907.)

## 1. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTION FOR INJURIES—NATURE AND FORM.

A passenger who is injured by the negligence of a carrier may, at his election, sue for a breach of the contract to safely transport, or for a breach of the duty springing from a violation of the contract of carriage.

## 2. SAME.

A petition does not commingle the two remedies when all the allegations taken together tend to a statement of a ground of recovery for a breach of duty. The petition is not rendered double by the inclusion of an inapt expression, where it is apparent the plaintiff does not rest his claim for recovery upon it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 134.]

## 3. SAME.

A petition for damages against a railroad company for injuries alleged to have been caused by an employé carelessly and willfully slamming the car door against the plaintiff's hand, which was resting against the door facing or jamb, though it sets forth in general terms a contract of carriage and alleges a breach thereof, should be treated as an action *ex delicto*, when it is manifest from the allegations and structure of the petition that the plaintiff is seeking a recovery because of the defendant's breach of duty, and not on account of its breach of contract.

(Syllabus by the Court.)

Error from Superior Court, Marion County; Wm. A. Little, Judge.

Action by Sam Rushin against the Central

of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

In his petition against the Central of Georgia Railway Company, as amended, Rushin alleged: That on October 18, 1904, he purchased from the agent of the railway company at Buena Vista a ticket from that place to Columbus, Ga., "the said corporation agreeing by the terms of said purchase to safely transport your petitioner from Buena Vista, Ga., to Columbus, Ga., a point on said line of railway." That after purchasing the ticket he got on the train, "for the purpose of being carried by said corporation, according to the terms of the contract as evidenced by the purchase of the ticket aforesaid," to his destination. That the train was stopped at Zellobee, a station where passengers got on and off the train, and while the train was so stopped petitioner and others got off to speak to some friends, who were on the ground, and got back on the train when it was ready to leave the station. "That, when in the act of returning to the car when leaving said station, he was injured as follows, and in the following manner: In going back into the train, he had reached the platform and started into the car, and there met the porter on said train coming out the door. That he stepped to one side to allow the porter to pass, and put his hands in the door-facing or jamb as he did so. That the porter, when he passed through the door, slammed it to with such force that the ends and the nails were mashed off two of the fingers of his right hand. That, in attempting to enter said door, he reached for the knob thereof to open the same, when the porter of said train pulled it out of his way by opening said door. That he then attempted to enter, and the porter in coming out of the door came in collision with him, and thereby made it necessary for plaintiff to either shove the porter out of his way or stand aside until said porter could come out. Choosing the latter, and with due caution and circumspection on his part, he stood aside, the train then being in motion. He put his hand on said door facing where the door opened in order to steady himself and to prevent falling or being brushed away by said porter. That said porter, with full knowledge of his position, and seeing his hand on said facing where said door shut, and with full knowledge that to slam said door to would catch his hand, did carelessly, negligently, recklessly, and willfully slam said door to on plaintiff's hand, wounding and injuring him as aforesaid. That petitioner and said porter (who was an employé of said corporation) were going facing each other, petitioner going into the car, and the said employé coming out, and petitioner could be plainly seen by said employé, and that this act on the part of said employé was an act of carelessness and negligence. That

said employé did see said plaintiff, and saw where his hand rested, and could have by the exercise of ordinary care and diligence prevented said injury to said plaintiff, but, with a wanton disregard for plaintiff's safety, did slam said door to on plaintiff's hand, injuring him as aforesaid, and, seeing plaintiff's hand so caught in said door, still held to the bolt thereof and continued to press the same against plaintiff's hand, notwithstanding plaintiff's cry from pain caused by said mash until plaintiff shoved him away, at the same time telling him to open the door and let him get his hand out, for which tortious act plaintiff was injured and damaged in the sum of \$300." Special damages to the extent of \$10 were alleged. Two hundred dollars was claimed for pain and suffering, and because the "carelessness and negligence on the part of said defendant [was] so willful that it amounted to aggravating circumstances," for which plaintiff also claimed \$100 as punitive damages. The thirteenth and last paragraph of the petition as amended sets forth: "Your petitioner would show that said corporation was negligent of a public duty which it owed to said plaintiff flowing from said contract of carriage, and violated the terms of said contract, as evidenced by the purchase of the ticket aforesaid, to safely carry said petitioner from Buena Vista to Columbus, in that had said employé exercised ordinary care and diligence such injury would not have occurred, and by reason of such negligence of its duty due said plaintiff as a passenger by reason of said contract of carriage, and violation of said contract by which tortious act aforesaid, your petitioner has been injured and damaged in the sum of \$300 as aforesaid." The defendant demurred generally, and also specially, to several paragraphs of the petition, on the ground that the suit was laid on a breach of contract, and, as these paragraphs complain of tortious acts in the discharge of a public duty, it is an effort to join an action ex delicto with a suit for breach of contract. The trial judge sustained both demurrers, and dismissed the petition, to which ruling plaintiff excepted.

Jno. C. Butt and W. D. Crawford, for plaintiff in error. C. E. Battle, for defendant in error.

EVANS, J. A passenger injured while on the cars in the progress of his journey by the negligence of the carrier has two remedies—one an action for the breach of the contract, the other an action on the case for the wrong; and he may elect which remedy he will pursue. *Patterson v. Augusta R. Co.*, 94 Ga. 140, 21 S. E. 283. Of course, he cannot join both causes of action in the same suit. If he does so, an appropriate demurrer will require a dismissal of the petition for duplicity, unless the duplicity is removed by an amendment eliminating the allegations in-

appropriate to the remedy elected. A petition is not necessarily duplicitous because of some inconsequential or inapt expression, which may not be strictly pertinent to the case therein made. Our statute does not require the plaintiff to state his case with all the niceties and refinements of special pleading. It is satisfied when he plainly, fully, and distinctly sets forth his charge, ground of complaint, and demand, and the name of the person against whom process is prayed. In stating the narrative of facts upon which a recovery is sought, it is common, especially in actions of this kind, for the plaintiff to state matters from which it appears that he may have another cause of action, either by way of amplification or as strengthening his description of the cause of action on which he relies, when it is obvious he does not rest his claim of recovery upon them. These superfluous statements are but surplusage. They mar the symmetry of the petition, but do not destroy it by making it double. In the case of *Seals v. Augusta Sou. R. Co.*, 102 Ga. 817, 29 S. E. 116, the action was against the railroad company for wrongfully carrying a passenger beyond the station to which she purchased her ticket. The petition alleged a contract of carriage and its breach, and the insistence of the railroad company was that the suit was thereby rendered one upon the contract. This court, however, held that the character of the plaintiff's suit depended, not upon a single allegation independently construed, but upon a consideration of the whole petition. The structure of the petition in the present case clearly shows the action to be *ex delicto*. It is true that the plaintiff alleges with great particularity a contract of carriage; but this allegation is mere matter of inducement to show the public duty which the carrier owed to the plaintiff. As was said in the *Seals Case*: "Those allegations which set forth the contract may well be taken as simply intended to lay the foundation for the introduction of evidence to show the existence of this public duty, preparatory to the introduction of further testimony to establish a violation of that duty amounting to the tort which appears to be the real gist of the action." The fourth, fifth, sixth, seventh, and eighth paragraphs contain allegations entirely appropriate to an action for a breach of public duty. The claim of damages for physical pain and suffering, and for careless and willful conduct of the defendant's employes, plainly shows that the plaintiff is suing for the tort, and not for the breach of the contract. But it is contended that, even after paragraph 13 was amended, there remained an allegation that the defendant had violated the terms of the contract to safely carry the plaintiff. This expression, however, when taken in connection with the other allegations of the same paragraph, shows that the plaintiff made reference thereto, not for the purpose of declaring

on the breach of the contract, or uniting any action which he might have for failure to safely transport with that for which he sues, but to show that his injuries were caused by the negligence of the defendant's employes in the violation of its public duty growing out of the contractual relation of passenger. We have carefully examined the petition, and do not believe that it was open to the criticism of duplicity which was raised by the special demurrer.

The general demurrer was also sustained and the petition dismissed. As amended, the petition stated a case of a passenger who was willfully injured by an employe of the carrier. Surely no argument is needed to prove that the plaintiff is entitled to recover upon a case such as is here stated. In the brief of the defendant our attention was directed to the cases of *Hardwick v. Georgia R. Co.*, 85 Ga. 507, 11 S. E. 832, *Ham v. Georgia R. Co.*, 97 Ga. 411, 24 S. E. 152, and *Murphy v. Atlanta & West Point R. Co.*, 89 Ga. 832, 15 S. E. 774, which are claimed to support the contention of the railroad company that no cause of action is set out in the petition. The plaintiff in each of these cases had his hand injured by the slamming of a car door, but under entirely dissimilar circumstances from those alleged in the petition in the present case. In none of them was it alleged that the carrier's servant willfully injured the plaintiff. The court erred in dismissing the petition on general demurrer.

Judgment reversed. All the Justices concur.

(123 Ga. 776)

#### HOPPER v. WILSON et al.

(Supreme Court of Georgia. Aug. 8, 1907.)

##### 1. ATTACHMENT—CLAIMS OF THIRD PERSON—PROCEDURE.

The failure to join issue in a claim case within five minutes after the announcement of ready by both parties is a sufficient reason for the judge to dismiss the levy; but, if in the exercise of a sound discretion he refuses to dismiss the levy, his ruling will not be interfered with. Civ. Code 1895, § 5646.

##### 2. ERROR, WRIT OF—DISCRETION OF COURT—REFUSAL OF NEW TRIAL.

The evidence was of such character as to demand the verdict, and the discretion of the court in refusing to grant a new trial will not be interfered with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3872.]

(Syllabus by the Court.)

Error from Superior Court, Banks County, J. J. Kimsey, Judge.

Action by C. N. and W. S. Wilson against Noah Walker in attachment; J. A. Hopper claimant. Judgment holding the property subject, and claimant brings error. Affirmed.

C. B. Faulkner and F. M. Johnson, for plaintiff in error. W. W. Stark, A. J. Griffin, W. B. Sloan, and H. H. Perry, for defendant in error.

ATKINSON, J. This was a claim case. Mrs. Hopper was claimant. Noah Walker was defendant in attachment. The jury found the property subject. The claimant moved for a new trial, which being refused exception was taken, and the ruling of the court refusing to grant a new trial is here for review. The first headnote sufficiently deals with the matter to which it relates. Error is assigned upon the charge of the court and upon the admission of certain evidence; but, as the verdict was demanded by other evidence, omitting all reference to the evidence which was admitted over objection, we will not consider the assignment of error made upon the charge of the court, or upon the ruling of the court admitting the evidence to which objection was made.

It remains only to deal with the general grounds. The plaintiff in attachment introduced the attachment record and levy describing an undivided one-half interest in a certain tract of land, and proved that J. M. Brooks had died before the attachment was sued out. The plaintiff then introduced a written agreement between the claimant, Julia A. Hopper, and the defendant in attachment, Noah Walker, made at the March term, 1894, of the superior court of Banks county, whereby they settled a suit then pending in said court between them, involving the title to the land, which agreement was approved and made the judgment of the court. By the terms of the agreement, it was provided, among other things, that the said Julia A. Hopper should have possession of the premises until the death of her father, the said J. M. Brooks, and after his death title to the same should "vest absolutely in fee simple, jointly and severally," in said Julia A. Hopper and Noah Walker, "their heirs and assigns, each an undivided one-half interest therein." The plaintiff having closed, the claimant offered certain evidence tending to show that prior to her marriage with Hopper she had been married to one Walker, and by him had several children, all of whom had attained majority before the trial of the attachment and claim case; that her husband Walker died at some date which the record fails to disclose; that after the death of her first husband she married Hopper, who had also died, leaving her with one child, the issue of that marriage, who was a minor at the time of the trial of the claim case; that she had been in continuous possession of the land for nearly 40 years, and while in possession she, as the head of the family, in 1870 applied for and obtained a judgment of the court of ordinary setting apart the land in dispute as a homestead. She admitted having had the litigation with Noah Walker subsequently to the creation of the homestead, and the execution of the agreement and rendition of the judgment disposing of the litigation involving the assertion of title by one Walker to the property in

dispute. The title asserted was adverse to Mrs. Hopper, either as an individual or as the head of a family. The judgment conclusively settled the differences between them, and vested title to the undivided one-half interest in the land now in dispute in the defendant in *fi. fa.*, subject only to the condition that its possession should be postponed until the death of J. M. Brooks. Mrs. Hopper as an individual was plaintiff in the case against Noah Walker, and Mrs. Hopper as an individual is claimant in the case now under consideration. Under these conditions there is no room for contention that the agreement, which was made the judgment of the court in the first case, is not conclusive upon Mrs. Hopper in the present case. Moreover, see, in this connection, *Barfield v. Jefferson*, 84 Ga. 609, 11 S. E. 149. As the claimant cannot go behind the judgment, no other verdict could have been rendered except one finding the property subject.

Judgment affirmed. All the Justices concur.

(128 Ga. 781)

GORDON COUNTY et al. v. MAYOR, ETC.,  
OF TOWN OF CALHOUN.

(Supreme Court of Georgia. Aug. 8, 1907.)

1. DEDICATION—ACTS CONSTITUTING—EXPRESS DEDICATION.

K., in pursuance of an obligation previously entered into, granted, sold, and conveyed to the judges of the inferior court of Gordon county certain described lands, including the tract in controversy, and inserted in the tenendum clause the following provision: "Provided, however, and it is hereby understood, that all that part of said piece of land which lies south of the road leading from the depot to the Oothcaloga Mill, and which has not heretofore been laid off into town lots, shall remain as a common for the town of Calhoun, and no lots shall be sold or timber cut from the same without the joint consent of the judges of the inferior court of Gordon county for time being, and of the said John P. King." *Held*, that this constituted an express and immediate dedication as to that part of said land which lies south of the road leading from the depot to the Oothcaloga Mill as a common for the town of Calhoun; and the stipulation that no lots should be sold nor timber cut from the land without the joint consent of the judges of the inferior court and of the grantor was not a reservation of any property rights or title inconsistent with the use and occupation of said town as a common.

2. SAME—OPERATION AND EFFECT—RIGHTS AS TO CONTROL OF PROPERTY—PARTIES PLAINTIFF.

The land dedicated being situated in the town of Calhoun, that municipality is a proper party plaintiff to equitable proceedings instituted to preserve the use, and prevent interference therewith.

3. SAME.

The fact that the town of Calhoun had not been incorporated at the time of the dedication of the common would not destroy the effectiveness of the dedication; the organization and incorporation of the town being then contemplated and shortly thereafter accomplished, and the deed with all its terms and conditions having been accepted by the judges of the inferior



court, and the town, after its organization and incorporation, having accepted, used, and enjoyed the common for a long period of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 9.]

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Bill by the mayor, etc., of the town of Calhoun against Gordon county and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

In 1850 John P. King and the authorities of Gordon county made and entered into a contract, whereby King agreed to sell and convey to the county authorities certain lands whereon the town of Calhoun is now situated, and the authorities agreed to accept the land, lay out the county site thereon, sell the lots, and divide the proceeds of the sale with King. In 1851, in pursuance of the above contract, King conveyed to the justices of the inferior court of Gordon county the lands described in the controversy. The habendum and tenendum clause of said deed is as follows: "To have and to hold the said parcel of land [except five acres which had been sold to the state as a site for a depot on the W. & A. R. R.] unto the said judges of the inferior court aforesaid, and their successors and assigns, forever. Provided, however, and it is hereby understood, that all that part of said piece of land which lies south of the road leading from the depot to the Oothcaloga Mill, and which has not heretofore been laid off into town lots, shall remain as a common for the town of Calhoun, and no lots shall be sold or timber cut from the same without the joint consent of the judges of the inferior court of Gordon county for time being, and of the said John P. King." At the time this deed was executed the town of Calhoun had not been incorporated, but was incorporated by an act of the Legislature approved the following year, 1852, and the lands to be used as a common are situated within the corporate limits of that town. The town was laid out, lots were sold, and the proceeds divided as was agreed upon, and all that part of said tract of land which lies south of the road leading from the depot to the Oothcaloga Mill was reserved as a common for the town of Calhoun, and no lots were sold nor timber cut from the same. During the past year Henry B. King, the successor in title of John P. King, and the authorities of Gordon county, acting jointly, undertook to convey a part of the "common" to one Gardner. The mayor and aldermen of Calhoun filed a bill to enjoin the sale. The defendants demurred to the petition on the grounds (1) that no cause of action was set out; and (2) that, if the petition did set out a cause of action, the municipality was not a proper party plaintiff. The court overruled the demurrers, and the defendants excepted.

T. W. Skelly and R. J. & J. McCamy, for plaintiffs in error. Neel & Peeples, for defendants in error.

BECK, J. (after stating the facts). 1. The petition in this case sets forth facts which constitute an immediate and express dedication of the lands in dispute. After the clause of conveyance in the deed of John P. King to the judges of the inferior court, we find in the habendum and tenendum clause the following: "To have and to hold the said piece or parcel of land [except as before excepted] unto the said judges of the inferior court aforesaid, and their successors and assigns, forever. Provided, however, and it is hereby understood, that all that part of said piece of land which lies south of the road leading from the depot to the Oothcaloga Mill, and which has not heretofore been laid off into town lots, shall remain as a common for the town of Calhoun, and no lots shall be sold or timber cut from the same without the joint consent of the judges of the inferior court of Gordon county, for time being, and of the said John P. King." No other construction can be put upon the language that it "shall remain a common for the town of Calhoun"; and the import of these words, as amounting to an express dedication, is not rendered nugatory nor weakened by the clause following, and providing that "no lots shall be sold or timber cut from the same without the joint consent of the judges of the inferior court of Gordon county, and of the said John P. King." Suppose that the dedication, instead of having been made expressly by the terms of the deed, had been made as in the case of *Cincinnati v. White*, 6 Pet. (U. S.) 431, 8 L. Ed. 452—that is, a plan of the town had been made and approved by the owner of the land—according to which the 30 acres lying south of the road from the depot to the Oothcaloga Mill was set apart as a common for the use and benefit of the town, and that lots had been sold in pursuance of and with reference to this plan. Clearly, under the direction of that case and the numerous cases which have followed it, a plain case of dedication would have been established. But suppose, further, that appended to the plan or map of the town as laid out, as a part thereof, there had been the statement in writing that no lots should be sold nor timber cut from the land constituting the common without the consent of the owners of the land at the time of the dedication and certain designated public officers. Could this stipulation have had the effect to destroy the presumption of a dedication arising from the fact that lots had been sold with reference to the plan? It would seem not. Such a stipulation might have effect to prevent the municipal authorities from making any change in the condition or status of the common without the consent of the designated persons, but it

could not have the effect of preserving to the original owners nor those in privity with them the power to change, alter, or dispose of the lands set apart in the plan of the town as a common. So we hold in this case that the plain language of the deed creates a common in the lands in dispute, and that, while the stipulation as to the selling of lots and cutting timber therefrom might operate as a restriction upon the power of the municipal authorities in dealing with the common should they attempt to make a change therein, or dispose of any portion thereof, it was not a reservation of property right or title to the premises referred to inconsistent with the right of the town and its inhabitants to use and enjoy them as a common.

2. The deed conveying the land declares the use for the town of Calhoun, and the land to be used as a common is situated within the corporate limits of that town. That being true, the town in its corporate capacity was the proper party plaintiff in these proceedings. "The municipality in which the land dedicated is situated, as trustee for the public, may maintain proceedings to enforce and preserve the use. Thus, where lands are dedicated to the use of the inhabitants of a city or incorporated village for a public square, a bill may be filed in the name of the corporation to restrain the erection of a nuisance thereon, or to protect the equitable right of the corporators to the use of the public square as such, and it may maintain ejectment to recover possession of the dedicated property from any one wrongfully withholding it." 18 Cyc. 502; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. 236; *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942.

3. The principle set forth in the third headnote is well settled. "The title to land which has been dedicated to public use, as for a highway or public square in a city, is in the city as trustee for the public; and it has been held, in the case of such a dedication of land in a proposed city to be thereafter built, that the fee will remain in abeyance until the proper grantee or city comes in esse, when it will vest in such city. A dedication to the public may exist where there is no city or town or corporate entity to take as grantee; and in such case, while the fee may remain in the individual who dedicates the land, he will be estopped from setting it up as against the public who may be interested in the use of the land according to its dedication. Nevertheless, when a dedication is made in an existing city, the city takes title as trustee. These statements are borne out by the following cases: *Pawlet v. Clark*, 9 Cranch (U. S.) 292, 3 L. Ed. 735; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 7 L. Ed. 521; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 435, 436, 8 L. Ed. 452; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; 8 L. Ed. 477; *New Orleans v. United States*,

10 Pet. (U. S.) 662, 9 L. Ed. 573; *Police Jury v. Foulhouse*, 30 La. Ann. 64." *Werlein v. New Orleans*, 177 U. S. 390, 401, 20 Sup. Ct. 632, 44 L. Ed. 817.

Judgment affirmed. All the Justices concur.

(2 Ga. App. 200)

#### PALMER v. INGRAM. (No. 311.)

(Court of Appeals of Georgia. June 26, 1907.)

##### 1. EXCEPTIONS, BILL OF—WRIT OF ERROR—ASSIGNMENT OF ERRORS—SUFFICIENCY.

The following assignment of error did not sufficiently comply with the requirements of Civ. Code 1895, § 5527: "On the trial of said case the following order was granted, to wit: 'On motion of plaintiff's counsel, the foregoing answer is dismissed in open court, October 31, 1906. Frank L. Little, Judge City Court of Sparta'—which said order so granted on verbal motion of plaintiff's counsel was error." An assignment of error must plainly specify not only the decision complained of, but must point out the error in such decision.

##### 2. DAMAGES — ASSESSMENT — DEFAULT IN PLEADING — UNLIQUIDATED DAMAGES — NECESSITY OF PROOF.

In suits for unliquidated damages, notwithstanding the absence of plea or answer, the plaintiff shall be required to prove the amount of damages.

##### 3. LANDLORD AND TENANT—BREACH OF LEASE BY LESSOR—MEASURE OF DAMAGES.

In a suit to recover damages for the breach of a contract by which the defendant agreed to rent to the plaintiff a farm for one year for a stipulated sum to be paid as rental, the measure of damages for not admitting the plaintiff into possession at the beginning of the term is the difference between the rent to be paid and the actual rental value of the premises at the time of the breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, § 723.]

##### 4. SAME.

In this case it was error to allow as damages the difference in the stipulated rent and the gross value of the products of the farm for the year of the lease, without any deduction for cost of production.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Action by Ann Ingram against Teresa Palmer. Judgment for plaintiff, and defendant brings error. Reversed.

T. M. Hunt and R. H. Lewis, for plaintiff in error. H. H. Little and W. H. Burwell, for defendant in error.

HILL, C. J. The plaintiff below brought suit to recover damages for a breach of a written contract by which the defendant agreed to rent her a certain described farm for the year 1905 at a stipulated rental of 1,500 pounds of midland lint cotton. By consent the case was tried by the court without the intervention of a jury. On motion by the plaintiff, the court dismissed the answer of the defendant, and, after hearing evidence and argument, rendered judgment for the plaintiff for the sum of \$423.25, besides interest and costs. The defendant (now plaintiff in error) assigns error on the judg-

ment dismissing her answer, and also excepts to the judgment against her for said sum, because said judgment was "contrary to law and evidence, and without evidence to support it."

The judgment dismissing the answer was as follows: "On motion of plaintiff's counsel, the foregoing answer is dismissed in open court, October 31, 1906. Frank L. Little, Judge City Court of Sparta." And the exception to this order is in the following words: "Which said order so granted on verbal motion by plaintiff's counsel was error." The defendant in error objects to this assignment of error, on the ground that it does not specify plainly the decision complained of or point out the error in the decision. We think this objection is well taken, and that this assignment of error does not comply with the requirements of Civ. Code 1895, § 5527, which declares that every bill of exceptions "shall specify plainly the decision complained of and the alleged error." *Warren v. Oliver*, 111 Ga. 808, 35 S. E. 673.

Notwithstanding the fact that this left the case without plea or answer, the burden was still upon the plaintiff to prove her damages, as the damages claimed were unliquidated. Civ. Code 1895, §§ 5073, 5078. She introduced her lease, and proved its breach by the defendant, and also proved what had been made on the farm during the year covered by her contract. The court awarded her damages for the full amount so proved, less the amount of rent that she had stipulated to pay. In other words, the court allowed her the gross amount of what was made on the farm, without any deduction for the value of the labor and cost necessary to be bestowed in making the amount, only deducting therefrom the amount that she had agreed to pay for the rent of the farm. We think that the measure of damages thus adopted by the court was improper, and entirely too liberal to the plaintiff. Mr. Chief Justice Bleckley, in *Kenny v. Collier*, 79 Ga. 746, 8 S. E. 60, speaking for the court, says: "The measure of damages for not admitting a lessee or tenant into possession at the beginning of the term is the excess in the value of the term over the amount stipulated as rent. This is the general rule." And he further says that this general rule "confines the recovery to profits arising from the contract itself, the measure of which is the difference between cost and value. If there be no difference, or if cost be in excess of value, nominal damages only will be recoverable." The plaintiff in this case was entitled to recover, if the evidence justified it, the difference in the market value of her lease for the year and the amount which she had agreed to pay for it. If the stipulated price was in excess of the market value of the lease, she could only recover nominal damages for the breach. The only proof submitted was as to the gross value of what had been produced on the farm during the

year that the plaintiff was entitled to the farm under her contract; and the court gave her as damages the difference between this gross amount and the stipulated rent. This measure of damages would make it far more profitable to tenants that landlords should break their leases at the beginning of the term than that they should keep them. Evidence of the net proceeds of the crop made on the farm was used as illustrative of what was the true market value.

Judgment reversed.

(2 Ga. App. 250)

# CLARK & WILCOX v. EMPIRE MERCANTILE CO. (No. 347.)

(Court of Appeals of Georgia. July 4, 1907.)

## 1. WRIT OF ERROR—REVIEW—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.

New trials are not granted for harmless errors. When a jury find a verdict which is necessarily correct in spite of erroneous instructions, errors in the charge are harmless. Where, upon review of the evidence, it is manifest that the finding of the jury was as favorable to the party complaining thereof as if no error had been committed, defects in the charge are immaterial; and it would be useless to order a second trial, when the judgment rendered in the former trial is as favorable to him as it could have been, had there been no error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4227.]

## 2. CONTRACTS—CONSTRUCTION—QUESTION FOR JURY.

While it is the duty of the court to construe written contracts for the jury, in the absence of ambiguity, yet in this case the court very properly left to the jury to determine the meaning of the words "invoice cost," contained in the contract, for the reason that the stock of goods in question had been twice sold by invoice, and it was an issue of fact between the parties as to which invoice was to determine the cost or value of the articles sold. See *Moss Mfg. Co. v. Carolina Cement Co.*, 57 S. E. 914, 1 Ga. App. 232.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 767.]

(Syllabus by the Court.)

Error from Superior Court, Irwin County; J. H. Martin, Judge.

Action by the Empire Mercantile Company against Clark & Wilcox. Judgment for plaintiff, and defendants bring error. Affirmed.

Haygood & Cutts, for plaintiffs in error.  
E. W. Ryman, for defendant in error.

RUSSELL, J. The Empire Mercantile Company had two stocks of merchandise at Wray. One stock of goods at Wray had been bought as a whole from the Dooly Lumber Company and was what might be called an old stock. Clark & Wilcox entered into a negotiation to buy both stocks of goods, and the trade was closed by the following writing or contract: "Received of Messrs. B. E. Wilcox and John Clark five and no/100 dollars as part payment on stock of merchandise now owned by us at Wray, Ga.; it being understood and agreed by both parties, should the Dooly Lumber Co. fail to agree to transfer

agreement between them and the Empire Mercantile Co., then said sale to be null and void, otherwise to be in full effect, to take place and be transferred on the 1st day of March, 1903, at invoice price plus the freight, and should any article in stock appear to be damaged, when both parties fail to agree on price said article to be taken out of inventory, provided, however, such articles are meant as are actually damaged or shop-worn. Terms of sale: Two thousand dollars cash; balance to be divided into six equal payments of 30, 60, 90, 130, 150, 180 days each." In conformity with this contract Clark & Wilcox executed the six notes, payable as therein provided, and five of them were paid at maturity. The sixth note was not paid. Suit was brought on it and is the subject of this litigation.

It seems that the stock which was bought from the Dooly Lumber Company was the cause of the trouble. Some time after the sale Clark & Wilcox found out that the Dooly Lumber Company had given the Empire Mercantile Company a discount of 25 per cent. when they bought this old stock. The dispute, therefore, arose as to whether the words "invoice price" referred to the original invoice cost, which appeared to have been marked on the goods, or to the price paid by the Empire Mercantile Company for the stock of the Dooly Lumber Company, on which there was 25 per cent. concession. It was undisputed that at the time of the negotiation for the sale, and when the sale was closed, some of the members of the mercantile company did not know that there had been a 25 per cent. discount allowed in their purchase. Under these circumstances we agree with the judge of the superior court that the judge of the city court very properly allowed the jury to determine what was meant by the words "invoice cost" in the contract between the parties in this case.

Nearly all of the numerous exceptions assign error on the failure of the judge of the city court to construe the contract as matter of law. We think the learned counsel misconceived the holding of the trial court. There is nothing in the charge, nor is there any ruling of the court, which indicates a purpose on the part of the trial judge to shirk his duty in this regard; but where a contract is ambiguous the jury must find the facts, and in this instance it was nothing but an issue of fact that was to be determined, to wit, whether invoice cost (the meaning of which is, the cost as appears from the invoice or bill furnished contemporaneously with a purchase of goods) in this case was to be derived from one invoice or another and different invoice; in other words, whether the price was to be fixed by the invoice at which the Dooly Lumber Company stock was bought by them, or whether indebtedness of Clark & Wilcox to the Empire Mercantile Company for the stock purchased by them from the

Dooly Lumber Company was to be diminished by a 25 per cent. discount, which, so far as the evidence discloses, did not appear upon any invoice. And in this view of the case the ruling of the court, in our opinion, was more favorable than the plaintiffs in error had any right to expect. But, conceding all that the plaintiffs in error claim (which is that they were entitled to a discount of 25 per cent. on the stock of goods known as the "Dooly Lumber Company stock"), no error harmful to the plaintiffs in error appears in the judgment overruling the certiorari. Their contention was that, allowing the 25 per cent., the note would be canceled by the credit to which they would thus be entitled. But the evidence shows that, taking into consideration about \$500 worth of the Dooly Lumber Company's stock returned by Clark & Wilcox as shop-worn, there was only about \$400 worth of this stock included in the purchase. While there was conflict as to this, and testimony placing the amount higher than \$500, still the jury were authorized to find, as the value of the Dooly Lumber Company stock, \$500 less. Twenty-five per cent. of this valuation being deducted from the note sued on would be equivalent to the verdict found by the jury.

The credibility of the witnesses is exclusively a question for the jury, and in our opinion the preponderance of the evidence established the fact that the value of the Dooly Lumber Company stock accepted by the plaintiffs in error showed it to be worth from \$300 to \$400, and not exceeding the latter figure. The verdict of the jury found \$243.71 for the plaintiffs. The note in suit was for \$368.71, a reduction of \$125. The verdict, therefore, shows clearly that the jury adopted the theory of the plaintiffs in error that they ought to be allowed a discount of 25 per cent., and that they found the value of the Dooly Lumber Company stock to be \$500. The jury would have been authorized, under the evidence, to find the value of the Dooly Lumber Company stock to be only \$300, or to find it to be \$400; and in either event, as the credit allowed would have been less, a greater verdict in favor of the plaintiff than that found would have been fully sustained. In this view of the case, the errors assigned in the petition for certiorari either failed to be sustained or became entirely immaterial. Granting every contention of the plaintiffs in error, and that the court on another trial should rule in exact accordance with their view of the case, still, if the jury believe that the value of the Dooly Lumber Company's stock, after the rejection of the shop-worn goods, was worth no more than \$500, the verdict would be the same; and, as no reason appears why the result would be different, a new trial is useless. It is useless to grant a new trial for errors in a charge or ruling upon evidence, when the result of such trial and the judg-

ment rendered therein is as favorable to the movant as it could be if there had been no error; and when, upon a review of the evidence, it is manifest that the finding of the jury was as favorable to the party complaining thereof as if no error had been committed, defects in the charge of the court become immaterial, it being otherwise evident that the parties have had a fair trial and the evidence was fully and properly submitted.

Judgment affirmed.

(2 Ga. App. 202)

HALL v. COATS et al. (No. 340.)

(Court of Appeals of Georgia. June 26, 1907.)

WRIT OF ERROR—REVIEW.

No material error of law was committed, and the theory of the evidence adopted by the jury in finding the verdict is not unwarranted, and is in entire accord with substantial justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 878.]

(Syllabus by the Court.)

Error from City Court of Dublin; J. B. Burch, Judge.

Attachment by J. M. Hall against Clara Coats and others. From the judgment, plaintiff brings error. Affirmed.

Jas. B. Sanders, for plaintiff in error. Williams & Blackshear, for defendants in error.

HILL, C. J. The plaintiff in error sued out an attachment against the defendants, returnable to the city court of Dublin, for the purchase money of two mules. The declaration alleged that the defendants bought from Pope & Bales two mules for \$353.39, for which they made and delivered to said Pope & Bales their note, and to secure the payment thereof executed a mortgage on the mules. The note and mortgage were dated November 24, 1904, and due September 15, 1905. The note recited that, if not paid at maturity, it was to bear interest at 8 per cent. per annum from its date. The note and mortgage were transferred to the plaintiff by Pope & Bales October 2, 1905. In answer to the declaration the defendants admitted the execution of the note and mortgage, and that the same were for the purchase money of the mules. They further answered that they had paid on the note \$168.16, and that after the note was due, and when it was still in the possession of Pope & Bales, they had tendered to Pope & Bales the full balance due thereon, which Pope & Bales stated was \$190, and that Pope & Bales had agreed to surrender to them the note on payment of this balance; that, notwithstanding this agreement, Pope & Bales refused to accept the tender of this amount and surrender the note, on the ground that they had transferred it to J. M. Hall, the plaintiff. They further answered that they then tendered the full amount due on said note to J. M. Hall, "and are here and now ready to

pay the said Hall the entire balance due on said note, and here bring the same into court and tender it." All of the facts as to the tender were admitted to be true, but the plaintiff alleged that no payments had been made on the notes by the defendants, and that the full amount, with interest, was due; that the credits on the notes were made by him, and not by the makers. The jury found a verdict for the plaintiff for \$190, without interest, and he made a motion for a new trial, which was overruled.

It was not denied that Pope & Bales told the defendants that the balance due on the note was \$190, and that they agreed to surrender the note on payment of this balance; nor was it denied that the defendants did tender this amount to Pope & Bales and to J. M. Hall. The evidence is not clear as to the exact date when the tender was made to Pope & Bales, but there is some evidence from which the jury might have found that such tender was made before the transfer of the note to Hall. If such was the fact, Hall took the note, it being past due, subject to the rights which resulted from the agreement of Pope & Bales to accept \$190 in full payment thereof, and the tender to them of this amount. The only objection urged by counsel for the plaintiff to the tender was that it was not in full of the specific debt due on the note. A calculation of the balance due on the note, when the makers asked the holders thereof how much was then due, will show a small sum in excess of \$190, including principal and interest; but the holders had the right to accept in full payment the sum of \$190, and, having agreed to do so, the full obligation of the defendants was met when that amount was tendered. The jury accepted this theory of the case, and we cannot say that this verdict is unsupported by the evidence. It seems to be in accordance with substantial justice, and we will let it stand, there having been no error of law committed.

Judgment affirmed.

(2 Ga. App. 213)

DILMAN BROS. v. PATTERSON PRODUCE & PROVISION CO. (No. 379.)

(Court of Appeals of Georgia. June 26, 1907.)

1. SALES—EXECUTORY CONTRACT TO BUY—BREACH—REMEDY—FORM.

A breach of an executory contract for the purchase of goods will not support an action upon an open account for the price thereof.

2. SALES—EXECUTED SALE—PASSING OF TITLE—NECESSITY.

The intention of the parties to a contract may dispense with delivery of personal goods, and delivery may be constructive; but for a contract of sale to be executed, and not merely executory, the title must pass to the purchaser, in the absence of delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 512.]

3. SAME.

"The main thing to be considered is the intention of the parties." *Shepard v. King*, 23 S.

E. 114, 86 Ga. 84. Where title to personal goods is retained by the vendor by attaching a bill of lading, "order notify," to a draft for the purchase price of such goods, delivery is postponed until after payment, and the contract of sale is executory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 512, 542, 547, 549.]

**4. WRIT OF ERROR—REVIEW—DISCRETION OF COURT—GRANTING NEW TRIAL.**

The general rule as to the discretion of the presiding judge in granting a first new trial does not prevail, where such grant rests solely on a question of law. *Hiller v. Howell*, 74 Ga. 174.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3863.]

(Syllabus by the Court.)

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by Dilman Bros. against the Patterson Produce & Provision Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hill & Royal, for plaintiffs in error. W. H. Dorris, for defendant in error.

RUSSELL, J. Dilman Bros. brought their suit upon an open account against the Patterson Produce & Provision Company for \$232.16; this amount representing the price of a car load of Danish cabbage and Baldwin apples, shipped on Lehigh Valley car No. 5,609, from Waterloo, N. Y., on March 20, 1905, by Dilman Bros., "order notify" Patterson Produce & Provision Company, at Cordele, Ga. The plaintiffs had the bill of lading for the shipment taken to their own order, and attached thereto a draft for the purchase price of said produce, and drawing through the Cordele National Bank of Cordele, Ga., and the draft, together with the bill of lading, was presented to the defendant for payment. The defendant refused to accept the car of produce or to pay the draft, and notified the plaintiffs of this fact immediately; and the plaintiffs instituted this suit. Upon an agreement between the counsel in the case, the issue was submitted to the court without a jury; and after hearing the evidence the court rendered a judgment in favor of the plaintiff for said amount of the purchase price of the produce. The defendant made a motion for a new trial upon various grounds. Upon the hearing of the motion his honor, Judge Strozler, granted a new trial; and this is the error assigned in the bill of exceptions.

As the new trial was granted for the sole reason that it appeared from the evidence "that the goods sued for were never delivered to the defendant, and for this reason an action upon account could not be maintained," it is only necessary to consider two grounds of the motion for new trial. These are as follows: "(3) Because the court erred in rendering judgment in favor of the plaintiff, for the reason that under the evidence the contract was an executory contract, and not

an executed contract, and the title to said property did not pass out of the plaintiff into the defendant, and the title to same, under the contract of shipment, would not pass out of the plaintiff until the draft attached to the bill of lading was paid, because the evidence shows that the shipment was made to 'order' of the plaintiff. (4) Because the court erred in rendering judgment in favor of the plaintiff against the defendant, for the reason that the evidence does not disclose any delivery of the merchandise sued for to the defendant by the plaintiff, or any acceptance of them on the part of the defendant, and this plaintiff cannot maintain an action for the purchase price of the merchandise against this defendant in plaintiff's suit on open account." The question in the case turns upon the point whether there had been a sale of the articles whose purchase price was sued for—whether the contract between the parties was executory or executed.

It is well settled that delivery of goods is essential in order to maintain an action for the purchase price. It is true that actual delivery may be dispensed with by agreement of the parties, and also true that by constructive delivery (where such is shown by the evidence) actual manual possession of the goods by the vendee is not necessary to complete the sale. But to complete the sale of personalty there must be a relinquishment by the vendor to the vendee of dominion and control of the property sold. The evidence in this case shows that the parties contemplated a cash transaction, and that actual delivery should be had before the sale was complete. Under Civ. Code 1895, § 3545, "until delivery is made or dispensed with, the goods are at the risk of the seller," and "if a purchaser refuses to take and pay for goods bought the seller may retain them and recover the difference between the contract and the market price at the time and place of delivery, or he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale, or he may store or retain the property for the vendee and sue him for the entire price." Civ. Code 1895, § 3551. The contract was an executory and not an executed contract, for the reason that Dilman Bros., as sellers, took a bill of lading from the railroad company to their own order, and attached draft to same for the purchase price, drawing on the defendant, through the bank of the defendant's residence. The vendors thereby retained title to the goods in themselves until the draft was paid or accepted by the defendant under the contract of shipment, thereby rendering the railroad the agent of the seller, and not the agent of the buyer. Furthermore, under the contract of shipment, the bill of lading was security for the draft, and neither the title nor the right to the bill of lading passed to the defendant, but the title to the goods re-

mained in the plaintiff. For these reasons we think the judgment of the trial judge in granting a new trial was right.

The case of *Maddox v. Wagner*, 111 Ga. 146, 36 S. E. 609, lays down the rule that a breach of an executory contract for the purchase of goods will not support an action upon an open account for the price thereof. Then, was this an executory contract? The goods were ordered by telegram and were consigned to the order of the shippers. One of the stipulations of the bill of lading was as follows: "Not negotiable. If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before the delivery of the property at destination, as provided by section 9 of the conditions of the uniform bill of lading, on the back thereof." And on the back of the bill of lading was the following: "(9) If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned (without any conditions or limitations other than the name of a party to be notified of the arrival of the property), the surrender of this bill of lading properly indorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading." As before stated, this bill of lading was attached to a draft for the purchase price drawn on the Patterson Produce & Provision Company, and under Civ. Code 1895, § 3554, neither the title to the goods nor the right to the bill of lading passed to them until they either accepted, or accepted and secured, or paid, that draft. As held by the Supreme Court in *Farmers' & Traders' Bank v. Allen-Holmes Company*, 122 Ga. 69, 49 S. E. 817: "Under the very terms of the contract of shipment the carrier obligated itself to transport the car and hold it subject to the orders of the holder of the bill of lading, whether such holder was the party to whom the bill of lading was originally issued or his assignee." So that delivery to the carrier was never delivery to the Patterson Produce & Provision Company, unless it became the holder of the bill of lading in one of the ways pointed out in section 3554. It did not pay the draft. There was no delivery. The manner of the shipment proved the contract of sale to be executory—such a contract as, under the decision in *Maddox v. Wagner*, supra, would not support the action upon open account.

The case of *Woodward v. Solomon*, 7 Ga. 246, cited by learned counsel for plaintiff in error, does not rule contrary to what we now hold. In that case the vendor had been paid in full for his property, and in writing relinquished dominion and control to the vendee.

In the *Woodward Case* the vendee, having paid the price, not only had the right of property, but was also entitled to the possession. The vendor did everything there was to be done, and the rule laid down in that case is merely that, if there is nothing to be done by the vendor, the title passes to the vendee. In other words, the court was simply discussing the question of title to property under sales generally. As said by Justice Lumpkin, in *Allen v. Hollis*, 31 Ga. 143 (1): "When goods are sold, and nothing is said as to the time of delivery or time of payment, and everything the seller has to do is complete, the property vests in the buyer." And, after remarking that Broom's Commentaries upon the Common Law contained more law than any volume of its size extant, he quotes from that book as follows: "Property in specific chattels may pass without delivery. It will so pass when, at the time of the bargain, everything is already done which according to the intentions of the parties was necessary to transfer the property. An appropriation of the property, being equivalent to a delivery by the vendor and the assent of the vendee to take the specific chattels and pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the chattel in the bargainee." The rule is nothing more nor less than that transfer of title (the right of property) is equivalent to delivery and dispenses with it. The doctrine has no application in this case, for the vendor in this case expressly reserved title by attaching the bill of lading to the draft.

If Dilman Bros. had consigned the goods directly to the Patterson Produce & Provision Company, title would have passed to the consignee; and, delivery to the carrier being delivery to the consignee, nothing would have remained for the vendor to do, and the case would have been properly brought. But the evidence shows that the vendors in this case did not intend to dispense with delivery. That usual essential of a sale was still incomplete, and title was retained in order to make the execution of the contract dependent upon payment. "The general rule is that when one orders goods from a distant place, to be shipped by a common carrier, and the order is accepted and the goods shipped, the delivery to the common carrier is delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and when this is done the title, without more, passes from the vendor to the vendee. If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title himself, he may vary this rule, when he makes the consignment and delivers the goods to the carrier, by taking the bill of lading from the carrier to his own order. When the vendor does this, it is evidence that he does not part with the title of the goods shipped, but retains the same until the draft

which he sends with the bill of lading is accepted or paid." Delivery of personal goods may be evidence of title. Title is not necessarily dependent upon delivery. But there can certainly be no sale without change of title. There was no error in granting a new trial.

It is not necessary to consider the other questions raised in the record. While it is true, as a general rule, that the first grant of a new trial on the part of the trial court will not be reviewed or controlled, still the general rule as to the discretion of the presiding judge in granting a first new trial does not apply when the new trial is granted solely on a question of law.

Judgment affirmed.

(2 Ga. App. 196)

**FOOTE & DAVIES CO. v. HOUCHIN MFG. CO.** (No. 283.)

(Court of Appeals of Georgia. June 26, 1907.)

**1. CONTRACTS—CONTRACT TO CONSTRUCT MACHINE—DUTY OF MANUFACTURER.**

A., a manufacturer of machinery, entered into a contract with B., a bookbinder, to construct for him a "book-covering machine" according to B.'s design. The machine was an experiment, and there was doubt as to its practical success when completed. B. therefore agreed with A. "to pay all the expenses incurred in getting up the machine, whether the machine finally met with B.'s approval or not."

**Held:** (a) In the construction of the machine A. was under an implied obligation to use reasonably proper and suitable material and to perform the work of construction in a reasonably skillful manner. (b) If the machine, when completed, was not suited to the purpose intended and was a failure, and such unsatisfactory result was due to the inferior quality of the material used by A. in its construction and to the unskillful manner in which he performed the work, B. would be released from his contract to pay all the expense incurred by A. in getting up the machine.

**2. SAME.**

In a suit by A. against B. to recover the expense incurred in constructing the machine, an answer setting up the facts indicated in the foregoing headnote as the causes for the failure of the machine to produce satisfactory results constituted a good defense, and evidence offered in support thereof should have been allowed and submitted to the consideration of the jury.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Houchin Manufacturing Company against the Foote & Davies Company. Judgment for plaintiff, and defendant brings error. Reversed.

Chas. W. Smith, for plaintiff in error.  
Candlers, Thomson & Hirsch, for defendant in error.

**HILL, C. J.** The plaintiff in the court below was a manufacturer of machinery, and the defendant was a publisher and bookbinder. The president of the defendant company desired to have constructed a book-covering machine, and, acting for his company, em-

ployed the defendant to construct such a machine. As the machine seems to have had no model, but was novel and experimental, there was some doubt as to its practical success. The plaintiff, therefore, while willing to undertake its construction, and though it had faith in its ability to construct the machine to meet the views of the defendant, was unwilling to attempt the experiment without a special contract. This contract was entered into by the parties, and is evidenced by the following two letters:

"Atlanta, Ga., April 1, 1904.

"Messrs. Foote & Davies, City—Gentlemen: With further reference to the conversation had with our Mr. Houchin, we beg to advise you that we are entering your order for one of the machines referred to upon the following conditions: All expenses that we may incur in getting up this machine, whether the machine finally meets your approval or not, will be borne by you. While we have every reason to believe that we will get up a machine to successfully meet your views, yet we could not attempt to make the experiment at our expense. We write this, so that there may be no misunderstanding between us, and ask you to acknowledge receipt of this letter, agreeing with our requirements, and we will proceed with the machine without further delay.

"Yours truly,

"Houchin Manufacturing Company."

In reply to this letter, the Foote & Davies Company wrote as follows:

"Atlanta, Ga., April 2, 1904.

"The Houchin Mfg. Co., 115 Garnett St., City—Gentlemen: Yours of the 1st is our understanding of the contract for building machine.

"Yours very truly,

"Foote & Davies Company."

Under the contract entered into by these two letters, the machine was completed. It proved to be unsuccessful, and on the refusal of the Foote & Davies Company to pay the expense of constructing the same the Houchin Manufacturing Company brought suit against the Foote & Davies Company for the expenses incurred in getting up the machine. The suit was based upon the foregoing contract. In addition to the answer, making a general denial of indebtedness, the Foote & Davies Company filed an amendment thereto, as follows: "Defendant says that the machine which plaintiff built for it was properly planned, and, if properly and carefully built, would have been serviceable and of great value to the defendant, but that, instead of its having been properly built, it was built so carelessly and of such inferior material, and the work thereon was so inferior, that said machine is unserviceable and of absolutely no value to the defendant." This amendment was allowed. On the trial of the case the defendant offered proof in support of this amended answer, which was



rejected by the court, as in the opinion of the court, under the terms of the contract, the defendant took the risk of everything in the contract in connection with the construction of the machine. The court permitted the defendant to show the market value of the material that was put into the machine, but refused to allow the defendant to show, either that such material was of proper quality to put into the machine or that the machine was constructed in a suitable and workmanlike manner, and for these reasons was worthless. The jury found a verdict for the plaintiff for the full amount, and the defendant filed a motion for a new trial, which was overruled, and the plaintiff excepted.

The only material exceptions to be considered by this court are the exceptions to the rulings of the trial court in refusing to allow evidence to be introduced by the defendant in support of the averments set up in the amended answer and in charging the jury that under the contract in the case they could not consider the allegations that the machine was not constructed in a proper and workmanlike manner, but was very improperly and carelessly constructed, and of inferior material, and the work on it was inferior, and that as a result the machine was not serviceable, and was of no value to the defendant. The machine in question was the conception of Mr. Foote, the president of the defendant corporation, and it was understood that it was an experiment, and its practical utility, when constructed, was doubtful. Mr. Foote testified that during the construction of the machine by the plaintiff he was personally present a great deal of the time, and made repeated objections to the material that was going into the machine and to the character of the workmanship; but these objections were disregarded. We think the trial court erred in its construction of the contract in question. We think that under this contract there was an implied obligation on the part of the plaintiff to construct the machine skillfully and in a workmanlike manner, and to make a selection of proper material to be used in it. If, after using such skill and selecting such material, the machine as completed did not prove to be a successful experiment, the defendant was nevertheless bound to pay the expense of its construction. It seems to us that it would be an unreasonable interpretation to place upon the contract that, however unskillfully made and however inferior and unsuited the material used, the defendant was nevertheless bound to pay all expense incurred in connection therewith. It seems to us far more reasonable to say that if the manufacturers, after using proper skill and workmanship and ordinarily good material, had nevertheless failed in making a successful machine according to the plans of the defendant, it was bound to pay the expense incurred.

Any other construction, in our opinion,

would place the defendant at an unfair disadvantage and entirely at the mercy of the plaintiff. In the case of *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734, the Supreme Court held that, if the particular kind of material to be furnished and the manner in which the work is to be done are not specified in a contract, the contractor is at liberty, and is under a corresponding duty, to himself make a selection of proper material and to perform the work in the manner in which it should be done. No particular kind of material is specified in the contract now under consideration to be used in the construction of the machine, nor does the contract say anything as to the manner in which the work of construction should be performed. But we think that the law wrote into the contract the obligation to use reasonably suitable material and to do reasonably skillful work in the construction of the machine. If the machine was a failure, and was not reasonably suited to the purpose for which it was constructed and intended, and this was because of defective and unsuitable material and careless and unskillful workmanship, and not because of any defect in the plan thereof as indicated by the defendant, we think these facts would, if proved, constitute a good defense, and would not be repugnant to the terms of the contract between the parties. Of course, if Foote was present directing the work, and saw the material used and the character of the work done, and made no objection, this plea would not avail the defendant.

Judgment reversed.

(2 Ga. App. 178)

#### TAYLOR v. CHAMBERS. (No. 357.)

(Court of Appeals of Georgia. June 20, 1907.)

##### 1. SLANDER—PRIVILEGED COMMUNICATIONS.

Communications which would otherwise be slanderous are protected as privileged, if made in good faith by the injured person in the prosecution of an inquiry regarding a crime which he believes to have been committed upon his property, and for the purpose of detecting the criminal or bringing him to punishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 130.]

##### 2. PLEADING—AMENDMENT OF PETITION—EFFECT.

A petition may be amplified by amendment. Such an amendment, voluntarily made, may cure errors previously committed by the court in the amending party's favor as to the original sufficiency of the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 736.]

##### 3. TRIAL—RIGHT TO OPEN AND CLOSE.

A partial plea of justification will not entitle the defendant in a slander suit to open and conclude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 47.]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action by Frank Chambers against H. T.

Taylor. Judgment for plaintiff, and defendant brings error. Reversed.

Bule & Knight, for plaintiff in error. J. W. Powell, W. G. Harrison, and Alexander & Gary, for defendant in error.

POWELL, J. An action for slander was brought by Chambers against Taylor. The petition as amended alleged, in substance, that the defendant had said to H. W. Griffin, Samuel Long, J. D. Hutchinson, J. F. Robinson, W. W. Bird, W. F. Matthis, Joel W. Parrish, Willie Lassiter, and Eddie Lassiter that the plaintiff had burned a certain house of the defendant, thereby intending falsely and maliciously to impute to the plaintiff a felony, the crime of arson. In the fourth paragraph it is alleged that the defendant also tried to hire Long to swear that the plaintiff confessed the crime. In the sixth paragraph it is alleged that on the preliminary trial, at which the plaintiff stood charged with this offense, the defendant under oath publicly proclaimed that the plaintiff had burned the house. In the seventh paragraph it is alleged that the defendant attempted to indict the plaintiff before the grand jury for the offense, but failed. The defendant denied all the allegations of the petition, but set up additionally: "That it is true that in December, 1904, one of his houses, out of which plaintiff had just moved, was mysteriously burned, and all the circumstances pointed toward plaintiff being the perpetrator of the deed; that in good faith and in performance of a private and public duty he made affidavit and had plaintiff arrested for committing said act; that all words spoken by him were in furtherance of the belief, from facts and circumstances known, that plaintiff committed the act, and not from a wanton and malicious mind on the part of defendant, and, although a committal court did not find plaintiff guilty, the facts and circumstances surrounding the whole transaction point strongly to his being the perpetrator; that defendant has never since said committal trial attempted to push in any manner such charge against plaintiff, preferring to let the matter drop against him, merely from his own choice, and not from a belief of the innocence of plaintiff." The defendant also demurred generally and specially; but we do not deem it profitable to report the grounds herein.

There was no evidence as to the communication of the alleged slander to any of the persons named in the petition, except H. W. Griffin, Ed Lassiter, and Will Lassiter. After swearing out a warrant against Chambers charging him with arson, Taylor, in pursuance to directions from the magistrate, went to Griffin, on whose place Chambers was living at the time of the fire, and told him that the house had been burned, and that he desired to get the man who did it;

that from circumstances he was led to believe that Chambers was the guilty person; and that, desiring to prove Chambers' whereabouts on the night in question, he had come to him (Griffin) for information as to that fact. Ed Lassiter was the person who discovered that the house was on fire; and, he having expressed the belief that Chambers had burned the house, the defendant in discussing the matter agreed with him. Will Lassiter was also a witness to material circumstances in connection with the criminal prosecution, and in discussing the case with him the defendant expressed the belief that Chambers was guilty. There was no evidence supporting the other allegations of the petition. Taylor testified to a state of facts indicating utmost good faith in his discussing with the witnesses the plaintiff's suspected connection with the burning of the house. The jury returned a verdict for \$300 in favor of the plaintiff.

1. "Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Const. Ga. art. 1, par. 15 (Civ. Code 1895, § 5712). It is not an abuse of this liberty for one who has had his property burned, and who suspects another of having set it on fire, to institute a criminal proceeding against the latter, and, in connection therewith and in the preparation of the case, to make bona fide statements of his suspicions and grounds of suspicion to third persons, who would likely possess evidence as to the guilt or innocence of the accused, with the view of ascertaining how far their knowledge and information would corroborate or weaken the charge made; and this is true, whether the suspicions, if bona fide entertained, were well-founded or not. Such communications are privileged, and, if not maliciously made, are not actionable. In a slander suit, based upon such communications, malice is not presumed, and the burden of showing the same is upon the plaintiff. These principles are well recognized, and from an abundance of authority we cite only the following: Civ. Code 1895, § 3840; *Ventress v. Rosser*, 73 Ga. 539; *Newell on Slander and Libel* (2d Ed.) p. 500, §§ 98-100; *Id.* p. 478, § 68.

2, 3. In regard to rulings upon the pleadings in the trial court: The amendments made to the petition cured any error committed in overruling the demurrers, except as follows: The demurrer to the latter portion of the fourth paragraph of the petition should have been sustained; likewise the demurrer to the sixth and seventh paragraphs. The defendant's plea, not admitting the use of the words charged in the manner alleged, was not such a plea of justification as to give the defendant the right to open and conclude. There was no error in allowing the petition to be made more specific by amendment.

Judgment reversed.

(3 Ga. App. 84)

**TRAYLOR, SPENCER & CO. v. BRIMBERY. (No. 353.)**

(Court of Appeals of Georgia. May 24, 1907.)

**1. CONTRACTS—CONSTRUCTION—TIME AS OF THE ESSENCE OF THE CONTRACT.**

Time is of the essence of a contract, when the nature of the contract is such as to indicate that this must have been the intention of the parties. In order for a proposition to be binding upon him who makes the proposal, the opposite party must accept it before the time fixed for the performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 939-943.]

**2. SAME.**

In a case where B. agreed in writing to pay to the creditors of C., in the event that they "may hereafter accept my offer of settlement," 50% of principal in full settlement of said claims, paying 25% February 1, and 25% April 1, 1899," and D., one of the creditors, accepted the proposition on May 16, 1899, B. was not bound thereby to pay the said 50 per cent., for the reason that an acceptance after the date proposed for payment is not acceptance within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 67.]

**3. SAME.**

The evidence disclosing the above state of facts, in an action brought to recover the 50 per cent. proposed to be paid, it was not error to award a nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by Traylor, Spencer & Co. against M. F. Brimbery. Judgment for defendant, and plaintiffs bring error. Affirmed.

I. A. Bush & Sons and W. R. Hammond, for plaintiffs in error. Pope & Bennet, for defendant in error.

RUSSELL, J. Traylor, Spencer & Co. brought suit in a justice's court against M. F. Brimbery. Attached to the summons was the following account: "Winston, N. C., July 15, 1899. M. F. Brimbery, in Account with Traylor, Spencer & Company. Terms: 1/2 Feb. 1st; 1/2 April 1st, 1899. July 15. To cash acct. settlement and transfer acct. vs. A. B. Brimbery, at 50%, \$65.37." The case was appealed to the superior court, and upon introduction of the plaintiff's evidence a nonsuit was awarded.

The plaintiff introduced the following writing: "Camilla, Ga., Dec. 23, 1898. In consideration that the stock of goods, notes, accounts, and other property belonging to A. B. Brimbery is hereby placed in my hands for disposition, I hereby agree to pay to I. A. Bush & Sons, attorneys at law, for such of creditors of A. B. Brimbery as have not already accepted my offer of 50% in full settlement of claims, their pro rata share of the proceeds of said stock of goods, notes, and accounts, etc., as soon as the same can be reduced to cash by me. In the event that said creditors may hereafter accept my offer of settlement, as made to I. A. Bush & Sons, attorneys aforesaid, I agree to pay them 50%

of principal in full settlement of said claim, paying 25% February 1, and 25% April 1, 1899. Claims as follows: French, Morris & Co., \$100.95; Loomis & Hart Mfg. Co., \$49.10; Atlanta Wooden Ware Co., \$43.45; Traylor, Spencer & Co., \$127.00; Cumberland Paper Co., \$57.15; Ware Fur Mfg. Co., \$72.00; Wilber Seed Co., \$32.00; John C. Vogler, \$38.25; W. H. Marks & Co., \$23.50 (paid); Waxelbaum Pepper Co., \$49.00. [Signed] M. F. Brimbery."

I. A. Bush testified for the plaintiffs that I. A. Bush & Sons were attorneys for the plaintiffs when the agreement was signed by M. F. Brimbery. A. B. Brimbery, a son of defendant, failed in business and turned over to I. A. Bush his stock of merchandise and other property for the benefit of his creditors. M. F. Brimbery claimed to be one of A. B. Brimbery's largest creditors. The said M. F. made the proposition set out in the agreement, and by consent of A. B. Brimbery I. A. Bush & Sons turned all the property of A. B. Brimbery over to M. F. Brimbery. Soon after this M. F. Brimbery sold the stock of goods for \$2,000 or \$2,200. Witness was not able to state the amount realized out of the other property. He further testified that Marshall E. Bush, a witness on the former trial of the case, was dead; that the said deceased witness testified, on the former trial, that as soon as he was authorized by plaintiffs in this case he notified said Brimbery that he would accept his proposition of 50 per cent. on the dollar as full settlement. I. A. Bush further testified that he knew that M. F. Brimbery was notified by M. E. Bush, because he talked to him about it several times. The notice of acceptance was given M. F. Brimbery after the dates named in the agreement and after the date of the letter hereafter in evidence.

The plaintiffs introduced in evidence the following letter: "Danville, Va., May 16, 1899. Messrs. I. A. Bush & Sons, Camilla, Georgia—Dear Sirs: In reply to your favor concerning A. B. Brimbery's account, would say that you may accept 40% net to us in full settlement of the account. We trust that you will close the matter at once. Traylor, Spencer & Company." I. A. Bush then testified: "This letter from Traylor, Spencer & Co. to I. A. Bush & Sons came by due course of mail from the post office address of plaintiffs."

Omitting the objections to the magistrate's summons and to the peculiar wording of the account thereto attached, and that the contract proposed by Brimbery may well be construed as a contract between the defendant and I. A. Bush & Sons, attorneys at law, for all such creditors of A. B. Brimbery as have not already accepted the offer at 50 per cent. and not a contract for the plaintiffs individually, and remembering that niceties of pleading are not required in justices' courts (Southern Railway Co. v. Oliver, 1 Ga. App. 730, 58 S. E. 244), we come to the controlling

point in the case. We have no difficulty in construing the suit as one for \$65.37 in cash, which would have been the amount due if the plaintiffs had accepted the proposition. If the plaintiffs had accepted the defendant's proposal, he would have owed them 25 per cent. of their claim on February 1st, and 25 per cent. on April 1st, and this debt was to be discharged in cash. He had been intrusted with the stock of goods, and if this proposition was accepted the debt did not arise altogether from the contract; but the contract was also evidence of the amount he was to pay. Assuming, then, that the statement of account is sufficient for the purposes of a justice's court, and that suit was brought (as is apparent) to recover under the 50 per cent. proposition, and not the pro rata, was the evidence so insufficient to sustain the allegations that a nonsuit ought to have been awarded?

We think that the case was properly nonsuited. Admitting that the evidence harmonized with the summons and that the suit was brought to recover the 50 per cent. offered, the suit must fail for the reason that the evidence shows that the offer or proposal to pay 50 per cent. was not accepted until long after the time for the performance of the contract had passed. The proposal cannot be construed to be held out indefinitely, in view of the times fixed for the payments in case of acceptance; and the offer would have had to be accepted in a reasonable time. To a proposal made December 23, 1898, and payments under which were to begin February 1st following, an acceptance made several months thereafter (during May, 1899) would not be an acceptance within a reasonable time. It is evident, from the terms of the writing signed by Brimbery, that he proposed to pay the creditors either their pro rata share of the proceeds of the stock of goods, notes, accounts, etc., or 50 per cent. of the amount of the claim of each creditor, at his option. If he honestly administered the trust reposed in him, the creditor would receive his pro rata share, which might be more or less than 50 per cent. of his account. There was no risk in this to Brimbery. The risk was on the creditor. If the creditor accepted the 50 per cent., it devolved the risk upon Brimbery, and there was no risk on the creditor, though his pro rata share from the stock of goods might not have amounted to 10 per cent. of his claim. From the very nature of the transaction time was of the essence of the proposal to contract, and of the contract, if one had been made by acceptance on the part of the creditor.

If the creditor had accepted the 50 per cent. proposal before February 1, 1899, Brimbery would have been bound to pay the amounts contracted to be paid, regardless of what the stock brought and whether he had sold the stock or not. He would have been compelled to pay, if able to respond, even if the stock had been destroyed by fire. In

other words, he took all the chances. The plaintiffs really had three options. They could allow Brimbery to sell and collect for the stock, notes, accounts, etc., and take their pro rata in a division with all the creditors. They could have accepted the 50 per cent. or could have disregarded Brimbery's proposal altogether, sued the debtor, A. B. Brimbery, or his legal representative, and garnished M. F. Brimbery, obtained a judgment for the full amount justly due him, and perhaps, by garnishment, have collected his entire claim. By failing to accept either of Brimbery's proposals, he is remitted to the latter course of action.

Judgment affirmed.

(2 Ga. App. 218)

**INGRAM v. JACKSON MERCANTILE CO.**  
(No. 397.)

(Court of Appeals of Georgia. June 26, 1907.)

**1. GARNISHMENT—JUDGMENTS WHICH WARRANT—DORMANT JUDGMENT.**

Under Civ. Code 1895, § 3761, no judgment shall be enforced after it becomes dormant.

(a) To allow a dormant judgment to subject money through a process of garnishment based thereon would be to enforce it in violation of this section.

(b) A judgment obtained in a justice's court is dormant, where the execution issued thereon is more than seven years old, and neither the execution nor any official entry thereon has been entered upon the superior court execution docket; and this is true, although the execution has been, within the period named, entered upon the general execution docket.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 8; vol. 31, Justices of the Peace, § 415.]

**2. SAME—JUDGMENT AGAINST DEFENDANT—NECESSITY.**

A valid existing judgment against the defendant is a condition precedent to a judgment against the garnishee; and the latter may contest the validity of the judgment against the defendant, when the same is offered as a basis for a judgment in the garnishment case. This is true, although the garnishee has failed to make answer, or has answered admitting indebtedness to the defendant, or has answered denying indebtedness, and, upon traverse, the issue has been found against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 249.]

(Syllabus by the Court.)

Error from Superior Court, Butts County; C. L. Redman, Judge pro hac.

Garnishment proceedings in a justice's court by the Jackson Mercantile Company, on a judgment obtained against J. M. Ingram, against J. S. Ingram, administrator of the estate of Susan P. Ingram, deceased. From a judgment of the superior court for plaintiff on certiorari to review the judgment in justice's court for the garnishee, the garnishee brings error. Reversed.

O. M. Duke, for plaintiff in error. H. M. Fletcher and Ray & Ray, for defendant in error.

POWELL, J. On May 15, 1897, the Jackson Mercantile Company recovered judgment

in a justice's court against J. M. Ingram. On May 21, 1897, execution was issued. On August 28, 1897, the execution was placed upon the general execution docket of the county. On January 9, 1904, an entry of nulla bona was made on the execution; but neither the execution nor the entry of nulla bona has ever been recorded on the superior court execution docket. On October 17, 1906, the Jackson Mercantile Company sued out a garnishment proceeding based on this judgment, and caused summons of garnishment to be served upon J. S. Ingram, administrator upon the estate of Susan P. Ingram. To the answer of the garnishee there were filed both an objection as to its being sufficient, and as to the time of its filing, and also a traverse. When the execution was offered on the trial, as evidence of the plaintiff's judgment against the defendant, the point was made that it was dormant. The jury found in favor of the garnishee. The plaintiff sued out certiorari; and on the hearing in the superior court the judge pro hac vice awarded final judgment in favor of the plaintiff, presumptively upon the theory that the answer of the garnishee was insufficient, or not filed in time, and that the garnishee was, therefore, not in position to attack the validity of the plaintiff's judgment.

1. The judgment was dormant. This is clear. When a judgment is obtained in a justice's court, in order to prevent dormancy, the execution and entries are to be recorded upon the superior court execution docket, not upon the general execution docket. The record upon the latter docket is for a different purpose. Civ. Code 1895, § 3762; Columbus Fertilizer Co. v. Hanks, 119 Ga. 950, 47 S. E. 222; Rountree v. Jones, 124 Ga. 395, 52 S. E. 325. A dormant judgment is asleep for all purposes, legal and equitable; and by the express letter of Civ. Code 1895, § 3761, it is not to be enforced. Palmer v. Inman, 126 Ga. 519, 55 S. E. 229. To let it seize money through a process of garnishment would unquestionably be to enforce it, and would be a violation of the law.

2. A valid existing judgment against the defendant is a necessary prerequisite to a judgment against the garnishee; for the existence of such a judgment is the only and adequate answer of the garnishee to the defendant when the latter calls upon him for payment of the indebtedness existing between them. The garnishee may by answer admit indebtedness to the defendant, or, by failing to answer, may put himself into a position where the court conclusively presumes against him an admission of such indebtedness, or he may become estopped to deny the indebtedness, by reason of a finding in favor of a traverse to his answer. Still he is not to be required to pay to the plaintiff the money actually or constructively admitted or found to be due to the defendant until the plaintiff submits a judgment against the defendant, valid against the latter and sufficient

to protect the garnishee from the subsequent demand of the defendant against the garnishee for the same fund. Until the garnishee has actually or constructively admitted the indebtedness, or a finding has been rendered against him estopping him from denying the indebtedness, and final judgment is about to be entered against him, the garnishee has no interest in the question whether the plaintiff has a valid judgment against the defendant or not; but then, though not till then, it is his right and duty to inquire into the validity of the alleged judgment against the defendant, on which the final judgment against the garnishee must necessarily rest. Merchants' Bank v. Haiman, 80 Ga. 624, 5 S. E. 795. See, also, Fagan v. Jackson, 1 Ga. App. 24, 57 S. E. 1052.

Judgment reversed.

(2 Ga. App. 53)

Burr v. ATLANTA PAPER CO. (No. 222.)

(Court of Appeals of Georgia. May 24, 1907.)

# 1. SALES—WARRANTIES—CONSTRUCTION AND OPERATION.

In the case of an express warranty that the property sold will be of a particular kind and quality, the purchaser has a right to rely on the warranty, and may plead partial failure of consideration, growing out of defects discovered after acceptance, even though such defects would have become apparent upon an examination before delivery. Cook v. Finch, 44 S. E. 95, 117 Ga. 541. And partial payments, with knowledge of the defective condition, will not estop the buyer from pleading partial failure of consideration. Moultrie Repair Co. v. Hill, 48 S. E. 143, 120 Ga. 731.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 817-823.]

# 2. SAME—ACTIONS—EVIDENCE.

The defendant having pleaded and relied upon an express warranty and partial failure of consideration, evidence tending to show that the article sold was defective in certain particulars covered by the express warranty was properly admitted; and, the jury having sustained the defendant's plea, their verdict will not be disturbed.

# 3. SAME.

The fact that "the vendee accepted delivery of inferior box board, and, with knowledge of its inferiority, caused it to be made into boxes," and for that reason "the vendor would not be answerable in damages for loss accruing from making the box board into boxes," has no application in a case where recoupment is not pleaded nor damages asked. While, as a general rule, a vendee cannot complain, after acceptance of an article with knowledge of its defective condition, that it is inferior to the quality contracted for, yet where the seller, upon complaint made by the buyer, expressly authorized the vendee to use the article (box board), admitting that it was not up to warranty, and leaving the entire matter in the hands of the vendee, and, after knowledge that the vendee claimed that the goods were of an inferior quality, accepted a payment on the goods sold, such a state of facts presents an exception to the general rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 817-823.]

# 4. WRIT OF ERROR—PRESENTATION OF ERROR—INSUFFICIENCY OF EVIDENCE.

Complaint cannot be made that evidence is too vague, uncertain, and indefinite to authorize a verdict, when such evidence corresponds in nature, statement, and definiteness with the pleadings, unless attention has been called there-

to by demurrer to the pleadings or objection at the trial to the evidence. A case is sustained when the proof fits the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1290.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between the Atlanta Paper Company and C. H. Burr, Jr. From the judgment, Burr brings error. Affirmed.

W. R. Hammond, for plaintiff in error.  
Slaton & Phillips, for defendant in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 158)

AGER v. STATE. (No. 482.)

(Court of Appeals of Georgia. June 19, 1907.)

**1. INDICTMENT—MATTERS TO BE PROVED—SURPLUSAGE—CRIMINAL LAW—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

The name "Americus Furniture & Undertaking Company" connotes a corporation. An allegation, in a criminal accusation, that this company is a corporation, is surplusage, and need not be proved. The admission of secondary evidence tending to prove such allegation is therefore harmless error, where the corporate entity has not been put in issue. *Crawford v. State*, 68 Ga. 822; *Mattox v. State*, 41 S. E. 709, 115 Ga. 221; *Alsbrook v. State*, 54 S. E. 805, 126 Ga. 102.

**2. FALSE PRETENSES—TRIAL—INSTRUCTIONS.**

In a case of cheating and swindling, to give in charge to the jury section 31 of the Penal Code of 1895, without more, is not sufficient compliance with a written request to charge that "intention is an essential ingredient, and it must be proved beyond a reasonable doubt, and before you will be authorized to convict it must appear that it was the intention of the defendant at the time to cheat and defraud the prosecutor." *Crawford v. State*, 43 S. E. 762, 117 Ga. 251, 252; *Mulkey v. State*, 58 S. E. 1022, 1 Ga. App. 521.

**3. WRIT OF ERROR—REVIEW.**

No other error appears.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Simon Ager was convicted of cheating and swindling, and he brings error. Reversed.

Howell B. Simmons, for plaintiff in error.  
Zach Childers, Sol., for the State.

POWELL, J. Judgment reversed.

(2 Ga. App. 182)

SOUTHERN RY. CO. v. FLYNT. (No. 245.)

(Court of Appeals of Georgia. June 20, 1907.)

**1. RAILROADS—INJURIES TO PERSONS ON ADJACENT HIGHWAYS.**

The statute requiring the blowing of the whistle or the ringing of the bell and the checking of the speed of the train when approaching a public crossing is not applicable when the injury occurred elsewhere than at a public crossing. The statute is for the protection of those on the crossing, approaching with the intention

to use it, or who have just passed over the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1260.]

**2. SAME—VIOLATION OF RULE OF RAILROAD—PROXIMATE CAUSE.**

The violation of a rule of the company in the operation of its trains is not actionable negligence, unless such violation was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1390.]

**3. SAME—DUTY OF RAILROAD.**

Relatively to travelers on adjacent highways, when the crossing law is not applicable, railroad companies are under no duty to regulate the speed of their trains to prevent horses from becoming frightened at the sight of the moving train, or the noise produced thereby, and are not liable for injuries resulting from horses becoming frightened on highways at the mere sight of its trains, or the noises usually and necessarily incident to the running of the trains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1260, 1271.]

**4. SAME.**

Railroad companies are not required, where the crossing law does not apply, to give any warning signal to travelers upon adjacent highways of the approach of the train; nor are they required to keep any lookout for such travelers. The probability of horses becoming frightened on public roads near to railroad tracks by the running of trains, which may result in injury, is a risk which the traveler on the road assumes, and is one for which the railroad company is not responsible, unless caused by the negligent conduct of its employees in operating the train in an unusual and unnecessary manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1260.]

**5. SAME.**

The duty to give warning signals, and to keep a lookout is limited to persons on the track, or that apparently may get on the track. No such duty is required as to travelers on adjacent and parallel highways.

**6. SAME.**

Where those in charge of the running train see apparent danger to persons on the highway, it then becomes their duty to use reasonable and practicable care to prevent injury.

**7. SAME.**

"Injuries resulting from the frightening of a horse by the appearance of moving railway cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, are *damnum absque injuria*."

**8. SAME.**

Applying the foregoing principles of law to the petition and the amendments thereto, there was no actionable negligence alleged, and the general demurrer to the petition as amended should have been sustained.

(Syllabus by the Court.)

Error from City Court of Forsyth; W. M. Clark, Judge.

Action by J. W. Flynt against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Arthur Heyman and Cabaniss & Willingham, for plaintiff in error. Smith, Berner, Smith & Hastings, for defendant in error.

HILL, C. J. J. W. Flynt brought suit against the Southern Railway Company to recover damages for the loss of the services of his wife. In his original petition he alleged

the following facts: On December 29, 1904, he and his wife were riding in a buggy along a public street in the town of Culloden. The street crossed the track of the defendant, and, after crossing the track, ran for some distance parallel to the same. As petitioner drove his buggy up to said crossing, he stopped and listened for the train, heard none, and drove over the crossing. If any warning had been given by the ringing of the bell or the blowing of the whistle, he would not have driven upon and over said crossing until the train had passed. While the buggy in which he and his wife were riding was near the track of the defendant, and the horse was turning into the street, a freight train approached the crossing at a rapid rate of speed without ringing the bell, or blowing the whistle, or giving any other warning, thereby frightening the horse and causing him to become unmanageable. The horse ran a short distance from the track, and then began backing towards the track, and his wife, fearing that he would back onto the track and into the train, and cause her death, jumped from the buggy to the ground. He alleges, further, that the defendant failed to check and keep checking the speed of said train as it approached the crossing, and failed to ring the bell or blow the whistle, all of which he alleges was negligence; that because of the situation of the public street and the railroad at said place, it was one in which horses and animals would be frightened at the approach of trains, and the defendant knew this, or would have known it by the exercise of reasonable care, and in the exercise of reasonable care should have blown the whistle or rung the bell as the train approached said place, and the failure to ring the bell or blow the whistle as it approached said place was negligence. Each and all of said negligence, it is alleged, caused the injury to plaintiff's wife. The petition fully sets forth the character of her injuries, her age, the value of her services, and doctors' bills. To this petition the defendant demurred generally, on the ground that the petition "does not set forth any cause of action," the demurrer setting forth specifically wherein the petition fails to set forth any cause of action, and demurred specially on the ground that the petition failed to set forth with sufficient particularity the rate of speed which was complained of.

To meet this demurrer the plaintiff amended his declaration as follows: The train was running over the crossing at a rate of 10 or 15 miles an hour. Plaintiff and his wife were riding in his buggy about dark. On their approach to the town of Culloden they crossed the track of the railroad company and turned into a public road which ran parallel with the track for several hundred yards, down to another public crossing just north of the depot of the defendant. The track and the public road were close to each other. Looking down this road to the depot

of the defendant, a person would be unable in the nighttime and at the hour in which they were traveling to determine whether the train was moving at all, and, if moving, whether it was moving from or towards him; the inability to determine this fact being due to the straightness of the road and the track with reference to the depot. The place on the public road at which the injury occurred was near the public crossing within the city limits. In view of this fact, and the locality of the public road with reference to the track, it was the duty of the company to operate its trains, especially after dark, with such care and diligence, and to have its trains under such control, that they could be stopped at any time in the event travelers along the road were being endangered by their operation, and failure to exercise this care and diligence in this particular case brought about said injuries, for which the defendant is liable. It is a rule of the defendant that, "when cars are pushed by an engine (except when shifting and making up trains in the yards), a white light must be displayed on the front of the leading car at night." The train which caused the injury was being pushed back by the engine, and there was no light of any character upon the front of the rear car to put the defendant upon notice that the train was moving in his direction, so that he could be upon his guard and get out of the buggy, or otherwise avoid the danger of the train, and this failure to comply with said rule was negligence. It was the duty of the defendant, in the exercise of reasonable care and diligence, when it undertook to operate its trains from the depot back towards Atlanta and over the public crossing near the depot, and along the highway over which the petitioner and his wife were traveling, to have a flagman or other employé on the end of the rear coach, so as to detect any danger to travelers over said road and avoid injuries to them. This was especially true in view of the fact that there was a public crossing over said railroad track; and in any view it was the duty of the company, in operating its trains after night, pushing them back, to have rung the bell, blown the whistle, or to have had a light upon the rear end of the said car, or an employé thereon to detect the danger to travelers and avoid injuries to them. Failure to have said light or said employé on the end of said car, or to ring the bell, or to blow the whistle, was negligence, for which the defendant was liable in the event of injury resulting.

Although it is alleged that the train approached a public crossing at an illegal and rapid rate of speed, without checking the speed, or blowing the whistle, or ringing the bell, it is clear, from the allegations of the petition as amended, that a violation of the requirements of the public crossing law is not relied upon as a ground of recovery. This law is made only for the protection of

travelers at or near the crossing, and in this case it is alleged that the plaintiff had left the crossing and was in the public road running parallel with the railroad down to the crossing near the depot. Indeed, the crossing over which the plaintiff had driven was not the crossing which it is alleged the defendant approached and ran across without complying with the law. This was the crossing nearer the depot, and it is not alleged that the plaintiff intended to use this crossing. On the contrary, it is apparent that he did not so intend. It is stated by the learned and eloquent attorney for the defendant in error that "the plaintiff put his right to recover, not upon the violation of the statute with reference to public crossings, either within or without the limits of a town, but upon the failure of the defendant to exercise reasonable care and diligence in the operation of its trains after dark, and at the particular place described in the petition and the amendments thereto." At this time and place, the acts of omission and commission relied upon as constituting negligence may be succinctly summarized as follows: (1) A failure to comply with a rule of the company requiring a white light on the front of the rear car of a backing train. (2) The illegal and rapid rate of speed of the backing train, which frightened the horse. (3) The failure of the company to warn the plaintiff that the train was approaching on the track near the parallel highway over which he was traveling with his wife; the time being at night, and the plaintiff not being able to discern, on account of the straightness of the track and its parallel relation to the highway from where he was to the depot where the train was, whether it was moving from or towards him, and the place where plaintiff was driving being on a public road in a town, near to the track, and over which it was to be reasonably expected that numbers of people would be traveling. For these reasons it is alleged that ordinary diligence required the defendant to run its trains slowly, to use the white light at the front of the rear car of the backing train, and to give warning signals and keep a lookout for people who might be on this nearby parallel public road.

Do these allegations set forth a cause of action against the defendant company? The test of liability is the existence of some duty, and the proof of liability is the breach of this duty, and both the duty and the breach must be alleged and proved by the plaintiff. Failure to discharge a duty to the plaintiff, and resulting injury to him, are indispensable elements of actionable negligence. As Mr. Justice Lumpkin expresses it: "Relatively to one to whom no diligence whatever is due, there can, in legal contemplation, be no negligence at all in causing him a personal injury, and the measure of the diligence due by a railroad company to any person is a

relative one, and what is or is not due diligence must be arrived at in every case with reference to the surrounding circumstances and the relation which, for the time being, the company and the person in question occupied towards each other." *Holland v. Sparks*, 92 Ga. 753, 756, 18 S. E. 990, 991. So the fundamental question in this case is: What duty of diligence did the company owe to the plaintiff at the time and place of the injury? This question must be resolved solely from the allegations of the petition. It is alleged that the company was negligent, in that it violated the following rule of the company: "When cars are pushed by an engine (except when shifting or making up trains in the yards), a white light must be displayed on the front of the leading car at night." It is claimed that the violation of this rule was negligence as to the plaintiff, because the failure to use the white light on the front of the rear car of the backing train prevented him from discovering that the train was backing towards him, so that he could have been upon his guard and gotten out of the buggy and avoided the danger. It is not alleged that the rule was applicable to the facts of the case, or that the cars pushed by the engine were not within the exception to the rule. Indeed, it is fairly inferable from the petition that the engine was shifting the cars and making up the train at or near the depot. Besides, it is distinctly alleged that the proximate cause of the injury was the fright of the horse, and that the horse became frightened at the rapid rate of speed of the train. The failure to have the light was, therefore, not negligence causing the injury, if negligence at all. The allegation that the light would have enabled the plaintiff to avoid the injury is remote and conjectural.

It is next alleged that the "train approached said crossing at a rapid rate of speed, without ringing the bell, or blowing the whistle, or giving any warning, thereby frightening the horse and causing him to become unmanageable." Eliminating from this statement any applicability to the public crossing statute, in accordance with the allegations of the petition as amended and the declaration of counsel for defendant in error, and we have the situation presented, upon which negligence is based, of a traveler on a public highway, near the railroad, whose horse is frightened by the rapid speed of the train. Of course, the negative statement that this illegal and rapid speed was unaccompanied by the blowing of the whistle or the ringing of the bell was not intended as matter of aggravation. The failure to do these things, reasonably considered, diminished the peril of the situation. Therefore the only pertinent and illustrative allegation of negligence is the rapid rate of speed of the train, which frightened the horse on the adjacent highway. An allegation of negligence in respect to the speed of the train can only be



material where the law imposes some duty upon the railroad company to regulate its speed in reference to the place where the train is operated. There is no allegation here that the speed of the train was contrary to any public law, state or municipal. As to a traveler on a highway who did not intend to cross the track, there was no duty imposed upon the railroad company as to the speed of the train. There is no allegation of any unusual and unnecessary noise caused by the running of the train; and, so far as this court is advised, the railroad company had the right to run its train on its track at the time and place and with reference to the traveler on the highway, regardless of speed.

The allegation "that the close proximity of the train and the rapid and illegal rate of speed at which it was running made it impossible for the plaintiff or his wife to get out of the buggy in time to avoid injury" does not alter the case. It would be impossible for a railroad company to run its trains in such a manner as to allow travelers on an adjacent highway to get out of vehicles, if horses indicated fright at the approach of trains, and the law does not impose upon railroad companies such an onerous burden or impracticable duty. Fright of horses caused by running trains is one of the necessary risks which travelers on the highways take. Injuries resulting from horses becoming frightened by the appearance of railway cars, trains, or locomotives, or the usual noise incident to its ordinary operation, are *damnum absque injuria*. *Dewey v. Chicago N. & St. P. Ry. Co.*, 75 N. W. 74, 99 Wis. 455. "A railroad company is not liable for injuries resulting from horses becoming frightened on the highways at the mere sight of its trains or the noises necessarily incident to the running of trains or the operation of the road." 3 *Elliott on Railroads*, § 1264; 2 *Thompson on Negligence*, § 1908.

The plaintiff alleges that on account of the location of the track with reference to the public road, and the impossibility for himself or his wife to look down towards the depot, where the train was standing or being operated, and to tell whether it was moving towards them, it was the duty of the company, in operating at this point and along this track, to use such care and diligence that its employees would be able to stop the train, if at any time it should appear that travelers and teams were in danger by the operation of its trains, and that such care and diligence required that a railroad company should notify the travelers on the highway of the approach, either by a light, or the ringing of the bell, or having an employé on the front end of the rear car, for the purpose of detecting danger to travelers and avoiding injury to them. In our opinion railroad companies owe no such degree of diligence to travelers on adjacent highways. The railroad companies have as much right to use

their tracks as travelers have to use the highway. It is the duty of travelers on adjacent and nearby public roads to keep a lookout for approaching trains, and to guard against injuries resulting from horses becoming frightened. The traveler is in a much better position to prevent dangerous consequences from frightened horses than the railroads are to prevent the fright of horses. That horses on highways will become frightened at the cars cannot be foreseen or prevented by those in charge of running trains. Travelers have such knowledge and such power in the exercise of proper diligence. The law simply imposes upon railroad companies the duty of operating trains relatively to adjacent highways so as not unnecessarily to interfere with the rights of individuals traveling such highways, or to endanger such travelers by unusual and unnecessary noises. The duty of keeping a lookout and of giving warning is limited to the track and the public crossing. It does not extend to travelers on adjacent highways. "A statute which requires railroad companies to give a warning signal of the approach of trains to their crossings of the road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use the crossing, and such parties cannot recover of railroad companies for a failure to give the warning. This record does not tend to prove any negligence on the part of the railroad company. The fact that it failed to give the statutory signal for a crossing is the only evidence of its negligence. It owed no duty to ring its bell or sound its whistle because the plaintiff was driving along the public road, unless that duty was imposed upon it by this statute. In the absence of a statute, it has as much right to use its railroad for its trains, without notice to the plaintiff, as the plaintiff had to use the public road without notice to it." *Reynolds v. Great Northern Ry. Co.* (C. C. A., 8th Circuit) 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695. "The railway company owes to a workman in an adjacent field, to a domestic in a neighboring house, or to a traveler on a parallel road, who has not crossed and does not intend to cross or enter upon the railroad, no duty to signal the approach of its train." 69 Fed. 808, 16 C. C. A. 435, 29 L. R. A. 695; *Carrington v. L. & N. Ry. Co.*, 6 South. 910, 88 Ala. 472. It is well settled that no negligence can be imputed to a railroad for failure to give warning of approaching trains by reason of the close proximity and paralleling of its right of way to the public thoroughfare. *Favor v. Boston & Lowell R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364; *Melton v. St. Louis Ry. Co.*, 73 S. W. 232, 99 Mo. App. 232; *Bailey v. Hartford R. Co.*, 16 Atl. 234, 56 Conn. 444; *Lamb v. Old Colony R. Co.*, 2 N. E. 932, 140 Mass. 79, 54 Am. Rep. 449.

While we do not think the law imposes

upon railroad companies the duty of keeping a lookout or of giving warning to travelers on an adjacent highway of the approach of trains, yet, when danger to such traveler is discovered, it then becomes a duty to use care to avert an injury, such care as the then situation would make it practical and possible for the railroad in the proper conduct of its business to use. *L. & N. R. Co. v. Smith*, 53 S. W. 269, 107 Ky. 178; *Lamb v. R. Co.*, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; *Ala. Great Southern Ry. Co. v. Fulton*, 144 Ala. 332, 39 South. 282; *Louisville, N. A. & C. R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774. In the case now under consideration, the sole allegation of negligence causing the injury is that the running of the train at such a rapid rate of speed caused the fright of the horse. It has been repeatedly held, not only by the Supreme Court of this state, but in many other jurisdictions, that railway companies were not liable for the fright of horses, and injuries resulting therefrom, caused by the running of engines, cars, or trains, unless such running was accompanied by unusual and unnecessary noises. The uniform ruling of the courts on this question is tersely expressed by the decision of the Supreme Court of Pennsylvania in *Yingst v. Lebanon Street Ry. Co.*, 31 Atl. 687, 167 Pa. 438: "As the right of the defendant company to run its cars on its track is fully equal to the right of the plaintiff to ride in a wagon on the street, the mere fact that the horse took fright at the sight of the cars confers no right of action whatever against the defendant." And in the case of *Douglas v. Railway Co.*, 88 Ga. 282, 14 S. E. 616, the Supreme Court says: "Where the proximate cause of an injury received by a person from a plunging horse, which took fright at an approaching train, was the noise made by the emission of steam by the engine of the train, the railroad company will not be liable in damages to the person so injured, unless it appears that the noise was unusual or unnecessary at the time when and the place where it was made."

We therefore hold that the allegations of the petition as amended did not set out any facts indicating that the railroad company was chargeable with actionable negligence causing the injury to the plaintiff's wife, and the court should have sustained the demurrer.

Judgment reversed.

(2 Ga. App. 171)

ROBERTS v. DOCKINS (two cases). (Nos. 321, 322.)

(Court of Appeals of Georgia. June 20, 1907.)

1. WRIT OF ERROR—REVIEW.

In case No. 321, the pleadings and evidence contained in the record do not warrant the verdict rendered.

2. SAME.

In case No. 322, the pleadings and evidence do warrant the verdict, and no error appears.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Two actions between T. G. Roberts and A. M. Dockins. From the judgment in each case, Roberts brings error. Judgment as to one case affirmed, and as to the other reversed.

J. R. Grant, J. C. Edwards, and McMillan & Erwin, for plaintiff in error. W. S. Paris, for defendant in error.

POWELL, J. The two actions were commenced in the justice's court and came to the superior court by appeal. The original summonses were identical; both being in the usual form and requiring the defendant to appear to answer a complaint "In an action upon two promissory notes dated December 25, 1894, for \$50 principal each, a copy of which said notes is hereto attached." Each summons had attached, without explanation, not two notes, but four notes, for \$50 each, all dated December 25, 1894, and maturing consecutively on the 25th day of December of each of the years from 1896 to 1899, inclusive. Certain identical small credits, aggregating less than \$50, were entered after the copies of the notes in each case. In case No. 322, in the superior court, the plaintiff made an amendment to his summons, and therein stated that the two notes sued on in this case were the notes maturing in the years 1898 and 1899; but the clerk certifies that no amendment was filed in case No. 321, though in the bill of exceptions an amendment to the summons is specified as a part of the record. It appears from a note by the trial judge attached to the brief of the evidence that all of these notes were written on one sheet of paper and constituted one transaction, and were all introduced in evidence in both cases. In case No. 321, in the brief of the evidence, is the following explanation: "Plaintiff's attorney stated that they were only suing on the note maturing December 25, 1899, and that the other three were only offered to show the land transaction—three being on the same sheet of paper." In case No. 322, in the brief of the evidence, the same language appears, except that the words "December 25, 1898," are used instead of the words "December 25, 1899." The only evidence introduced was the four notes. In case No. 321 the court directed a verdict for \$71.26; in case No. 322, for \$100. There are in the record several assignments of error; but, except as herein indicated, none of them are meritorious.

1. In case No. 321, since four notes were attached to the summons, and there was nothing in the pleadings to identify which two were being sued upon, the court erred in directing a verdict for the sum of \$71.26, especially so in the light of the fact that, although all four of the notes were introduced, only one of them, according to statement of plaintiff's counsel, was relied upon. We might, in order to give a reasonable intend-

ment to the action of the court, disregard the statement of counsel; but, if we do so, there is nothing in the record by which the verdict can be supported. A single note would not justify the amount found. All four of the notes would prove a case for more than \$100, which would be beyond jurisdiction of the court; the case being an appeal.

2. In case No. 322 the amendment did identify the two notes sued on; and, since these two notes were in evidence, we sustain the action of the court in this case.

In case No. 321, judgment reversed; in case No. 322, judgment affirmed.

(2 Ga. App. 246)

**E. VAN WINKLE GIN & MACHINE  
WORKS v. PITTMAN et al.**  
(No. 318.)

(Court of Appeals of Georgia. July 4, 1907.)

**1. TRIAL—RIGHT TO OPEN AND CLOSE.**

The right to open and conclude in a jury trial is of great importance; and the plaintiff should not be deprived of this right, unless the defendant, in his pleadings, before the introduction of any testimony by the plaintiff, admits facts authorizing, without further proof, a verdict in the plaintiff's favor for the full amount claimed in the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 47.]

**2. SAME.**

Oral admissions by the defendant are not sufficient to entitle him to the opening and conclusion. Admissions for that purpose must be made in his pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 50.]

**3. SAME.**

In a suit by a corporation, as such, on a promissory note which contains a provision for attorney's fees, and alleging written notice of intention to sue, as required by law, an admission in the answer, limited to the execution of the note, accompanied with a denial of the allegation as to notice of intention to sue, is not sufficient to entitle the defendant to open and conclude the argument.

(Syllabus by the Court.)

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by the E. Van Winkle Gin & Machine Works against W. C. Pittman and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. S. Ayers and Ellis, Wimblish & Ellis, for plaintiff in error. John B. Gamble and Shackelford & Shackelford, for defendants in error.

**HILL, C. J.** This was a suit on a promissory note. The petition alleged that the plaintiff was a corporation, that the defendants were jointly and severally indebted to it in the amount of the note made and delivered to it by the defendants, and that written notice had been duly served on the defendants of an intention to sue. The defendants filed a joint answer. They denied that plaintiff was a corporation under the laws of Georgia. They denied that any

written notice was served on them as required by law of an intention to sue. They admitted the execution of the note sued on. They further answered that they had paid \$100 on the note, which had not been credited to them. The jury found a verdict for the plaintiff for the amount which the defendants admitted in their answer was due on the note. The plaintiff made a motion for a new trial, and the court overruled the motion. On the trial of the case, when counsel for plaintiff had opened the case and tendered in evidence the note sued on, the attorneys for the defendants stated orally that the defendants would admit a prima facie case, and asked that they be allowed the opening and conclusion. Over the objection of the plaintiff, the court permitted the defendants to assume the burden and open and conclude the argument before the jury. The plaintiff excepts to this ruling, because it deprived the plaintiff of its legal right, and was contrary to law and the rules of the court. Besides the general grounds, it assigns several errors in the admission of testimony. We think it only necessary to review the ruling allowing to the defendants the right to open and conclude the case.

1, 2. The Supreme Court has frequently held that the right to open and conclude in a jury trial is an important right, and that an improper denial will work a reversal. *Buchanan v. McDonald*, 40 Ga. 288; *Chapman v. Atlanta & West Point Railroad*, 74 Ga. 548; *Fisher v. Jones Co.*, 108 Ga. 490, 34 S. E. 172. This right is most valuable when the questions in the case are largely dependent upon the facts, and the opinion which the jury may entertain of conflicting evidence. Of course, the general rule is that this right belongs to the plaintiff; and before the defendant will be entitled to open and conclude the argument he must in his pleadings admit enough to make out a prima facie case for the plaintiff. In other words the pleadings of the defendant must contain admissions sufficient to entitle the plaintiff to a verdict for the full amount sued for. Admissions made by the defendant for the purpose of gaining the advantage of opening and concluding must be in his pleadings, and not merely oral. *Du Bignon v. Wright*, 122 Ga. 263, 50 S. E. 65; *Dorough v. Johnson*, 108 Ga. 812, 34 S. E. 168. The foregoing being well settled as rules of law, does the admission contained in the answer of the defendants measure up to the requirements? This is a suit on a promissory note. The admission in the answer is: "Defendants admit the execution of the note sued on." "The defendant in an action upon a promissory note payable to the plaintiff or bearer is entitled to open and conclude, when by his plea he admits the execution of the note sued on and that the plaintiff is the legal holder of the same." *Levens v. Smith*, 102 Ga. 480, 31 S. E. 104.

3. It is insisted that the admission in

the answer as to the execution of the note sued on was not sufficient, in that it failed to admit that the plaintiff was the legal holder of the same, and as such entitled to bring the suit, and that the denial of the allegation of corporate existence made it necessary for the plaintiff to prove that fact. The plaintiff is the payee named in the note. Its name imports a corporation, even if there was no such allegation. A presumption of corporate existence was thus raised and the burden was cast on the defendants to prove affirmatively that no such corporation existed. The admission, aided by this presumption, was sufficient on this part of the plaintiff's case. Besides, we cannot see how the corporate existence of the plaintiff was at all material to the defendants. They admitted the execution of the note. The suit was brought by the payee against the makers, and whether such payee was a corporation or a partnership was wholly inconsequential. But the plaintiff, according to the terms of the note, also sued for attorney's fees, and alleged that written notice of intention to sue had been properly given the defendants. This allegation was denied in the answer, which made it incumbent upon the plaintiff to prove it in order to recover attorney's fees. "To entitle the defendant in a civil action arising ex contractu to the opening and conclusion of the argument by virtue of the admission that the plaintiff has a prima facie right to recover, the defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in the plaintiff's favor for the full amount claimed in the declaration." *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Phoenix Insurance Co. v. Gray*, 113 Ga. 432, 38 S. E. 992. We are clear that the admission made by the defendants, for the reasons stated, was not sufficient to entitle them to the right to open and conclude the case, and that the trial court erred in permitting them to do so.

The other grounds in the motion for a new trial, as corrected and verified, are without merit.

Judgment reversed.

(2 Ga. App. 175)

#### WORTH COUNTY v. SYKES. (No. 348.)

(Court of Appeals of Georgia. June 20, 1907.)

#### COUNTIES — OFFICERS — COMPENSATION — COUNTY TREASURER — COMMISSIONS.

A county is not liable to the county treasurer for commissions upon a fund which he never handled, and which was raised by private donation and deposited with the ordinary, with the conditions imposed that the ordinary should personally disburse it in buying a lot and in paying other expenses in the erection of a public building for the county, and that he should not pay it into the county treasury.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by B. F. Sykes against Worth coun-

ty. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Tipton, for plaintiff in error. Polhill & Foy, for defendant in error.

POWELL, J. To influence the removal of the county seat of Worth county from Isabella to Sylvester, citizens of the latter community agreed in public advertisement to erect a new courthouse and a jail in the event of such removal, and as a guaranty of good faith deposited with the ordinary of the county certified checks for \$10,000. The removal was duly authorized. Afterwards the ordinary, acting for the county, decided that it would be wise to erect buildings more commodious than those originally planned and costing more than \$10,000. It was thereupon agreed between the ordinary and the committee representing the citizens of Sylvester that out of the fund deposited the ordinary should buy lots for the courthouse and the jail, and use the remainder in paying, as far as it would go, other necessary expenses incident to removing the old offices and erecting the new buildings; but it was stipulated, in order to avoid charges for handling the fund, that the same should be disbursed by the ordinary directly, and should not be handled through the county treasury. There was a condition in the original offer that all expenses of an election contest should first be paid out of the sum above mentioned; and these expenses, amounting to \$1,310, were retained before the money was turned over to the ordinary. Out of the fund which went into his hands the ordinary bought lots for the courthouse and the jail, and used the remainder of the money, with the exception of about \$2,000, in paying the architect's fee and similar bills. Before the sum of \$2,000, just referred to, was expended, the ordinary decided to remove from the county; and, with the consent of the committee, he paid that amount into the county treasury. After the funds came into the hands of the ordinary, the county treasurer demanded that they be paid into the treasury. Except to the extent indicated above, this demand was refused. Thereupon the treasurer sued for his commissions on the money and recovered judgment for commissions on the full amount, less the sum retained for expenses of the contest and the \$2,000 which had been paid over to him.

In the argument of the case many nice questions were ably presented. We do not deem it necessary to enter at length upon a discussion of them; for, after full consideration of them all, we think that the case finally turns upon the points herein decided. While by Pol. Code 1895, § 458, "all county funds are to be paid to and disbursed by the county treasurer, except such as may be specifically excepted by law, and then to be collected and disbursed as specially directed," and while by Pol. Code 1895, § 460, it is the duty of

that officer "to diligently collect from all officers and others all county dues," yet we do not think that the fund in controversy was a county fund in the sense used in the statute; nor do we think that the treasurer had the right to demand of the ordinary custody of the same. We concede that the citizens of Sylvester might have made a donation of money to the county funds of the county (indeed, such seems to have been the result when, with their consent, the ordinary paid the \$2,000 into the county treasury); and in that event such money would pass beyond the control of the donors and become subject to the sole control of the county authorities. On the other hand, there was no obstacle to prevent their making a donation on the condition that the money should not become county funds, but should be so invested that it should pass into the custody of the county in the shape of property, and not of cash. The ordinary did not hold the money in this case as the agent of the county as a corporation, but as the agent of the donors; the fund possibly being impressed with an implied trust in favor of the citizens of the county, who are in legal contemplation a different entity from the county as a corporation. Compare *Justices v. Plank Road Co.*, 9 Ga. 485, 486. The treasurer could not have successfully demanded this fund from the committee of citizens; nor did he have the right to demand it from their agent, the ordinary, although this agency may have been lodged in the same person in whom officially was vested jurisdiction in county matters. If he had demanded the fund of the ordinary, it would have been a complete reply on the latter's part that he had been forbidden to deliver it by the very terms of the conditions on which it came into his hands. Unless the treasurer had a right to demand the fund, his claim to commissions must be unsuccessful. *Wood v. Commissioners of Greene County*, 60 Ga. 556; *City of Baxley v. Holton*, 114 Ga. 724, 40 S. E. 728; *Board of Roads and Revenues v. Clark*, 117 Ga. 291, 43 S. E. 722. The county treasurer is not entitled to commissions on anything but money. His bond is not responsible for anything else. The county receives and takes other property without his intervention. The donation in this case, when it came finally into the custody of the county, came as property, not as cash; hence the claim for commissions should have been denied.

It is true that there is in the record an official order of the ordinary, sitting for county purposes, in which it is recited that he accepts the cash deposited with him in lieu of the former proposition of the citizens to erect the buildings; but other recitals in the same order restrict the meaning of the language so used, and it is clear from the parol proof that, even at the time of the passage of this order, the former agreement that the donation should come finally into the custody

of the county in the form of specifics bought with the money, and not of cash, was never abrogated. The trial judge held that this parol evidence had no probative value; that it could not vary the recitals of the order. In this he erred. This order was not such a contract as created an estoppel against the truth being shown in variance or explanation thereof. Besides, the treasurer could not make this question, as he was not a party to the agreement. The ordinary could not make the county liable for commissions on a fund which he had not in fact received as a county fund, no matter how solemnly he may have asserted he had so received it. If the recitals of fact of the ordinary in his order are to be taken as meaning that he had received an unconditional donation in cash, in the light of the record such statement was not the truth of the transaction; and the treasurer must recover from the county upon the truth of the transaction, and not otherwise.

Judgment reversed.

(2 Ga. App. 153)

#### EPPS v. STATE. (No. 457.)

(Court of Appeals of Georgia. June 19, 1907.)

#### 1. JURY—PEREMPTORY CHALLENGES—NUMBER—STATUTORY PROVISIONS.

Under the act establishing the city court of Jeffersonville, the defendant in criminal cases is given the right to seven peremptory challenges, and the state to five. Acts 1905, p. 248. Where, in the trial of a criminal case in that court, the defendant exercised this right and challenged peremptorily seven of the jurors, but the state challenged peremptorily only three jurors, there was no error in the judgment of the court in refusing to allow the defendant the two peremptory challenges which had been waived by the state. The contention that the defendant was entitled to the peremptory challenges which the state had not used, in addition to the seven allowed to him by law, is utterly without merit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 616.]

#### 2. WRIT OF ERROR—EVIDENCE—SUFFICIENCY.

No other error of law is complained of, and the verdict was fully authorized by the evidence. (Syllabus by the Court.)

Error from City Court of Jeffersonville; W. M. Clements, Judge.

Will Epps was convicted of a crime, and he brings error. Affirmed.

R. V. Hardeman, S. A. Crump, and L. D. Moore, for plaintiff in error. M. J. Carwell, Sol., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 92)

#### SOLOMON v. STATE. (No. 367.)

(Court of Appeals of Georgia. May 24, 1907.)

#### 1. CRIMINAL LAW—CONDUCT OF TRIAL—REMARKS OF JUDGE.

Taken in connection with the charge on the same subject, it is not error to state, in ruling upon the admissibility of testimony relative to dying declarations, that "the rule is this—the

meaning of the law is this: That when a man feels like he is in a dying condition, and makes a statement, it has the same weight as if made under oath, upon the theory that a man in a dying condition would not misrepresent a fact."

**2. HOMICIDE — INSTRUCTIONS — VOLUNTARY MANSLAUGHTER—CRIMINAL LAW—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Under the evidence submitted, the law of voluntary manslaughter should have been given in charge to the jury, and the jury were properly instructed upon that subject by the trial judge. "Minor verbal inaccuracies in the charge, not calculated to mislead the jury, do not constrain the grant of a new trial." *Moody v. State*, 58 S. E. 262, 1 Ga. App. 772.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 655; vol. 14, Criminal Law, § 1438.]

**3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—NATURE OF EVIDENCE DISCOVERED.**

The ground of the motion for a new trial, predicated upon alleged newly discovered evidence, presents no reason for setting aside the verdict, and does not commend itself to favorable consideration. When the affidavits filed in connection with this ground are considered, no reason is afforded for believing that on another trial a different result would or should be obtained.

**4. SAME—GROUNDS.**

The numerous grounds of the motion for a new trial not specifically treated by the ruling above announced disclose no reason for reversing the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; T. A. Parker, Judge.

Mark Solomon was convicted of manslaughter, and he brings error. Affirmed.

A. C. Pate, Marion Turner, and Shelby Myrick, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

**RUSSELL, J.** Mark Solomon was indicted for the offense of murder, and was convicted of the offense of manslaughter. After conviction, a motion for a new trial was made and was overruled, and the bill of exceptions assigns error upon the judgment refusing a new trial. As appears from the record, the defendant and one Oscar Newman had an altercation on the night of November 15, 1885, in which Newman was cut in the side, and Newman died three days later from the effects of the wound. They were returning home along the road after having called on some young girls. Newman was about 18 years of age; Solomon, perhaps a little younger. A dispute arose about an apple which Solomon or Newman had given to one of the young ladies that evening, both of them having given an apple to the same young girl. Four of the young men were going along the road together—Newman, Solomon, Henry Dixon, and J. T. Grimsley. Grimsley had given an apple to Newman, and he asked Newman what he did with the apple he gave him. Newman replied: "I gave it to my girl." The defendant remarked that a respectable girl would not take an apple from a young man. Newman then said: "Yes; I've given her baskets full." Solomon again said that no respectable young lady

would take an apple from a young man. Newman said: "My sisters are respectable." Then Solomon said, "You must be a damn fool," and Newman struck Solomon across the shoulders with a walking cane. As he did so, Solomon made a back-handed lick, as they were walking side by side. As soon as the lick was made, Newman said: "Boys he has cut me." They were at the fence where Newman turned off to go through the field. Dixon and Grimsley went with Newman through the field. The defendant went on home. Newman had gone only a little way in the field before he had to lie down. Help was summoned from his home, and he was carried there. Newman said: "He has cut me." Solomon picked up a limb lying in the road, and drew it back and said: "If you haven't enough, I'll give you enough." The cane with which Newman struck Solomon was a little limber cane about the size of a finger. It was not a stick that one could kill another with. Newman lived three days and three nights. According to the witness Grimsley, Dixon and himself were walking together, and the defendant and the deceased were also walking together; but the evidence does not disclose which couple was ahead of the other. The first thing that attracted Grimsley's attention was that Solomon called Newman a "damn fool," and all stopped. The next thing that occurred was that Newman struck Solomon with a little walking cane, and the next was a back-hand lick from Solomon, and Newman's exclamation that he was cut. Grimsley did not see any knife. It was at night, and, though the moon was shining, it was cloudy. The state proved the dying statement of the deceased by Jesse Newman, his father. This statement was as follows: "You heard me and Dixon as we were going down to Mrs. Jesup's. You heard me shaking the apples off the trees. I gave one to one of the girls. On the return back home Mr. Solomon got in a dispute about it. He ran under me and cut me. As he cut me, I struck him with that little cane." The wound was in the abdomen of the deceased, about opposite the navel and about two inches long, ranging downwards. It did not go straight in. This is the case on the part of the state. The defendant's statement was, that the deceased struck him with a stick, and that he then reached down, took up a limb, and drew it back at the defendant, who was approaching him with a knife drawn, having pulled it from his left-hand pocket, and that he (Solomon) hit Newman over the head with the limb, and Newman ducked down, and as he went down he said, "I am cut," and then Newman got up, shut his knife up, and put it in his pocket. Solomon's contention about the knife was that, if Newman was cut, he cut himself. The defendant was indicted shortly after the killing, but for some reason not disclosed by the record he was not tried for more than 21 years. He moved for a new trial upon various grounds.

In the first assignment of error it is insisted that the judge erred in saying, in the presence of the jury, while ruling upon the admissibility of certain testimony relative to the dying declaration of Oscar Newman: "The rule is this—the meaning of the law is this: That when a man feels like he is in a dying condition, and makes a statement, it has the same weight as if made under oath, upon the theory that a man in a dying condition would not misrepresent a fact." It is insisted that this language contained an erroneous statement of the law as to the weight and effect of a dying declaration, and was calculated to impress the jury that the deceased would not misrepresent the facts of the difficulty which occurred between him and the defendant, and that the statement of the court amounted to an expression of opinion, in the presence of the jury, upon the evidence. We do not think that the assignment of error is well taken. The court correctly stated the reason underlying the admissibility of dying declarations. There was no expression or intimation of opinion as to what weight the jury should give the evidence, in saying that such statements are admitted "upon the theory that a man in a dying condition would not misrepresent a fact."

The second assignment of error complains that the court charged the law of voluntary manslaughter, and read to the jury, as a part of the charge on that subject, section 65 of the Penal Code of 1895. The plaintiff in error insists that the court, by reading the entire section, gave the jury the impression that voluntary and involuntary manslaughter were one and the same thing, and could have prevented the jury from bringing in a verdict of involuntary manslaughter; and the plaintiff in error insists, further, that the judge should not have charged upon the subject of voluntary manslaughter at all. This assignment is absolutely without merit. All the evidence in the case shows a sudden quarrel, and not to have charged upon the subject of voluntary manslaughter would have been manifest error. It would have been more proper to omit the definition of involuntary manslaughter, contained in section 65, as no view of the case rendered a charge upon involuntary manslaughter applicable; but the error, if any, was certainly harmless.

There is no merit in the third ground, in which exception is taken to the charge of the court.

The portions of the charge excepted to in the fourth, fifth, and sixth grounds of the amended motion are correct presentations of principles of law applicable to the facts of the case. The charge excepted to in the fourth ground was as follows: "If they [the facts and circumstances surrounding the case] were such as to excite the fears of a reasonable man that some bodily harm, less than a felony, was imminent, and the defend-

ant killed the deceased under these circumstances, he would be guilty of voluntary manslaughter." The fifth ground complains of the following charge: "I charge you, further, that if you find that the difficulty between the defendant and the deceased was brought about by the defendant cursing the deceased, that the deceased thereupon struck him with a stick—a small stick—that the stick did not make a sufficient blow to be disproportionate to the insult given, and that thereupon the defendant stabbed and killed the deceased, he would be guilty of murder." The charge complained of in the sixth ground was given in connection with instructions upon the application of the rule of reasonable doubt, and, considered in connection with the rest of the charge, was beneficial, rather than hurtful, to the defendant. The language complained of was as follows: "If you are not satisfied of his guilt of the crime of murder, then consider, under the rules of law which I have given you in charge, as applied to the evidence, whether the defendant is guilty of voluntary manslaughter; and, if you are satisfied that he is, then it would be your duty to so find. The punishment for voluntary manslaughter is confinement in the penitentiary for not less than 1 nor more than 20 years. If you should not be satisfied to a moral and reasonable certainty, and beyond a reasonable doubt, that the defendant is guilty of the offense of murder, then you look to the law as given you in charge, and the testimony as you have heard it from the witness stand in the case, and see whether or not the defendant is guilty of the lesser offense of voluntary manslaughter; and if you find to a moral and reasonable certainty and beyond a reasonable doubt that he is, then the form of the verdict would be: 'We, the jury, find the defendant guilty of voluntary manslaughter.'" The error assigned as to these three extracts from the charge was that a charge upon the subject of voluntary manslaughter was not warranted by the evidence; and, as we have stated above, a consideration of the evidence satisfies us that there is no merit in these exceptions.

The seventh ground of exception is because the court charged the jury: "If you are satisfied of the guilt of either of these offenses, then the form of your verdict would be: 'We, the jury, find the defendant guilty.'" Not to have instructed the jury as above quoted would have been error, and consequently there is no merit in the assignment of error.

The eighth ground of the motion relied upon the newly discovered evidence of R. S. Manning, as appears in two affidavits, both dated November 6, 1905, which are as follows: "Personally appeared before me, the undersigned, an officer of the said state authorized by law to administer oaths, R. S. Manning, who on oath says that he knew Oscar Newman before he died, and was at Oscar Newman's home on the Monday or

Tuesday before the Wednesday on which Oscar Newman died; that at that time Oscar Newman told deponent that he (Oscar Newman) did not know whether Mark Solomon cut him, or whether he cut himself, as his knife was open in his pants pocket at the time of the difficulty with Solomon." The second affidavit was as follows: "Personally appeared before me, the undersigned, an officer of said state authorized by law to administer oaths, R. S. Manning, who on oath says that he knew Oscar Newman before Oscar Newman died, and was at his home Monday or Tuesday before he died on Wednesday. That deponent examined Oscar Newman's clothes, to see where the knife which caused the wound from which Newman died cut the clothes. Deponent says that there was a hole through the inside lining of Newman's pants pocket, which was directly over or covered the wound in his (Newman's) stomach, which caused his death; that there was no hole or cut in the outside cloth of the pants; that the pants showed no other cut except the one in the lining of the pocket; that the pants were the ones that Newman wore on Sunday, and were comparatively new."

Walving the point that Judge A. C. Pate, one of defendant's counsel, as appears from the record, did not make the required affidavit, and that his partner could not swear that Judge Pate did not know of the facts therein contained, and for that reason the affidavit would not be admissible in evidence, we think that the ruling of the court was correct in refusing to grant a new trial because of the newly discovered evidence. In the first place there was conflict between the testimony of Manning and that presented by the state upon the hearing. Two witnesses swore that Manning was never at the home of Oscar Newman after the cutting, and had no opportunity to have any conversation with him or to see his pants, as he swears he did. This raised a question of veracity, and called for an exercise of discretion and choice on the part of the judge of the superior court, with which an appellate court could not interfere, and which it would not control, unless that discretion was manifestly abused. Furthermore, if there had been no contradiction of the affidavit of Manning by other witnesses, the physical facts testified to by all the witnesses, and not contradicted by Manning himself, sustain the judgment of the judge of the superior court in not granting a new trial upon the newly discovered evidence. All of the witnesses testified with reference to the wound that it was above the pants line, on the left-hand side of the abdomen, and ranged downward. For Manning's testimony to have any probative value, the wound would have had to range upward, if the hole which was discovered in the pants was caused by the same stroke as caused the death of young Newman. It is strange that, living

in the same neighborhood with the parties to this case, Mr. Manning retained this information sacredly locked in his own conscience for 21 long years. But even now it could not produce a different result were another trial had; for, if it be submitted to the jury that Mr. Manning saw a hole in the pants pocket of the deceased, whether on the right or left hand side not disclosed, when all the testimony shows that the cut which caused the death of the deceased was above the pants line on the left-hand side, and ranged downward, it could not affect the case. The affidavit of Manning should have at least disclosed whether the pocket was the right-hand or the left-hand pocket. His testimony as to the statement by Oscar Newman comes under the rule that new trials will not be granted for newly discovered evidence merely impeaching in its character; for Mr. Manning does not claim to have seen the difficulty any more than did Mr. Newman, the father of the deceased. His testimony, therefore, would only be admissible as a contradictory statement made by the deceased, and for the purposes of discrediting the statement made to his father.

We find no error in the judgment overruling the motion for a new trial, and, being a court for the correction of errors only, we are constrained to affirm the judgment. The judgment must be predicated upon the record, and upon nothing else. But, in view of statements made in the argument, the truth of which we admit, we would, could we lawfully do so, award the plaintiff in error a new trial. It seems to us a proper case for the exercise of executive clemency; but we have no pardoning power.

Judgment affirmed.

(3 Ga. App. 207)

G. V. GRESS CO. v. BERRY BROS., Limited.  
(No 358.)

(Court of Appeals of Georgia. June 26, 1907.)

WRIT OF ERROR—REVIEW.

The assignments of error in this case are wholly without merit, and the finding of the court was fully warranted by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3855; vol. 43, Sales, § 486.]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge,

Action by Berry Brothers, Limited, against the G. V. Gress Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hendricks, Smith & Christian, for plaintiff in error. Bule & Knight, for defendant in error.

HILL, C. J. Berry Bros., Limited, brought suit against the G. V. Gress Company on an open account in the city court of Nashville. The case was tried by the court by consent



of counsel without a jury, and judgment was entered for the plaintiff for the amount sued for. The defendant made a motion for a new trial, which was overruled, and on this judgment error is assigned.

The motion for a new trial was based on the usual statutory grounds, and on the following grounds, set forth in an amendment to the motion: (1) In refusing to exclude the second and third direct interrogatories, and the answers thereto, of Orvi C. Lake, the only witness for the plaintiff; the objection being that the said interrogatories were leading. (2) Because the account sued upon was not sworn to by any person authorized to swear to it; it being sworn to by Henry W. Seyler, bookkeeper. (3) Because the account sued upon was not proved as required by law. (4) Because no delivery was ever shown by the plaintiff to any person or corporation for the defendant, or to the defendant itself.

The second interrogatory, objected to as leading, was as follows: "If, in answer to the first question, you state that you are credit manager for the plaintiff, then state what transactions plaintiff had with the defendant in the year 1904." We do not think this interrogatory was leading. Besides, the allowance of leading questions is a matter within the discretion of the trial judge, and his judgment will be reversed only where it is apparent that injustice has been done. Certainly this does not appear in the allowance of this question and answer. *Georgia R. Co. v. Churchill*, 118 Ga. 14, 38 S. E. 336; *City of Rome v. Stewart*, 116 Ga. 738, 42 S. E. 1011. The objection to the third interrogatory appears from the record not to have been made and filed with the interrogatories before the issuing of the commission. Civ. Code 1895, § 5668.

The petition in this case was strictly in accordance with the pleading act, and a bill of particulars containing each item of the account was made a part of the petition and sworn to by the bookkeeper of the plaintiff. It was not necessary to verify the petition, or any part thereof, suit having been brought in a court of record; and the defendant's filing an answer unverified shows that the petition was considered as an unverified one. The petition having fully set out the items of the account, it was only necessary on the trial to prove the items by competent testimony.

The account sued upon was clearly, accurately, and fully proved by the testimony of the credit man of the plaintiff, who testified positively from his own knowledge of the facts. It is not pointed out in this assignment of error in what manner or in what particular the account was not proved as required by law; and this court is not aware of any better way to prove a fact than by a witness who swears that of his own knowledge he knows the fact to be true. The credit man of the plaintiff swore positively and of his own knowledge that in the year

1904 the plaintiff sold and shipped to the defendant the goods as itemized and made a part of the petition. In the absence of evidence to the contrary, this would be sufficient proof of delivery.

We are constrained to say in this case that in our opinion the assignments of error are entirely without merit, and the finding of the judge was fully warranted by the evidence.

Judgment affirmed.

(2 Ga. App. 124)

#### WHITFIELD v. STATE. (No. 432.)

(Court of Appeals of Georgia. May 28, 1907.)

#### 1. CRIMINAL LAW—TRIAL—INSTRUCTIONS—CHARGE ON POSITIVE AND NEGATIVE TESTIMONY.

Where the state relied upon positive testimony as proof of the criminal act, and the defendant relied upon negative testimony to disprove such criminal act, it was error for the court to charge, without qualification, the rule for determining the relative value of positive and negative testimony as contained in Pen. Code 1895, § 985. In connection with the rule for weighing the testimony as embodied in this section, the court should also have instructed the jury to consider and pass upon the credibility of the witnesses.

#### 2. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—INSTRUCTIONS.

While it is not necessary that the person prosecuted for the act of selling should own the liquor, yet the question of ownership is one of the elements which the jury may look to in determining who made the sale; and in a prosecution for the unlawful sale of liquor, where the defense was that the defendant neither owned nor sold the liquor, it was error to instruct the jury that the title of the liquor alleged to have been sold was not a matter for them to consider.

#### 3. SAME—EVIDENCE—ADMISSIBILITY.

Apart from a minor error in the exclusion of testimony, no other error appears.

(Syllabus by the Court.)

Error from City Court of Monticello; W. M. Clements, Judge.

Lewis Whitfield was convicted of an unlawful sale of liquor, and he brings error. Reversed.

Greene F. Johnson, for plaintiff in error.  
Doyle Campbell, Sol., for the State.

HILL, C. J. The defendant was indicted and convicted for selling without license spirituous, alcoholic, malt, and intoxicating liquors in Jasper county. The testimony against him was given by one witness, who swore that he bought four bottles of beer from him, paying therefor 50 cents; the beer being in the house where the defendant and several other negroes were drinking whisky and beer. The witness testified that the defendant told him, at the time he sold him the four bottles of beer, that it did not belong to him, but belonged to one John Glover. The defendant introduced two witnesses, who testified that they were present in the house at the same time with the witness for the state, and saw him get the four bottles of beer from the de-

defendant, and heard him tell the witness for the state that the beer did not belong to him, but to one John Glover; that the beer was in a box which was marked "John Glover." Both these witnesses swore that, if the witness for the state paid the defendant any money for the beer, they did not see him do so, and they were present all the time. They also stated that they got some beer from the defendant on the same occasion, but paid him no money. The defendant further offered to prove by these two witnesses that they paid John Glover for the beer which they got from the defendant; but this testimony was excluded by the court. This was all the evidence in the case. The defendant stated that the beer did not belong to him, but that he had been asked to carry it to the house by the owner, John Glover, and that he did not sell any of the beer to the witness for the state, or to any one else, but that this witness and his witnesses took some bottles of beer out of the house.

1. The judge, in his charge, gave without qualification the rule embodied in Pen. Code 1895, § 985, as to the relative value of positive and negative testimony. While the facts presented a typical case for the application of this rule, the judge erred in not also giving, in connection therewith, the qualification that the jury, in weighing such testimony, should also consider and pass upon the question of the credibility of the witnesses. It has been repeatedly held by the Supreme Court, and by this court in the three recent cases of *Wood v. State*, 1 Ga. App. 684, 58 S. E. 271, *Phillips v. State*, 1 Ga. App. 687, 57 S. E. 1079, and *Thomas v. State*, Id., that section 985 of the Penal Code of 1895 should never be given in charge to the jury, except with the qualification above stated. "In weighing evidence its character as to being positive or negative is one element for consideration; but it is not the only one. Credibility is also essentially involved." *Warlick v. State*, 125 Ga. 142, 53 S. E. 1031.

2. Error is also assigned on the following charge by the court: "I charge you that the question of the title of the beer alleged to have been sold is not a matter for you to consider." Of course, the defendant was guilty, if he sold the beer, whether it belonged to him or to some one else; but he contended, and introduced evidence in support of his contention, that the beer did not belong to him, and that he did not sell it at all, and the question of ownership might have been considered by the jury as a fact corroborating the defendant's statement and supporting his contention. It would not have been error for the court to instruct the jury that, if they believed that the defendant sold the beer or assisted in selling it, the question of ownership was immaterial; but we think the court went too far in charging, under the facts of this case, that the question of ownership was not a matter for them to consider at all.

3. We think the court erred in excluding the testimony of the two witnesses to the effect that each got beer at the same time and place that the witness for the state got his beer, but that they did not pay the defendant therefor, but did pay one John Glover. While the purchase of the beer by these two witnesses, and their payment for the same to John Glover, were, in a sense, a separate transaction from the one for which the defendant was tried, yet it did in some degree tend to establish the contention of the defendant that the beer did not belong to him, and that he was not selling it. The fact that these two witnesses got the beer at the same time and place as did the witness for the state, and did pay therefor the party whom the defendant claimed was the owner, was of probative value as corroborating his contention.

The other assignments of error we think are without merit; but, for the reasons stated, we think the court erred in refusing to grant the defendant a new trial.

Judgment reversed.

(2 Ga. App. 221)

**SHEFFIELD et al. v. JOHNSON COUNTY SAVINGS BANK. (No. 410.)**

(Court of Appeals of Georgia. June 26, 1907.)

**1. BILLS AND NOTES—INDORSEMENT—SUFFICIENCY—SEAL.**

Writing and signature are necessary to the formal indorsement of a negotiable instrument; but no particular form of signature is necessary, any form adopted as such being sufficient. A seal is unnecessary to its sufficiency, whether it be that of a private person or of a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1829.]

**2. SAME.**

In a suit by the plaintiff as the transferee of a negotiable instrument, a written indorsement thereon, bearing as the signature only the corporate name of the payee, not accompanied by the name of the agent by whom affixed nor by the corporate seal, is nevertheless sufficient proof of the transfer, unless the indorsement be specifically denied on oath.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1022.]

**3. SAME—ACTIONS—BURDEN OF PROOF ON SHOWING FAILURE OF CONSIDERATION.**

While by common law and by general law, as recognized in most of the American states and possibly in this state, if the defendant in an action by the legal holder of a negotiable promissory note shows that the note was procured by fraud or duress, or that it is founded upon an illegal consideration or an original total lack of consideration, the burden of proving that he is a bona fide holder for value is cast upon the plaintiff, yet no such result follows from proof showing mere failure of consideration, total or partial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1677.]

**4. SAME—EVIDENCE—SUFFICIENCY.**

The verdict directed in this case is larger in amount than the proof warrants.

(Syllabus by the Court.)

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by the Johnson County Savings

Bank against R. H. Sheffield and others, administrators. Judgment for plaintiff, and defendants bring error. Reversed.

Pottle & Glessner and R. H. Sheffield, for plaintiffs in error. Bush & Stapleton and Oliver & Russell, for defendant in error.

POWELL, J. The plaintiff sued upon a negotiable promissory note made by the defendants' intestate, payable to the New England Jewelry Company. Upon the back of the note was an indorsement as follows: "March 2, 1903. For value received, we hereby sell and assign the within note to the Johnson County Savings Bank. New England Jewelry Co." The defendant pleaded, and attempted to prove, that the consideration of the note was jewelry, alleged to be good serviceable gold-plated and gold-filled jewelry, sold by the New England Jewelry Company to the defendants' intestate, whereas a lot of brass jewelry was delivered, worth only about one-fourth as much as the jewelry contracted for. There was no evidence of the circumstances under which the plaintiff's title to the note was acquired, except the written transfer set forth above. The court excluded the testimony offered by the defendants, showing that the jewelry was brass and worth only a small amount, and directed a verdict for the plaintiff.

1, 2. The plaintiffs in error concede that, if the plaintiff in the court below is to be conclusively considered as a bona fide holder for value, their defense was not available to defeat a recovery. They contend, however, that the indorsement on the note was prima facie insufficient; that the name New England Jewelry Company connotes a corporation; that a corporation can act only through an agent; that when no corporate seal is attached there is no presumption that the signature is genuine. This exact point was made in each of the following cases: *Templeton v. Hayward*, 65 Ill. 178; *Walker v. Krebaum*, 67 Ill. 252; *Second National Bank v. Martin*, 82 Iowa, 442, 48 N. W. 735. In all of them the contention is overruled. In speaking of a similar indorsement, the court in the case last cited says: "But, in our opinion, the signature of the indorser is sufficient as it appears. A little thought will make this plain. The name of the corporation written on the back of the instrument is in fact the signature of the indorser, just as it would be if it were shown that it was made by an officer of the corporation that signs it. It is the corporation that does the act by the officer; for it has not hands, and cannot write. When the name is found written upon the notes, it is known that it is intended as the indorsement in blank. If the name be written there by an officer having authority, it will bind the corporation, upon that fact being established, though the officer's name be not subscribed to, nor appears in, the instrument. It cannot be doubted that, had defendants raised an issue pre-

senting the question whether the name of the corporation was written upon the notes, for the purpose of indorsing them, by the officer clothed with authority so to do, the plaintiff would have been permitted to present evidence supporting the indorsement, by showing the authority of the one making it and his intention to bind the corporation as an indorser. Now, as no such issue was raised by the defendants' answer, the sufficiency and validity of the indorsement stands as admitted in the case." See, also, 7 Cyc. 792; *Habersham v. Lehman*, 63 Ga. 380; *Neal v. Gray*, 124 Ga. 511 (3), 515, 52 S. E. 622; *Tyson v. Bray*, 117 Ga. 689, 45 S. E. 74. It is true that the signature, not purporting to be made by any particular agent authorized to act for the corporation and not being accompanied by the corporate seal, does not import its own authenticity; but the defendant, by not denying the indorsement under oath, conclusively admits its genuineness. Civ. Code 1895, § 3706. The case of *Dodge v. American Freehold Mtg. Co.*, 109 Ga. 394, 34 S. E. 672 (2), relates to the method of proving the execution of an instrument not constructively and conclusively admitted to be genuine by a statutory rule of pleading, as is the case with this indorsement. The principles announced in the first two headnotes are now so well established by the current of authority as to admit of no serious question.

3. When a plaintiff introduces in evidence a negotiable promissory note duly assigned to him before maturity, the presumption immediately arises that he is a bona fide holder for value and is entitled to protection against equities and defenses which the maker might have against the original payee. At common law, if the defendant showed by his proof that the note was procured by fraud or duress, or that it was founded upon an illegal consideration or an original total lack of consideration, the burden was shifted to the plaintiff to show that he did in fact receive the note in ordinary course of trade, in good faith, for value, and without notice of the defenses; and this seems to be the rule recognized in most of the American states, and possibly in Georgia. See Norton on Bills and Notes, 243; 2 Greenleaf on Ev. (16th Ed.) § 172; *Duncan v. Scott*, 1 Camp. 99; *Miller v. Race*, 1 Burr. 452; 8 Cyc. 236-238. But "mere evidence of failure of consideration or partial failure of consideration is not sufficient to throw upon the holder the burden of proving that he obtained the paper in good faith." 8 Cyc. 239, and citations. The defendant's plea and tendered proof alleged and showed only a partial failure of consideration.

4. The note was payable in five equal installments, due serialim on the 20th day of the following months: January, April, July, and October, 1903, and January, 1904. It contained the following provision: "Any installment past due to draw 6 per cent. inter-

est per annum. If not paid within ten days after due, the whole note to become due on the option of holder." The first installment appears to have been paid. Otherwise the plaintiff would have fallen within the purview of the latter portion of Civ. Code 1895, § 3695. The court directed a verdict for the aggregate principal of the four other installments, "with interest on that amount at 6 per cent. per annum from April 20, 1903." In this direction as to interest we find error. The installments bore no interest until after the maturity of each. The plaintiff had the option to declare the whole note due for a default in the payment of any installment; but it was not obliged to do so. The entire note did not ipso facto become due when the first installment became past due. It required affirmative action on the part of the holder to effectuate this result. The holder of the note might have preferred to retain it as a contract maturing in installments, with the privilege of suing each installment in a justice's court, rather than to convert it into a single demand above justice's court jurisdiction. We cite this as one of a number of possible considerations why the law will not presume the exercise of the option on the plaintiff's part. We are not prepared to say that the plaintiff could hasten the maturity of the notes, even by an exercise of the option, so as to make his entire demand bear interest from that date, though as to this we are not called upon for a decision at present. The court having directed a verdict for too large a sum, a reversal results. *Kelly v. Strouse*, 118 Ga. 874, 43 S. E. 280 (8). Judgment reversed.

(2 Ga. App. 119)

#### STORY v. BUTT. (No. 342.)

(Court of Appeals of Georgia. May 28, 1907.)

##### 1. LIFE ESTATES—CROPS—STATUTORY PROVISIONS.

Civ. Code 1895, § 3092, relating to the right of a tenant for life to emblements, is merely declaratory of the common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 33.]

##### 2. SAME.

Civ. Code 1895, § 3093, which entitles one who rents from the tenant for life to the land until the end of the year, upon his complying with his contract with the tenant for life, notwithstanding the latter dies during the year, is not of common-law origin, but is manifestly an adaptation made by the compilers of our Code from St. 14 & 15 Vict. c. 25.

(a) Under this section a power is conferred upon the tenant for life to represent the whole estate to the extent of making a rent contract binding to the end of the year in which the death of such tenant for life may occur.

(b) The correlative duty of the undertenant is to comply with his contract with the life tenant; and if he does so he is not accountable to the remainderman for any portion of the year's rent, though the life tenant die before the crops are sown.

(Syllabus by the Court.)

Error from Superior Court, Marion County; W. A. Little, Judge.

Action by W. E. Butt against Jesse C. Story. Judgment for plaintiff, and defendant brings error. Reversed.

D. L. Parmer, for plaintiff in error. W. B. Short and Geo. P. Munro, for defendant in error.

POWELL, J. Mrs. Eliza Story had a life estate in certain lands. She rented them to the plaintiff in error, Jesse C. Story, for the year 1905, and took from him, for the rent, a negotiable promissory note. She died February 20, 1905, having previously transferred to another the rent note. Butt, the defendant in error, was the remainderman, or rather, by purchase, he succeeded to all the rights of a remainderman, and for the purposes of the case may be regarded as such. In the fall of 1905 Butt demanded payment of the rents of Jesse Story, who refused, having paid them to the holder of his rent note. Butt sued out a distress warrant, and Story defended. The ground had been plowed at Mrs. Story's death, but the crops had not been planted. The trial court held that although Jesse Story was, as under tenant of the life tenant, entitled to possession of the lands until the end of the year, yet, since the life tenant had died prior to the sowing of the crops, the remainderman was entitled to the rent for the year, and that Butt might maintain the distress warrant against Jesse Story, notwithstanding he had paid the rents to the holder of his rent note. Under the holding of the trial court there was a verdict in favor of Butt, and Story brings error.

1. Section 3092 of our Civil Code of 1895, which declares, "If the life estate be terminated not by act of the tenant, he and his legal representatives shall be entitled to emblements, which are the profits of crops sowed by him during life, whether the plants be annual or perennial," and section 3093, which asserts, "If the tenant for life rents the land for the year, and dies, or the estate is otherwise terminated during the year, the tenant shall be entitled to the land for the term of the year, upon complying with his contract with the tenant for life," are not both of the same origin. The former is merely declaratory of the common law. The latter is statutory in nature, having become law in this state through the adoption of the first Code, into which it was inserted by the codifiers as a new proposition. At common law, prior to St. 11 Geo. II, c. 19, if the life tenant died before the rent day, his executor could not recover from the undertenant the rent, or any portion thereof; nor could any one else collect it. The undertenant went rent free, and all his interests in the land terminated, except a qualified right of ingress and egress for the protection of his emblements, the right to gather crops already sown; for even the undertenant's rights to this extent were respected. Note the statement of Blackstone as to this right: "A third incident to estates for life relates to the undertenants,

or lessees; for they have the same, nay greater, indulgences than the lessors, the original tenants for life. The same, for the law of estovers and emblements with regard to the tenant for life is also law with regard to his undertenant, who represents him and stands in his place; and greater, for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exceptions shall not reach his lessee, who is a third person." Bl. Com. 123. The right to emblements merely relates to the privilege of gathering crops already sown, and the right to possess the premises is included therein only so far as such possession is necessarily incident to the gathering of such crops. There was no common-law privilege that the undertenant might possess the premises until the end of the year.

2. The uncertainty of the life tenant's estate, and consequently of the undertenant's dependent term, frequently made the undertenant's condition a precarious one. It also made his lease less valuable. Private ingenuity first found a means to avoid the hardship; so that it became customary for the grantor of a life estate to give the life tenant the express power to make leases which should not terminate with the life estate. Finally, in 1851, Parliament passed St. 14 & 15 Vict. c. 25: "That where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cessor of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cessor of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions and conditions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year." This statute, of course, did not come to us as a part of the laws of England, which this state had previously adopted; but its existence and beneficial purposes must have been

known to the great lawyers who, 10 years after its passage, undertook the compilation of our Code, for in that Code the spirit of this statute appears in the following language (section 2238): "If a tenant for life hires out a slave, or rents the land for a year and dies, or the estate is otherwise terminated during the year, the hirer shall be entitled to the slave and the tenant to the land, for the term of the year, upon complying with his contract with the tenant for life."

The very words of this section, especially so much thereof as relates to the hiring of slaves, indicates a local and statutory origin. The hand of war wiped from the statute the provision as to slaves, but the remainder of it stands as our present section 3093 of the Civil Code of 1895. Both the statute of Victoria and our Code section make the tenant for life the representative of the entire estate for the purposes leasing it to the end of the year. The law thus confers the power which formerly a special grant was necessary to create. So that now, when the undertenant secures his rent contract for the year from the life tenant, his estate and right of possession is not dependent solely upon the estate of the life tenant, but is also supported by the life tenant's power as the representative of the whole estate. His correlative statutory obligation is compliance with "his contract with the life tenant." If his contract with the life tenant binds him to pay the rent in advance, and he pays it, he has made compliance and cannot be required to pay again; or if the life tenant exact a negotiable promissory note, payment of that note to the legal holder thereof is all that can be required of him. The law having made the life tenant the agent of the remainderman, as well as of himself, to make the contract of tenancy for the year, the remainderman must stand or fall by the terms of that contract. The question whether under St. 11 Geo. II, c. 19, or any other law, or principle of equity, the remainderman can recover from the estate of the life tenant all or any portion of the year's rent, is not now before us for consideration.

We hold, and in this case we cannot properly decide more as to the resulting rights of parties, that Jesse Story, having complied with his contract with the life tenant, was entitled to the possession of the premises to the end of the year, and that he was not additionally liable to the remainderman for the rent. The Supreme Court of Alabama seems to have reached a similar conclusion in the case of *Terrell v. Reeves*, 103 Ala. 265, 16 South. 55, where it is held: "Where one takes possession of leased lands under a deed from the life tenant, who, prior to said conveyance, had assigned the rent note for the then current year to a third person, to whom the lessee paid the rent, upon the death of the life tenant in the same year, such grantee is not liable to the remainderman for the

rent of said land during the year in which the said deed was executed." Those having occasion to pursue the common-law phases of this question further may profitably examine the following cases: *Ex parte Smythe*, 1 Swan. 337, and cases cited in the footnotes; *Hawkins v. Kelly*, 8 Ves. Jr. 308, and citations; *Page v. Gee*, 9 Mod. 482; *Rockingham v. Penrice*, 1 P. Wms. 177; *Jenner v. Morgan*, 1 P. Wms. 392; *Clun's Case*, 10 Ves. 127; *Duppa v. Mayo*, 1 Saund. 282, and citations; *Plymouth v. Throgmorton*, Salk. 65; *Price v. Pickett*, 21 Ala. 741; *Marshall v. Moseley*, 21 N. Y. 280.

Judgment reversed.

(2 Ga. App. 29)

**HUGHES v. STATE. (No. 174.)**

(Court of Appeals of Georgia. May 24, 1907.)

**1. ARREST—AUTHORITY TO ARREST WITHOUT WARRANT—CONSTITUTIONAL LAW—PERSONAL SECURITY—UNREASONABLE SEARCHES.**

Neither a policeman nor any other arresting officer has any authority, without a warrant, either upon suspicion or information that another is carrying a concealed weapon, to arrest the latter and search his person for the purpose of ascertaining whether or not such person is in fact violating the law prohibiting carrying concealed weapons. Even if the person arrested was so violating the law, the offense was not, in legal contemplation, committed in the presence of the officer, and such an arrest, search, and seizure are unauthorized by law, and are, within the meaning of the Constitution, unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, §§ 147, 151; vol. 43, Searches and Seizures, § 5.]

**2. SAME.**

As a general rule the law requires a warrant in order to render an arrest legal, whether it be made by a policeman or by any other public officer. There are three exceptions to this rule: Where an offense is committed in the officer's presence; where the offender is endeavoring to escape; and where, from other cause, there is likely to be a failure of justice, for want of an officer to issue a warrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 147.]

**3. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—EVIDENCE OBTAINED BY UNLAWFUL SEARCH OF PERSON.**

Evidence of guilt, which the defendant, either directly or indirectly, is compelled to disclose by an unlawful search and seizure of his person under an illegal arrest, is not admissible in a criminal prosecution against the person thus illegally arrested.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

J. E. Hughes was convicted of carrying a concealed weapon, and he brings error. Reversed.

Frank L. Haralson, for plaintiff in error.  
C. D. Hill, Sol. Gen., and Lowry Arnold, Sol., for the State.

**RUSSELL, J.** The bill of exceptions assigns error on the part of the judge of the superior court in overruling a certiorari. The plaintiff in error was convicted in the crim-

inal court of Atlanta of the offense of carrying a pistol concealed. He sought to have his case reviewed by the superior court, and to that end he presented a petition for certiorari, which was duly sanctioned. The petition showed that the only evidence adduced by the state, upon which a conviction could be had, was objected to on the trial, and a timely motion was made to withdraw it from the consideration of the jury, "because the defendant was forced to produce evidence against himself; the arrest being illegal and the evidence illegal." The assignments of error, in the petition for certiorari, are: (1) That the verdict is contrary to law and contrary to evidence; (2) that the evidence complained of and asked to be ruled out by the court was improperly admitted, because this evidence was obtained by an illegal search of defendant's person, which forced defendant to furnish evidence against himself, and the court committed error in not ruling it out upon objection or motion; (3) because the court erred in its charge, as set forth in this petition; (4) because the court erred in not ruling out the evidence complained of as being illegally obtained from J. E. Chapman (the only witness for the state), on motion of defendant's counsel, as set out in this certiorari.

The only witness for the state testified as follows: "On Saturday night, September 22, 1906, I saw the defendant and another man turn from Whitehall viaduct, at the ticket office of the W. & A. Railroad, and start across the passway from Peachtree viaduct to Broad street. Myself, George Stein, and Mr. Hutchins, both city policemen, followed them, overtook them, and searched them, and found on the person of the defendant a pistol. The pistol was in his right hip pocket under his coat. We had hold of him when the search was made. We then carried him down to the police station, where we entered a charge against him of concealed weapons. The defendant and the man with him were walking leisurely along the passway when we overtook them. The defendant had not violated any law that we knew of. He was not intoxicated. We did not have any warrant or any other legal process against him. We had no authority to make the search when we found the pistol. He was tried on the charge before Judge Broyles, the recorder, and bound over to this court by him. I did not see the defendant do anything in violation of law before we took a hold of him and searched him. He was being held by the other policeman while I made the search. He made no attempt to get away or to resist the officers." This was the whole of the state's case.

The defendant proved by both of the witnesses who were with him, and also asserted in his statement, that he was quietly and peaceably walking a public thoroughfare on a peaceable mission; that he was not talking in a loud tone of voice, nor were his com-

panions, and that he turned back because he saw a mob gathering at the corner of Decatur, Whitehall, and Peachtree streets, and he was walking leisurely along, when three city officers walked up behind him, two of them grabbed him, and they immediately commenced searching him; that he was perfectly sober, and was not connected with the mob or with any one connected with the mob; that he is a law-abiding citizen, a carpenter by trade, who receives good wages and sticks closely to his business. The defendant did not say whether the pistol was concealed or not. Both of his witnesses were inclined to the belief that the pistol was not concealed, while they only testified that they had seen it a short time previous to the arrest.

The petitioner in certiorari excepted to the following charge of the court, which was admitted by the answer to be correctly set forth: "You have nothing to do with the arrest of the defendant, or the circumstances attending his arrest. It is not a question with you whether the arrest was legal or illegal, and whether the search and seizure of his person was illegal or not, or whether or not in this search they found a pistol on the defendant. The only question for you to determine is whether or not the defendant had on his person, 'not in an open manner and fully exposed to view, a pistol.' The question with you is (and it is the only question), did he have this pistol concealed? I charge you that this is the law, and that the jury is bound to take it as the law. As to whether or not the officers in this case had a warrant for the defendant, or whether or not he was involved in violation of some law, you have nothing to do. The question for you to decide is whether or not this pistol was concealed."

The defendant's motion for new trial having been overruled, and his certiorari dismissed, the question very clearly presented to us by the court's ruling on the defendant's objection to the evidence and to the charge of the court is whether the evidence objected to should have been excluded as illegal; in other words, whether the jury can consider, as the judge charged them that they could, evidence from a witness whose only knowledge of the facts was derived by force, after an illegal arrest of the defendant by such witness, acting as an officer. The question has already been decided by this court in *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66. But this case is an even more aggravated instance of a violation of the right of personal liberty, and of the constitutional provision which protects the citizen from being compelled to testify against himself, than the *Hammock* Case. In that case the sheriff at least acted upon information that the defendant was guilty of the offense. In the present case an orderly citizen, on a peaceable mission, so far as the evidence discloses, while walking the public thoroughfare, is assaulted, seized, searched, and deprived of his property, either upon bare suspicion or from mere

curiosity. While one of the officers holds him, another searches his person and discovers a concealed pistol. The defendant was violating one law. To get proof of this the witness was compelled to violate two.

With the utmost abhorrence and detestation of the practice of carrying deadly weapons concealed, we cannot give our sanction to a prosecution for crime which involves a commission of more crimes. Unless two wrongs make a right, prosecutions and convictions on evidence which can only be obtained by graver violations of the law cannot be countenanced by any consideration of sound public policy. Surely, unless the law recognizes favorites among crimes and gloats with fond partiality in the prosecution of one offense more than another, it ought not to be necessary to abuse the liberty of the citizen and compel him, directly or indirectly, not only by fear, but by superior force, to furnish evidence against himself. Under our Constitution no witness is compelled to testify against himself, or even to incriminate himself, and all evidence obtained by force or fear is justly outlawed. As well said by Justice Lumpkin, rendering the opinion in *Pickett v. State*, 99 Ga. 15, 25 S. E. 609, 59 Am. St. Rep. 226: "While \* \* \* an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion, or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he was carrying a concealed weapon in violation of law. The Constitution of this state expressly declares in the Bill of Rights that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.' \* \* \* If any search is unreasonable and obnoxious to our fundamental law, it is one of the kind with which we are now dealing. Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality."

In our opinion the ruling of the Supreme Court in the *Pickett* Case is controlling, at least so far as the offense of carrying concealed weapons is concerned; and, inasmuch as it has not been reviewed and expressly overruled, subsequent decisions apparently in conflict therewith must yield to the older adjudication. We are aware that in *Dozier v. State*, 107 Ga. 708, 33 S. E. 418, it was held that it was not error to allow the sheriff to testify that, the accused being in his custody under a warrant for a criminal offense, he searched him and found a pistol concealed in his pocket; but in that case the ruling

was put expressly upon the ground that the defendant was not compelled to furnish the evidence, and the case was thus distinguished from the case of *Evans v. State*, 106 Ga. 519, 32 S. E. 659, 71 Am. St. Rep. 278. The *Dozier Case* affords no parallel for the present case. In the first place, as shown by the conclusion of the opinion, the defendant's own statement demanded a verdict of guilty. "He stated that he had the pistol \* \* \* in his hand, that when he saw the sheriff coming he dropped it in his pocket, and the sheriff searched him and found it in his pocket. So that, in any event, the conviction must properly stand." So far as the record in the *Dozier Case* shows, no force was necessary to get the pistol from the prisoner; and he was in the lawful custody of an officer, who had arrested him on a warrant for a different offense, and whose duty it was, at least before confining him in jail, to search him and be certain that he had no instrumentalities concealed about his person by which he might effect an escape. The trial judge seems to have framed his charge in accordance with the decision in the *Dozier Case*, without taking into consideration the fact that, throughout the opinion, it is expressly distinguished from those cases, previously decided, in which the defendant was compelled to furnish evidence against himself and where there was no lawful arrest, and the further fact that, for that reason, the rule in the *Dozier Case* was never intended to be applicable to a case such as this, where the incriminating evidence was forced from a party not under lawful arrest, but illegally and lawlessly detained.

It must be remembered that when Judge Lumpkin, in the *Williams Case*, 100 Ga. 521, 28 S. E. 627, 39 L. R. A. 269, used the language: "We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure; nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy"—the words were merely used *arguendo*, and were addressed to an entirely different proposition from the one before us. The objection to the evidence in the *Williams Case* was "that, should it be admitted to the jury, it would violate the constitutional and inalienable right of defendant to be secure against such searches and seizures; and she then and there expressly claimed this right, privilege, and immunity, not only under the state Constitution, but as one to which she was entitled under the United States Constitution," etc. And by a careful reading of the opinion it will be seen that all of the reasoning of the opinion is addressed to the inquiry as to whether the contention of the accused, that her constitutional rights were infringed by the ruling of the trial judge upon the specific objection made, was tenable. The decision was that the objection made was not

tenable, for the reason that, in the absence of express legislation directed against the misconduct of private persons, these rights cannot be enforced so as to protect the citizen. In the words of the decision (page 519 of 100 Ga., and page 627 of 28 S. E. [39 L. R. A. 269]): "As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government; that is to say, we believe the framers of the Constitution of the United States and of this and other states merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible."

To confirm what we have said above with reference to the *Williams Case*, we need only add that in the *Evans Case*, 106 Ga. 522, 32 S. E. 660, 71 Am. St. Rep. 276, a case practically identical, as to the facts, with the case at bar, the Supreme Court, all the justices concurring, spoke as follows: "In the case of *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269, no such question as the one now under discussion was raised or decided. In that case an officer took from the person of the accused marked coins which were afterwards used in the evidence against her. \* \* \* The decision in that case simply holds that the constitutional provision as to unreasonable searches and seizures did not render the evidence inadmissible. It was there said that the purpose of the constitutional provision was to deter the lawmaking power from authorizing or declaring lawful any unreasonable search or seizure, and to prevent courts and executives from enforcing any law which was violative of this provision, but that it was not intended to operate so as to prevent the courts from receiving evidences of crime, although they might have been obtained by an illegal and unreasonable search and seizure. It would seem from these cases that the law in this state is that evidences of guilt found upon a person under legal arrest may be used in evidence against him, but that, where a person not in legal custody is compelled to furnish incriminating



evidence against himself, the evidence is not admissible. The ruling made in the Day Case, 63 Ga. 867, constrains us to reverse the judgment of the court below in refusing a new trial, on the ground that the evidence complained of was improperly admitted."

The case of *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814, is not similar to the case before us. The most that can be said of the evidence procured by search in that case is that it furnished an incriminatory circumstance which, when taken in connection with other proof in the case, might lead to the conclusion of the defendant's guilt; and the same is true as to the knowledge obtained by search in the *Williams Case*. In the case of concealed weapons the unlawful search and seizure, if it discloses anything, affords proof of the only fact necessary to constitute a violation of the law. And this line of distinction between cases where only incriminatory circumstances are developed, and a case where direct evidence of absolute guilt is obtained, is recognized in frequent decisions. It is not necessary, however, to further distinguish the *Duren Case*, because, in so far as it conflicts with the *Evans Case*, above cited, it must yield to the older adjudication. But, even under the ruling in the *Duren Case*, the evidence in the present case should have been rejected, when the motion was made asking that it be withdrawn from the jury; for, if the criterion be, "Who furnished or produced the evidence?" and if it be true that "If the person suspected is made to produce the incriminating evidence it is inadmissible," as held in the *Duren Case*, the evidence of the state's only witness in this case was inadmissible, because the defendant was forced to produce the evidence by being so completely overpowered that there was not even a chance to resist. If not bound by the previous decisions of the Supreme Court, the writer would unhesitatingly hold that evidence procured while a prisoner is under arrest, whether such arrest were lawful or unlawful, should be excluded; but the ruling of the Supreme Court, that where a person not in legal custody is compelled to furnish incriminating evidence against himself the evidence is not admissible, itself requires the grant of a new trial in this case.

Judgment reversed.

(2 Ga. App. 148)

#### SHERMAN v. STATE. (No. 448.)

(Court of Appeals of Georgia. June 19, 1907.)

#### 1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—EVIDENCE OBTAINED BY SEARCH OF DEFENDANT'S PERSON.

Evidence obtained by illegal seizure and search of the defendant's person, by which he is compelled to criminate himself, being inadmissible against a defendant accused of crime, the burden devolves upon the state to show that evidence obtained by search was procured after a legal arrest. Proof that the arrest was legal is not made by the statement of a witness that

the arrest was made under a warrant. The conclusion of a witness that a given paper is a warrant under which an arrest may legally be made is not proper proof that such a paper is in fact a warrant by virtue of which a legal arrest has been made, so as to authorize the admission of evidence obtained by means of an arrest under such paper or alleged warrant.

#### 2. JURY—SERVICE OF REJECTED JUROR ON JURY—GROUND FOR NEW TRIAL.

Where a juror, properly rejected by either party to a cause, serves without the knowledge or consent of such party and his counsel, and, unknown to such party or his counsel, participates in the finding and rendering of a verdict in the case, a new trial should be granted on the motion of such party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 634.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Ed Sherman was convicted of carrying a concealed weapon, and he brings error. Reversed.

Howell B. Simmons, for plaintiff in error.  
Zach. Childers, Sol., for defendant in error.

RUSSELL, J. Ed Sherman was tried and found guilty of the offense of carrying concealed weapons. He moved for a new trial, and his motion was overruled. It is only necessary to notice the amended grounds of the motion. These were two in number. In the first it is insisted that the court erred in refusing to exclude the testimony of the state's witness, upon the ground that a legal arrest was not shown, because it did not appear that the party arresting defendant had a warrant against the defendant, and because it must appear that the arrest of the defendant was legal before the testimony would be admissible. The second ground of the motion for new trial was that "only eleven of the jury selected to try the case served, and that in place of W. A. Stephens, one of the jury selected to try the case, was put or voluntarily went in one W. H. Justice, a member of the panel of the jurors that had been stricken." With regard to the second ground of the motion, the presiding judge qualifies his approval by the following note: "Two jury lists were handed out and a jury stricken. The jury was called, and 12 jurors took their places in the jury box, after being duly sworn. The solicitor and defendant's counsel both made their opening statements to the jury. Evidence was then introduced, and at its conclusion the case was argued by the solicitor and the defendant's counsel. The jury retired, and later the court was notified the jury had made a verdict. The court had the jury brought into the courtroom, and the foreman reported the jury had made a verdict. The court instructed the solicitor to receive it, which was done, and the verdict read and published in open court. As soon as the verdict was read and published, Mr. Simmons came up to the bench and informed the court privately he thought one of the jurors who served had been stricken.

The court informed Mr. Simmons he knew nothing of the matter, but would have the jury called, which was done, and one of the jurors had been stricken. Mr. Simmons here in open court requested the court to declare a mistrial, which the court refused, saying the motion came too late, as the verdict had been rendered, received, and published in open court." The ground of motion with reference to the juror was verified by the affidavit of Mr. Simmons, defendant's attorney, who swore that his client did not know any member of the jury, and that the jury was stricken by him in behalf of his client. He further swore that Justice was stricken by him, and would not, in any event, have been accepted by defendant, or by him as defendant's counsel, in a case where the rights of a negro (defendant being a negro) were concerned. The affidavit of counsel further showed that the defendant and his counsel relied upon the officers to see that the jury selected served, for the reason that the defendant knew none of the jurors, and his counsel was not acquainted with all of those selected; further, that the defendant's counsel is near-sighted, and did not have on his glasses, and did not notice that said Justice was on the jury until the jury had made a verdict. The jury list used upon the trial, and a copy of which is attached to the record, shows that W. H. Justice was stricken by the defendant.

The court was right in refusing to declare a mistrial. The motion to declare a mistrial came too late. But we think that the defendant is entitled to a new trial, and that our learned brother of the trial bench erred in overruling the motion. The only evidence introduced for the state was that of the witness Gatewood, who testified as follows: "On October 5, 1906, I arrested Ed Sherman, the defendant, and carried him to the jail, and in his right hip pocket he had a pistol concealed. I found it there when I went to search him, before locking him up. I had a warrant for him when I made the arrest. This was in Sumter county, Ga. I had one of the warrants, and M. Holloway had the other, when the arrest was made. I do not know who issued the warrant that I had; will not say that it was issued by Judge Crisp or Judge Suber. But I had a warrant for him—one of the two warrants that I have in my hand." The defendant's counsel moved to rule out the testimony of Gatewood, as it did not show a legal arrest. We think this motion should have been sustained. The state is required to prove its case by legal evidence. From the evidence adduced it is not shown whether the arrest was or was not a legal arrest; and the testimony could not affect the rights of the defendant, or be used to convict him, until it was shown affirmatively that the defendant had been legally arrested. As this court has already held, in the case of *Hughes v. State*, 2 Ga. App. —, 58 S. E. 390, "evidence of guilt

which the defendant, either directly or indirectly, is compelled to disclose by an unlawful search and seizure of his person under an illegal arrest, is not admissible in a criminal prosecution against the person thus illegally arrested." The law requires a warrant, in order to render an arrest legal, unless the offense is committed in the officer's presence, the offender is endeavoring to escape, or there is likely to be a failure of justice for want of an officer to issue a warrant. See *Hughes v. State*, supra. The arrest in this case may have been legal, and it perhaps could have been shown that the defendant was arrested on a warrant. But it devolved upon the state to show that the defendant was arrested on a warrant, and the state failed to prove it. The testimony of Gatewood, that he had a warrant for him and that he was arrested on one of the two warrants that he had in his hand, was nothing but the mere conclusion of the witness that the paper was a warrant. The paper itself, if it was a warrant, was the best evidence of what it contained, and as to whether it was or was not really a warrant. The conclusion stated by the witness was not only objectionable, because it involved a statement of the contents of a paper upon which depended, perhaps, the liberty of defendant, but, further, because the answer of the witness assumed to pass upon the sufficiency of the contents of that paper to constitute a valid warrant authorizing the defendant's arrest. The statement of the witness could not prove the paper to be a legal warrant, even if the paper had been lost and parol evidence of its contents were thus admissible. Not to say more, the answer of the witness assumed that the paper under which the defendant was arrested was issued by an officer authorized to issue warrants upon a proper affidavit, and that it set forth the violation of a penal law. If the defendant was arrested upon a legal warrant, proof of that fact was not made by the statement of a mere conclusion of the witness; and, as it was not shown that the defendant was legally arrested on a warrant, the evidence obtained by reason of his arrest should have been excluded. If the paper really was a warrant, the state could easily have put it in evidence.

We think, too, that a new trial should have been granted upon the ground that Justice served upon the jury, instead of Stephens, after having been rejected by the defendant. The case at bar is nearly identical with the case of *Stripling v. State*, 77 Ga. 108, 3 S. E. 277. It is true that in the *Stripling Case* neither the defendant nor his counsel knew the juror who served, while in the present case the defendant's counsel did know the juror Justice; but the testimony that the counsel is near-sighted and did not see Justice on the jury, or know that he was there, until the jury came to render their verdict, is not disputed, and otherwise there is no

difference in the two cases. It does not appear how Justice came to be substituted for Stephens; and, as remarked in the Stripling Case, "It is somewhat remarkable that the substitution was not discovered and corrected at an earlier period." But in the Stripling Case, as in this, the mistake was not discovered until after the trial was over. In that case Jobson was substituted for Jones, and Jones was an acceptable juror (as Stephens was in this case), while Jobson would have been a very unacceptable one (as Justice appears to have been in this case). "The allegation, in short, is that the defendant was tried by only 11 jurors of his own selection, and he asked, therefore, that a new trial be granted him upon this and other grounds, which, as before stated, the court refused. This refusal we are satisfied was error." There might have been exceptions made to Justice *propter affectum*, if the defendant had desired to urge them; but, however this may be, the record shows that the defendant had used his right to strike Justice, and thereby peremptorily challenged him. The defendant had the right to be tried by the 12 jurors selected; and, if it be true (and it is not contradicted) that neither the defendant nor his counsel knew Justice was on the jury until after the verdict, he was entitled to a new trial. If the affidavit of the defendant's counsel is true, "Somebody other than the defendant or his counsel was evidently to blame," and it is not material whether it was called to the attention of the judge prior to the motion for new trial. That the right to a jury of one's own selection may be preserved by motion for new trial, see *Dovey v. Hobson*, 6 Taunton, 461.

In our examination of this question we have found two cases in which a new trial was held to have been properly refused where one juror was substituted for another; but neither of those cases is similar to this case. In the case of *Anderson v. Green*, 46 Ga. 362, a juror was selected by both parties, and another answered to his name and served in his stead, and the Supreme Court held that that was not a good ground for new trial, as it did not appear that both the substitute and the principal were unknown to the defendant and his counsel. The difference between the *Anderson* Case and the case at bar is that the person who served had not been rejected. In the present case Justice had been peremptorily challenged and stricken from the list by the defendant. Nor was any reason shown or offered to be shown in the *Anderson* Case why the person who served was for any cause objectionable to the defendant. And the case of *Burns v. State*, 80 Ga. 545, 7 S. E. 88, is unlike this case, as that case was held by the Supreme Court to be unlike the Stripling Case, because in the *Burns* Case the juror Charles Foster, who served, was accepted by the defendant, and the court held that, while the accused

and his counsel did not know all the facts, yet in the exercise of due diligence they ought to have known, before accepting the juror, whether the juror they accepted (Charles Foster, a negro, instead of Charles Foster, a white man) was 21 years of age or a minor and whether he was upon the jury list of the county. In other words, the extent of the holding in that case was that an exception *propter defectum* to a juror accepted by a party on the trial could not be considered on a motion for new trial; but, from what appears here, this defendant, after having positively rejected the juror, was tried by him without fault on his part. To refuse him a new trial, under this state of facts, would be to deprive him of his right of peremptory challenge.

Judgment reversed.

(2 Ga. App. 98)

#### STEWART v. STATE. (No. 377.)

(Court of Appeals of Georgia. May 24, 1907.)

This case is controlled by the decision in *Hughes v. State*, 58 S. E. 390, 2 Ga. App. —. (Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

One Stewart was convicted of crime, and brings error. Reversed.

Busbee & Busbee, for plaintiff in error. Watts Powell, Sol., for the State.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 178)

#### LIVINGSTON & STEWART v KING.

(No. 352.)

(Court of Appeals of Georgia. June 20, 1907.)

#### 1. JUSTICES OF THE PEACE—APPEAL—AFFIDAVIT OF INABILITY TO GIVE BOND—SUFFICIENCY.

Where an appeal is entered by a firm from a judgment in a justice's court to a jury in the superior court, and no appeal bond is given, but the individual members of the firm make affidavit that each member of said firm separately, "owing to his poverty, is unable to give the security required by law," there was no error in dismissing the appeal on the ground that the affidavit did not show that the firm was unable to give the bond required by law. *Marlow v. Hughes Lumber Co.*, 17 S. E. 922, 92 Ga. 554; *Kline v. Swift Specific Company*, 45 S. E. 314, 118 Ga. 514.

#### 2. MOTIONS—ORAL MOTIONS—DEFECTS ON FACE OF PLEADINGS.

The defect, being apparent on the face of the pleadings, could properly be taken advantage of by oral motion. It is only where the powers of the court are invoked touching matters that lie outside the pleadings that a written application or motion is required. Civ. Code 1895, § 5046; *Smith v. Equitable Mortgage Co.*, 25 S. E. 423, 98 Ga. 240; *McCook v. Crawford*, 40 S. E. 225, 114 Ga. 337.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action between Livingston & Stewart and

**O. W. King.** From the judgment, Livingston & Stewart bring error. Affirmed.

**Payton & Hay,** for plaintiffs in error. Passmore & Tison and J. H. Tipton, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 249)

**E. VAN WINKLE GIN & MACHINE  
WORKS v. MATHEWS et al.**  
(No. 819.)

(Court of Appeals of Georgia. July 4, 1907.)

**1. CORPORATIONS—ACTIONS—BURDEN OF  
PROOF—CORPORATE EXISTENCE—TRIAL—  
RIGHT TO OPEN AND CLOSE.**

In a suit on a promissory note by the payee therein named, where the allegation is made that the plaintiff was a corporation, it would be incumbent upon the defendant to prove affirmatively that no such corporation existed. This would be true, without such allegation, where the name of the plaintiff itself imports a corporation. *Wilson v. Sprague Mowing Machine Company*, 55 Ga. 672; *Cribb v. Waycross Lumber Company*, 82 Ga. 597, 9 S. E. 428; *Mattox v. State*, 115 Ga. 219, 41 S. E. 709. Therefore, in such a suit, where the defendant in his pleading admits the execution of the note, such admission, with the presumption of corporate existence, makes a prima facie case for the plaintiff, and the defendant would be entitled to the opening and conclusion, although by his answer he had expressly denied the allegation that plaintiff was a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 47, 50.]

**2. WRIT OF ERROR—EVIDENCE—ADMISSIBILITY.**

The other grounds in the motion for a new trial, alleging error in the admission of testimony, as corrected and verified by the trial court, are without merit.

(Syllabus by the Court.)

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by the E. Van Winkle Gin & Machine Works against D. P. Mathews and others. From the judgment, plaintiff brings error. Affirmed.

**J. S. Ayers and Ellis, Wimblish & Ellis,** for plaintiff in error. **John B. Gamble and Shackelford & Shackelford,** for defendants in error.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 47)

**ELBERT COUNTY v. SWIFT.** (No. 220.)  
(Court of Appeals of Georgia. May 24, 1907.)

**1. EMINENT DOMAIN—NATURE OF INJURY—  
SUBSTANTIAL DAMAGE.**

The damages recoverable under the provisions of the Constitution of 1877 are for substantial injury to private property, real damage affecting the market value, and not speculative or imaginary damage affecting only the natural beauties of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 237.]

**2. COUNTIES—CLAIMS AGAINST—PRESENTA-  
TION—TIME FOR.**

Claims against counties must be presented by written demand to the proper county author-

ities within 12 months after such claims accrue or become payable, or the same are barred, unless held by minors or persons laboring under disabilities. Where it appeared from the evidence that the above requirement had not been complied with, a verdict against the county was unauthorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 315.]

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by T. M. Swift, for the use of J. Y. Swift, against Elbert county. Judgment for plaintiff, and defendant brings error. Reversed.

**C. P. Harris,** for plaintiff in error. **Z. B. Rogers,** for defendant in error.

**HILL, C. J.** T. M. Swift, for the use of J. Y. Swift, brought suit against Elbert county for damages to land. The trial court overruled a demurrer, and the case was submitted to a jury, which returned a verdict in favor of the plaintiff for \$175. A motion for a new trial was made and denied. The defendant excepts to the judgment overruling the demurrer and to the refusal to grant a new trial. This court will not consider the question made by the demurrer, but will decide the case on the merits, as shown by the facts.

The plaintiff was the owner of a certain tract of land located on the public road from Elberton to Petersburg. This tract of land had no improvements upon it, but by reason of many natural advantages, which are fully described in the petition and by the evidence, it was "unsurpassed in beauty and grandeur" as a site for a residence. Besides these natural advantages, it was located directly on the public road, which gave it additional value; and it was the intention of J. Y. Swift, who held the beneficial interest in the property, to erect on the same a family residence. The road which ran between Elberton and Petersburg and directly alongside this property had been the public highway for a long time, and it was by this road that ingress and egress was had to and from the property. The evidence is silent as to the value of the property in question, except that it was "chiefly valuable for a building site." In the spring of 1905 the commissioners of roads and revenues of Elbert county cut out, graded, and opened a new road. The new road leaves the old one some distance above the property in question, and comes back into it some distance below. Between this property and the new road there is an embankment of trees and bushes which completely hides the property from the road, "and is a gruesome and unseemly sight in front thereof." Although the old road was not closed up, it was practically abandoned by the traveling public, who preferred the new and better road. The old road, however, still remained as a highway, and as a means of ingress and

egress, into and from the property. The damage resulting to the property in question by the opening of the new road was alleged substantially as follows: The property could not be seen from the new road, and therefore its beauty as a building site was destroyed. The property was left off the traveled highway, because the old road is practically abandoned, and has not been worked by the county since the building of the new road. There was no way of getting to the new road from the property, or from the new road to the property, except through the intervening woods, or going for some distance on the old road. Instead of a valuable and beautiful residence site on a public road, which afforded easy access to it, it has become property without special advantages for residence purposes, located on an abandoned, unused, and unworked road. There is no evidence as to the market value of the property before the new road was opened, or since, and no evidence as to value at all, except the single statement, by the owner and his witnesses, that the property had been damaged at least \$500 by the opening of the new road and the practical abandonment of the old road. All the witnesses for the plaintiff concurred in the opinion that the property in question was chiefly valuable as a building site because of its natural advantages and of its location alongside the old road, and that it had been damaged by the new road and the abandonment of the old road, for such use, from \$500 to \$1,000. This is a substantial statement of the material evidence for the plaintiff. Without reference to the evidence for the defendant, does this evidence for the plaintiff make a case for the recovery of damages?

1. Under the Constitution of 1877, if private property is damaged by the construction of roads or any improvement made for the use of the public, its owner can recover whatever damage he has actually sustained. *Campbell v. Metropolitan Street R. Co.*, 82 Ga. 320, 9 S. E. 1078. Under this provision of our Constitution a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character, whether the damage is direct, as when caused by trespass or physical invasion of the property, or consequential, as in the diminution of its market value. *City of Atlanta v. Green*, 67 Ga. 390; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 81 L. Ed. 638. Unquestionably, also, the owners of land adjacent to public roads have a private right to have free access to their land and buildings thereon from the roads. 82 Ga. 320, 9 S. E. 1078, *supra*; *Street Ry. v. Cumminsville*, 14 Ohio St. 523. Applying these general principles to the facts as shown in behalf of the plaintiff, is this case one for damages? Certainly there is not shown any physical injury to his property, or any trespass thereon by the acts of the county com-

missioners in constructing the new road. Do the facts show any consequential damage, diminishing the market value of the property? Has his private property sustained any substantial injury from the making of the new road? It cannot be said that there is any diminution of its market value, for the very simple reason that it is not shown by the evidence to have had any market value either before or since the opening of the new road.

It is contended that its value as a building site has been damaged \$500 at least, because it is no longer adjacent to a public road, from which it can be seen, and to which there is easy access. The estimate of this damage is purely speculative, for there is no evidence whatever as to its value as a building site before the new road was made. Abstractly considered, the property still retains all of its natural advantages as a building site. We think damages might be recoverable for any diminution of the value of the property in connection with the use or uses to which it had been put, or to which it was peculiarly adapted; but we think it entirely too remote and speculative to give damages for a supposed injury to the mere ethical value of property for a certain use. Legal redress is given for substantial, and not imaginary, injury to property—for damage to market value, and not injury to landscape beauty. In this case the opening of the new road did not affect the physical advantages of the property. It is true "the embankment of trees and bushes" between the road and the property was left, "a gruesome and unwholesome" obstruction intervening between the road and the property; but this obstruction was not placed there by the ruthless hand of the county. It was the unappreciative act of nature. We know of no law that required this unsightly "embankment of trees and bushes" to be removed by the county authorities, so that the natural beauties of the property could be seen and admired from the public road.

On the question as to interfering with or preventing access to the property from the public road, the evidence shows that the old road is still open, and if the owner of the property desires to use the same for residential purposes, and to afford the traveling public the benefit of its beauty as they pass on by, or to afford him ingress and egress to and from the public road, he has only to call upon the county authorities, under the act of 1903 (Acts 1903, p. 41), to work this road and keep it in proper condition. It is somewhat remarkable that, notwithstanding the fact that this property was so unsurpassed in its beauty for residence purposes, it had never been improved by the present owner, although he had been in possession thereof for many years. The unsurpassed advantages of this favored spot for an "ideal country home" seem to have been overlooked or neglected by those who so greatly appreci-

ated its beauties until the opening of the new road. This public improvement was the flash-light that brought into view and value the hidden beauties of the place. We do not know of any law that requires a county to pay damages to a private citizen whose eyes have only been opened to the beauties of his private property by an improvement of public utility.

2. All claims against counties must be presented within 12 months after they accrue. Pol. Code 1895, § 362. The allegation of the petition is that "in the spring of 1905" the county cut out, graded, and built the new road which damaged the property, and that the petitioner "made a written demand on the defendant for the sum of \$500 damages," which had been refused. No time is stated when such written demand was made. The evidence on the subject is that the attorney for the plaintiff handed to the clerk of the board of commissioners a written claim for damages, in the amount of \$500, and that the board received it and declined to pay it. It is not stated when such written claim for damages was made. The suit for damages was not filed until July 24, 1906. It nowhere appears, therefore, either by allegation or by evidence, that any demand was made on the county within 12 months from the spring of 1905, when the claim for damages was alleged to have accrued. Treating the filing of the suit as a written demand, it does not show that such demand was made within the 12 months, for it was filed July 24, 1906.

Let the judgment of the court refusing to grant a new trial be reversed.

(2 Ga. App. 63)

**DUNLAP HARDWARE CO. v. THARP.**  
(No. 305.)

(Court of Appeals of Georgia. May 24, 1907.)

**1. JUDGMENT—DORMANT JUDGMENTS.**

The proper officer to record on the execution docket of a county court entries on executions issued from that court is the judge of the court. The sheriff has no authority to make such record. Therefore, where the sheriff recorded on the execution docket of the county court from which the execution issued an entry made by him as sheriff on the execution, there was no such compliance with the law as would prevent the dormancy of the judgment upon which the execution was based.

**2. EXECUTION—RETURN—RECORD.**

When the record on the execution docket of an entry on an execution is made by the proper officer, he should date such record as of the date when made.

**3. JUDGMENT—DORMANT JUDGMENTS.**

The entry as it appears on the execution should be recorded on the docket, and a substantial compliance with this requirement is necessary.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by the Dunlap Hardware Company against A. H. Tharp. The hardware company obtained a judgment against Tharp, and levy of execution thereon was made by

the sheriff on the property of defendant, whereupon defendant filed an affidavit of illegality on the ground that the judgment was dormant at the date of the levy. From a judgment sustaining the allegation of illegality and dismissing the levy, the hardware company brings error. Affirmed.

Hardeman & Jones, for plaintiff in error.  
C. E. Brunson and Wm. Brunson, for defendant in error.

HILL, C. J. The Dunlap Hardware Company (plaintiff in error) obtained a judgment against Tharp (the defendant in error) in the county court of Houston county, on October 21, 1895. Execution was issued, and duly entered upon the execution docket, October 30, 1895. Nulla bona was entered upon the execution on March 11, 1901. The execution docket of the county court, opposite the entry of the execution, showed the following entry: "Return nulla bona made by sheriff on this *fi. fa.* March 11, 1901." Levy of this execution was made by the sheriff on property of the defendant January 2, 1906, and the defendant thereupon filed an affidavit of illegality, on the ground that the judgment was dormant at the date of the levy. The issue thus presented was submitted to the decision of the judge without the intervention of a jury. The execution was introduced in evidence, with entries above noted. The entry of nulla bona on said execution appeared as follows: "Georgia, Houston County. Due search made, and no property of the defendant found upon which to levy the within execution. This the 11th day of March, 1901. [Signed] M. L. Cooper, Sheriff." Opposite the entry upon the execution docket was the following entry: "Return nulla bona made by sheriff on this *fi. fa.* March 11, 1901." M. L. Cooper, the sheriff, testified that he made the entry of nulla bona on the *fi. fa.*, and also the entry on the execution docket. He did not remember when it was made, but he did not make any entry and date it back. This was the only evidence; and the court sustained the illegality and dismissed the levy.

The only question presented in the case is whether the entry made by the sheriff on the execution docket of the county court was sufficient to prevent the dormancy of the judgment. "An entry made by a proper officer upon an execution issued from a judgment, unless recorded upon the execution docket of the court from which the execution issued, will not, even as between the parties to the judgment, arrest the running of the dormancy statute." *Nowell v. Haife*, 116 Ga. 386, 42 S. E. 719. See, also, *Civ. Code 1895, §§ 3761, 3762*; *Smith v. Bearden*, 117 Ga. 822, 45 S. E. 59; *Palmer v. Inman*, 126 Ga. 519, 55 S. E. 229; *Benton v. Fish*, 1 Ga. App. 656, 57 S. E. 1079. It is contended in this case that the record on the execution docket, relied upon to keep the execution in life, was not sufficient for that purpose, under

the law, because made by the sheriff, who was not the proper officer to make it, and it does not appear that he was in any way authorized to make it; because it was not dated; and because it was not a true transcript of the entry on the execution. The proper officer to make entries on executions on the execution docket of the county court is the judge of that court. Civ. Code 1895, § 4185. The sheriff has no authority to make such record on the docket. No presumption arises as to the regularity of the sheriff's act in making such record, because he has no authority upon the subject whatever. Regularity in the performance even of a ministerial act will not be presumed, unless the ministerial officer was authorized by law to perform the act. In other words, the question of regularity in the performance of an act cannot arise where no duty is imposed by law, or authority given by law to do the act. Civ. Code 1895, § 3763, requires that the clerk, or proper officer, making the entry on the execution docket, shall date such record when it is made. In this case the entry on the execution docket is as follows: "Return nulla bona made by sheriff on this fl. fa. March 11, 1901." This date clearly applies to the entry made by the sheriff on the execution, and not to the date when the entry was recorded by him on the execution docket. We do not think this sufficient. The date when the record is made on the execution docket should be clear and unequivocal, for the time of the record upon the execution docket is the all-important fact from which to determine the question of dormancy; the language of statute being: "No judgment shall be enforced after seven years from its rendition, when no execution has been issued upon it and the same placed upon the execution docket, or when execution has been issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, of the last entry upon the execution made by an officer authorized to execute and return the same." Civ. Code 1895, § 3761.

To save the judgment from becoming dormant the statute requires that the entry on the execution must be recorded on the execution docket of the court which the same issued. A substantial compliance with this requirement is essential. What was placed on the execution docket by the sheriff in this case was, not the entry which was on the execution, but a mere statement, according to the sheriff, of what the entry was. The reason for this requirement is that the execution docket must show a proper entry of the sheriff on the execution. The entry on the docket of the words, "Return nulla bona made by the sheriff on this fl. fa. March 11, 1901," is shown by reference to the entry on the fl. fa. not to be a correct transcript. It is true, as contended by the learned counsel for plaintiff in error, that the Supreme

Court in many cases has given to the dormancy statutes an equitable construction; but such construction has been limited to those cases where the acts of the plaintiff in execution to enforce his execution, by reason of their public character, served to keep the judgment alive. It has never been held by the Supreme Court that entries on the execution can be effective for this purpose when not recorded in the manner prescribed by the statute. In the case of Columbus Fertilizer Co. v. Hanks, 119 Ga. 955, 47 S. E. 224, the Supreme Court holds that, if the act of 1885 (Civ. Code 1895, §§ 3761, 3762) means anything, "it is that entries on an execution cannot serve to keep the judgment in life unless the entries are properly recorded."

We think it very clear that the judgment of the trial court, for the reasons stated, should be affirmed.

Judgment affirmed.

(3 Ga. App. 159)

SAWYER v. CITY OF BLAKELY. (No. 489.)  
(Court of Appeals of Georgia. June 19, 1907.)

1. MUNICIPAL CORPORATIONS—POLICE POWERS—PROHIBITING POSSESSION OF INTOXICATING LIQUORS.

A city whose charter contains a "general welfare clause" may legally pass an ordinance prohibiting the possession of intoxicating liquors kept for the purposes of illegal sale.

2. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

Under such an ordinance, proof of the possession of the liquor and an illegal sale thereof will authorize a conviction.

[Ed. Note.—For cases in point see Cent. Dig. vol. 29, Intoxicating Liquors, § 309.]

3. CERTIORARI—WHEN LIES.

Certiorari lies to correct judgments which are irregular or erroneous, but not those which are wholly void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 40-42.]

4. WRIT OF ERROR—EXISTENCE OF ACTUAL CONTROVERSY—MOOT QUESTIONS.

The courts will not pass upon moot constitutional questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 43.]

(Syllabus by the Court.)

Error from Superior Court, Early County; W. O. Worrill, Judge.

Monk Sawyer was convicted of a violation of an ordinance of the city of Blakely prohibiting the possession of intoxicating liquor kept for the purpose of an unlawful sale, and he brings error. Affirmed.

The plaintiff in error was convicted before the mayor, presiding in the police court of the city of Blakely, for a violation of the following municipal ordinance: "If any person shall have in his possession in said city any intoxicating liquors for the purpose of unlawful sale or giving away thereof, on conviction thereof such person shall be punished as prescribed in section 17 of the city ordinances. In prosecutions for the violation of this ordinance, one-half the fine shall be

paid to the informer." By section 17 of the city ordinances all persons convicted thereunder are to be punished according to section 13 of the city charter (Acts 1900, p. 223), which prescribes that the officer presiding in the police court shall have the authority to punish persons convicted therein of violating the city ordinances by fine not exceeding \$100, by imprisonment in the jail of Early county, or such other place as the city council may provide for a prison, for a term not exceeding 100 days, either or both, and to coerce the payment of fines by imprisonment. Labor in the chain-gang or on the streets, not exceeding 100 days, may be allowed as alternative to fine or imprisonment. Sentence may be cumulative. Upon the trial the accused moved a discharge on the ground that there was no sufficient charter authority for the passage of the ordinance under which he was being tried. The mayor denied the motion, and to this one of the exceptions is taken. The evidence was conflicting; but the mayor adjudged the defendant guilty and imposed a fine of \$50, with the alternative of 50 days' work on the streets of the city. The defendant sought certiorari, which was denied by the judge of the superior court.

Among the grounds for certiorari it is contended that the judgment and sentence of the police is void, because section 13 of the city charter is in violation of article 1, § 1, par. 2 (the due process of law clause), of the state Constitution, "because it provides for a penalty of 3½ months' servitude in the chain-gang or on the streets of Blakely, without providing for the due process of law in the trial of offenders; the process allowed petitioner consisting of a warrant sworn out before the mayor, on which he was put upon trial, without a copy of the accusation charging him with a crime, and without a trial by jury, and with nothing more on the record than the name of the arresting officer, the names of the witnesses for the prosecution, the offense charged, and (after the trial) the judgment and sentence of the court." A paragraph of the petition for certiorari also asserts: "Your petitioner avers that he has been denied the equal protection of the laws, contrary to and in violation of the fourteenth amendment of the Constitution of the United States (Civ. Code 1895, § 6030) which says that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' in that he was convicted of a crime whose punishment was more severe than the average punishment of misdemeanors in the state courts of our state, yet he was not furnished with an accusation of the crime, nor allowed a trial by a jury; and this deprivation of your petitioner's constitutional rights he assigns as error." It appears that the accused did not appeal to the city council, but sought a certiorari directly from the mayor's decision.

Section 14 of the city charter provides: "Any person convicted in the police court may obtain certiorari directly from the decision of the officer presiding in said court under the same rules as certiorari is obtained from the decisions of county judges in criminal cases, or he may waive his right to apply for certiorari, and may, within four days from the rendition of the decision in the police court, enter an appeal to the city council, who shall hear the case anew, and their decision shall be final. There shall be no certiorari from the decision of the council." In the petition for certiorari the applicant seeks to make the point that this provision of the charter is contrary to section 4634 of the Civil Code of 1895, which provides that certiorari can be had to correct errors in any inferior judicature, and is therefore unconstitutional, as being a special law in contravention of a general law.

Park & Collins, for plaintiff in error. J. R. Pottle, for defendant in error.

POWELL, J. (after stating the facts). 1. The ordinance under which the accused was convicted is valid. The charter of the city of Blakely (section 25) contains a broad "general welfare clause," and in addition thereto adopts by reference section 696 of the Political Code of 1895, which itself is broad enough in terms to authorize this ordinance. *Mayson v. Atlanta*, 77 Ga. 662 (3); *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903 (2); *Paulk v. Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; *Reese v. Newnan*, 120 Ga. 198, 47 S. E. 560 (1).

2. The mayor's finding was supported by the evidence. *Rooney v. Augusta*, 117 Ga. 709, 45 S. E. 72 (2); *Reese v. Newnan*, 120 Ga. 198, 47 S. E. 560 (2).

3. The point that the section of the charter under which the punishment was imposed is unconstitutional and void will not be considered, nor certified to the Supreme Court; for certiorari lies, not to correct that which is void, but only that which is irregular or erroneous. *Levadas v. Beach*, 117 Ga. 178, 43 S. E. 418 (2); *Bass v. Milledgeville*, 122 Ga. 177, 50 S. E. 59.

4. The question as to the constitutionality of so much of the fourteenth section of the city charter as requires the accused to waive his right of certiorari in order to appeal to the city council, and makes the finding of that body final, is not properly before us; for the accused did not appeal to the city council, and no court has yet denied to him the right of certiorari from any decision of that body. The time to decide that question will not be at hand until the right to certiorari from the decision of the city council is judicially denied and that judgment is brought under review. Courts will not gratuitously decide moot constitutional questions. Judgment affirmed.



(2 Ga. App. 1)

**ANDERSON v. STATE. (No. 395.)**

(Court of Appeals of Georgia. May 16, 1907.)

**1. CRIMINAL LAW—WRIT OF ERROR—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—CONSTITUTIONAL QUESTION.**

Before a reviewing court is authorized to pass upon the constitutionality of an act of the General Assembly, it must appear that the question was made or presented in the court below and was passed upon by the trial judge; also the alleged repugnancy of the statute to some portion of the Constitution must be specifically asserted.

(a) An allegation of the repugnancy of a statute to the Constitution is not sufficiently specific, unless the clause or paragraph of the Constitution claimed to be violated is set out.

(b) No constitutional question is properly presented in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2619.]

**2. INDICTMENT—SUFFICIENCY.**

An indictment is sufficient which states the offense in the terms or language of the statute, or so plainly that the nature of the offense charged may be easily understood by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 182.]

**3. CRIMINAL LAW—MISDEMEANORS—PUNISHMENT—STATUTES—PROSPECTIVE OPERATION.**

By Pen. Code 1895, § 1089, a definite punishment is prescribed for "every crime declared to be a misdemeanor." The effect of this section is not merely confined to the misdemeanors enumerated in the Code, but has a prospective force.

**4. GAMING—SPECULATION IN FUTURES—GAMING HOUSE—WHAT CONSTITUTES—ACTUAL DELIVERY—NECESSITY.**

A place where futures are bought and sold on margins is a gaming house.

(a) This is true, although "the contracts are telegraphed out of the state," if the actual wagering or the settlement of the wagers take place in this state.

(b) The Boykin act (Acts 1906, p. 95) has withdrawn from the business of dealing in futures on margins whatever legislative sanction there was to be implied from the fact that by the tax act of the state a license tax had been imposed upon "bucket shops."

(c) An assertion, although made in each transaction, by the customers of an office where futures are bought and sold, that actual delivery is contemplated and understood in all cases, will not prevent the keeper of the office from being guilty of maintaining a gaming house, if as a matter of fact the customers, throughout a continued course of dealings, do not make, tender, or accept actual delivery, but, through the proprietor of the office, settle their winnings and losses in money. The actual facts of the case must override the contradictory alleged contemplation of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 199, 200.]

**5. CRIMINAL LAW—WRIT OF ERROR—REVIEW—HARMLESS ERROR.**

Where an indictment contains two counts, and the defendant has been found guilty on both counts, and only one sentence has been imposed, and the evidence authorizes the conviction, errors assigned relating to one count only are immaterial. In this case the evidence authorized the verdict on both counts. The trial having been entirely free from error as to the count in the indictment charging the maintenance of a gaming house, this court will not pass upon alleged errors in the instructions of the court to the jury in relation to the count

charging a violation of the Boykin act, commonly known as the "Anti-Bucket Shop Law." [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

C. N. Anderson was convicted under an indictment charging in one count a violation of the Boykin act (Acts 1906, p. 95), commonly known as the "Anti-Bucket Shop Law," and in another a violation of the statute prohibiting gaming houses, and he brings error. Affirmed.

Anderson, Felder, Rountree & Wilson and Rosser & Brandon, for plaintiff in error. C. D. Hill, Sol. Gen., T. W. Rucker, and R. R. Arnold, for the State.

POWELL, J. This is what is known as the "Bucket Shop Case," being the first to come to this court from a prosecution under the Boykin act (Laws Ga. 1906, p. 95). The title of that act is as follows: "An act to prohibit contracts and agreements for the sale and future delivery of cotton, grain, provisions and other commodities, stocks, bonds and other securities upon margin, commonly known as dealing in futures; to declare such transactions unlawful, and to constitute a misdemeanor on the part of any person, association of persons or corporation participating therein, whether directly or indirectly; to prohibit the establishment, maintenance or operation of any office or other place where such contracts are made or offered; to define what shall constitute prima facie evidence of guilt; to compel all persons participating in such transactions to testify concerning their connection therewith; to provide that no discovery made by any witness which would tend to subject him to conviction or punishment under this act shall be used against such witness in any penal or criminal proceeding, and that he shall be altogether pardoned therefor; to provide that regular commercial exchanges and other bona fide trade organizations may post quotations of market prices, and for other purposes." Section 1 (page 96) provides that "from and after January 1, 1907, it shall be unlawful for any person, association of persons or corporation, either as principal or agent, to establish, maintain or operate an office or other place of business in this state for the purpose of carrying on or engaging in the business, forbidden by this act, commonly called 'dealing in futures on margins,' and any person violating the provisions of this section shall be guilty of a misdemeanor." In section 2 it is provided that "every contract or agreement, whether or not in writing, whereby any person or corporation shall agree to buy or sell and deliver, or sell with an agreement to deliver, any wheat, cotton, corn or other commodity, stock, bond, or other security to any other person or corporation when in fact it

is not in good faith intended by the parties that an actual delivery of the articles or thing shall be made, is hereby declared to be unlawful, whether made or to be performed wholly within this state or partly within and partly without this state; it being the intent of this act to prohibit any and all contracts or agreements for the purchase or sale and delivery of any commodity or other thing of value on margin, commonly called 'dealing in futures,' when the intention or understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement: provided, that nothing herein contained shall be construed to apply to transactions by mail or wire between persons in this state, and persons outside this state where the person outside this state is not represented in this state by any broker, agent or attorney in said transaction." Section 3 makes any person who shall become a party to any of such contracts, personally or as agent, directly or indirectly, or who shall do anything to aid or further such an agreement, guilty of a misdemeanor. Section 4 makes participants competent witnesses and provides immunity from punishment for such as are called to testify. Section 5 (page 97) makes proof of certain things prima facie evidence of guilt of a violation of sections 2 and 3. Section 6 is as follows: "Proof that anything of value agreed to be sold and delivered was not actually delivered, and that one of the parties to such agreement deposited or secured, or agreed to deposit or secure, what are commonly known as 'margins,' shall constitute prima facie evidence of a contract declared unlawful by the terms of this act." Section 7 provides that "proof that any person, association of persons or corporation, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of cotton, grain, provisions, stocks, bonds or other commodity or thing of value, or either of them, shall constitute prima facie evidence of guilt of the offense or offenses prohibited in section 1 of this act." And section 8: "This act shall not be so construed as to prevent or render unlawful the posting or publishing of market quotations or prices of commodities, stocks, bonds, and securities by any regularly organized commercial exchange or other bona fide trade organization in which no purchase or sale for future delivery on margin is permitted; that no person or corporation committing any of the acts or things prohibited in defense thereof to plead the payment of any license or other tax to the state, or to any county or municipality thereof, nor shall the payment of any license or other tax in any wise operate to relieve such offender from the penalties imposed by this act." Conflicting laws are repealed.

The indictment contained two counts, one under this act and the other one under the

statute prohibiting gaming houses. The substance of the first count is that the defendant, with others, "in the county aforesaid, on the 25th day of January, in the year of our Lord, 1907, with force and arms, did establish, maintain, and operate an office and place of business for the purpose of carrying on and engaging in the business commonly called 'dealing in futures on margins,' and did then and there, in said office and place of business established for the purpose aforesaid, maintain and operate and engage in a business commonly called 'dealing in futures on margin.'" The second count charges that the same persons did, "in the county aforesaid, on the day aforesaid, keep and maintain a gaming house." The defendant demurred to the first count of the indictment, on the following grounds: "(1) Because the first count of said indictment does not state facts sufficient to charge the defendants, or either of them, with a crime under the laws of the state of Georgia. (2) Because it is not averred in said count that the business which the defendants are alleged to have established, maintained, and operated is 'forbidden' by the act of the Legislature (Acts 1906, p. 95), nor that the business is one in which contracts are made for the future delivery of commodities, and that actual delivery of such commodities is not contemplated. (3) Because the allegations of said count are consistent with innocence under the law, and said count does not point out the details, nor in what ways or particulars the penal laws were violated. (4) Because the act of the Legislature aforesaid, upon which said count is based, prescribes no penalty or punishment for a violation of said act." The demurrer was overruled, and exceptions were duly taken.

The material parts of the evidence are as follows:

The first witness for the state had been a clerk in the defendant's office, both prior and subsequent to January 1, 1907. He testified that in the defendant's office stocks, cotton, and other commodities were bought and sold on margins for future delivery. He was with the defendant for over a year, and no actual deliveries were ever made during that period. On January 1, 1907 (the date the Boykin act went into effect), the defendant made a slight change in the name of his firm; and the room in which they had formerly posted market quotations was turned over to the Atlanta Commercial Exchange. A door which had opened between the defendant's office and this quotation room was closed up, and also the opening through a window. In the larger room, after January 1st, was the Atlanta Commercial Exchange; and in there a blackboard was kept, an operator was on duty, and the fluctuations of the market were posted. None but members of the Atlanta Commercial Exchange were admitted to this room. There were some 60 to 80 members.

"To become a member you just make an application to the secretary and pay \$1 a month dues. If a man wants to buy anything, any cotton or stocks or bonds, or wants to sell, he can get the quotations in the larger room, from the blackboard where they are posted; but he can't make a trade in there. For instance, if he wants to buy 100 bales of March cotton, or sell 100 bales of March cotton, he sees that in the larger room on the blackboard, and then if he wants to make a trade he goes to the next room to Mr. C. N. Anderson's [the defendant's] office, coming out of the corridor of the Prudential Building, stepping about 10 feet into another door. Yes, sir; he would come out into the corridor, and go around about 10 feet into another door, to get in where Mr. Anderson is. In there with Mr. Anderson is Mr. Hufaker, an operator, and a boy and myself when I was employed with them. When he goes into Mr. Anderson's office, if he wants to make a trade, he has first to sign a power of attorney, on a blank furnished. Yes; I have seen a great many men make trade there. I have known only one man to make a trade in that place since the 1st of January of this year. The money was handed either to myself or to Mr. Anderson, by Mr. Ewing, to buy stock. I think it was he was buying. I have seen Mr. Ewing do that a great many times since the 1st of January. If he wanted to buy, for instance, \$100 worth of stock, he would pay the money to C. N. Anderson & Co.—to Mr. C. N. Anderson. It would be placed to Mr. Ewing's credit. If the stock went down, or whatever he bought went down, he would have to put up additional margin, if he wished to carry the stock. Yes; I have known him to do that. For instance, if he bought any particular stock, expecting it to go up, and it went down, I have known him to come in and put up margins to stay in. Yes, sir; I have seen that done more than once in this county, since the 1st of January, by Mr. Ewing. If Mr. Ewing won, then Mr. Anderson paid him the money in his office, which was adjoining the blackboard room. Yes, sir; they settled by the figures of quotation on the blackboard. The money was paid to Mr. Ewing, if he won, by Mr. Anderson, at that place; if he lost, the money he had already paid was kept by Mr. Anderson and forwarded to whoever the broker was he placed the trade with. His correspondent outside of the state and county was Campbell & Co. That was the only correspondent he had. I don't know who Campbell & Co. was, except they are in Cincinnati. No, sir; I could not swear there was a Campbell & Co. Yes; if he lost, he paid his loss to Mr. Anderson in that room. If he wanted to let his trade go, Mr. Anderson kept the money; and if he wanted to stay in the market, he would have to put up additional margins with Mr. Anderson. If the price of a particular stock he had bought went down, and he didn't put up a margin,

the money he had already put up was exhausted, and was sent to Cincinnati by Mr. Anderson. If there was a rise in the price of an article he had bought, and he wanted to close out, then he got his money from Mr. Anderson in that building. He would get the difference between what he bought it at and what he sold at, less the commission. \* \* \* From the room containing the blackboard I would say you would have to go about 15 or 16 feet to get where Mr. Anderson sat."

On cross-examination this witness testified: "The business that C. N. Anderson undertook to do was just acting as agent for people, to transmit orders for execution in some other state. As to my connection with C. N. Anderson & Co., and the duties I performed in connection with that firm, I was clerk, you might say. If any came in, and couldn't write quick enough, and wanted a quick execution, I would assist them in writing it, and they signed all the blanks. I never actually transmitted any of the orders that went through C. N. Anderson & Co. to Cincinnati, except handing them to the operator. In the case of Ewing he came and signed the telegram himself, on a Western Union telegraph blank, and I handed that to the operator, and the operator transmitted it over the wire. Yes; that is true. C. N. Anderson & Co. had no interest in that transaction, except to receive a commission or brokerage from Ewing; that is all. Yes; Ewing paid me and Anderson & Co. the margins to put up for him, and C. N. Anderson & Co. put that up with Campbell & Co. O. N. Anderson, acting as broker for Ewing, when this telegram had been sent in and executed and the trade confirmed, took the margin and sent it on to Campbell & Co. Campbell & Co. were the brokers in Cincinnati. C. N. Anderson & Co. paid Campbell & Co. part of the brokerage they received from Ewing on any other trade that came in. Yes; it is true that, when a telegram was handed to the operator to be forwarded to Campbell & Co., no order was executed, or no statement of execution was handed out to the trader, until Campbell & Co. were heard from. The purpose was, when Ewing filed the telegram with the operator, that wire was sent on to Campbell & Co., and when Campbell & Co. telegraphed back, then C. N. Anderson & Co. took the margin from Ewing and sent it on, and the trade was executed. I cannot recall specifically the several trades that Ewing made, or the exact date. I simply know that Mr. Ewing came in and made trades. I am really testifying about the course of business more than anything else. I can't recall any specific trade where he made a profit or loss. I am satisfied Mr. Ewing made some profit, but I do not recall any specific instance. No; I cannot recall any other person. I was with L. J. Anderson & Co. from the 31st of January, 1906, and with C. N. Anderson from the 1st of

January this year, until about the 13th of January or the 15th of January. \* \* \* I don't know whether it was for actual delivery or not. No; I do not know that there was ever any understanding had with Ewing or any other trader that the goods were not to be actually delivered when called for. I don't know anything about that. The members of the association were not required, if they wanted to make trades, to make them through C. N. Anderson & Co. at all. I know of some members of the exchange that did not make any trade at all. Mr. Lincoln is one, a grain man here doing business in Atlanta. I cannot recall any others just now, but I presume I do know others. It is true that there are a number of the members of the exchange who did not have anything to do with C. N. Anderson & Co., and did not operate in there at the time I was there. The two places of business were entirely distinct. C. N. Anderson & Co. had no control over the operations of the exchange. They were brokers pure and simple, for commission, operating only for a commission on employment. I do not know positively that persons who wanted to trade through C. N. Anderson & Co. took their quotations from the board of the Atlanta Commercial Exchange, but I know a great many of them did. Yes; as a matter of fact I simply know that some members of the exchange traded through C. N. Anderson & Co. Yes; C. N. Anderson & Co. had their own operator. It is true, as a matter of fact, that when a trade was closed with which C. N. Anderson & Co. were connected it was closed with the quotation of prices as given by Campbell & Co., in Cincinnati, or by themselves if they made a limited order. If they made a limited order, it went out at that limit, or the trade closed at that time. Whether there was a profit or not, it was settled according to the limit. Q. But where that was not true, where the operator's margin was exhausted and his trade was closed, or where he ordered it closed at a certain figure, that was all done by quotation from Campbell & Co. straight, wasn't it? You didn't have to go to the board for that, did you? A. I will have to commit myself to answer that question. I will have to commit Anderson to answer that question. Q. You say you can't answer that, then? When you stated on direct examination that Anderson always closed the trade and settled by the quotations on that board, you didn't mean that, did you? A. Well, you ask me a direct question now. They were both on the same wire. They got their quotations over the same wire, and that is the reason why I stated what I did on the direct examination. It is a mere deduction of mine. No; it is not true, as a matter of fact, since I think about it, that Anderson & Co. had to go to that blackboard to get the quotations at all. Yes; it frequently happened that a trader who wanted to purchase cotton for future delivery would

simply have his order telegraphed in to purchase at the prevailing quotations, and that was all done in Cincinnati. A telegram was simply sent in to Campbell & Co. to execute an order the best they could upon the market at the time they got it, according to the market when they got it, when it was sent without a limit to it. Yes; it frequently happened, when a prospective purchaser wanted to buy at a certain figure and the market in the meantime ran up, that Campbell & Co. could not buy at all, and when they ordered the trade closed out upon the market, whatever the market might be, that was done by Campbell & Co. in Cincinnati, and the market telegraphed in, when the trade was wound up or closed. No; that was not done by any inspection of these blackboards at all."

On redirect examination this witness testified: "As to the purpose of having that blackboard in the room where the quotations and fluctuations of the market were posted, it was to furnish quotations to the members. No; a man could not know anything about the market until he went in to that board, unless he could make a guess at it. A member would get his information upon which he made his trade from this blackboard. The information on the blackboard came from Campbell & Co. That information from Campbell & Co. came on the same wire as C. N. Anderson & Co. They were the same line—the same wire; but Anderson's operator did not take those that were put on the board, you know. Yes; it came over that wire. The same quotations that went on that board came over Anderson's wire. There were two operators, one in Anderson's room and one where the blackboard was, and both of them took the same information of the rise or the fall, or fluctuations, of stock, bonds, cotton, etc., from Campbell & Co. of Cincinnati. Mr. Anderson got those commissions. As to the expense of those quotations, telegraph service, the cost of a wire a day, it didn't cost anything to get those messages, so far as I know. I don't know who paid for them. It cost nothing to my knowledge. I don't know about that. I know prior to the 1st of January it didn't cost, but after the 1st of January I couldn't swear positively whether it cost anything or not. As to how many employees were in those rooms, the two places, there were two where the blackboard was—the operator, and the secretary and treasurer, who was the doorkeeper. The operator marked the quotations. In the other room were only three, after I left; four when I was there. The operator was paid \$30 a week, and I was paid \$20 a week, and the office boy was paid \$3.50 a week. I said that the last I knew of it there were about 75 or 80 members of the exchange that paid a dollar a month."

The Mr. Ewing referred to above was also called as a witness. He testified: "I have bought up there several times since the 1st

of January, 1907, but I could not tell you how many times. We have got a board of trade up there, you know, something over 100 members, and we put the quotations on the board as they come in, and we see the quotations, and then send our orders anywhere we please. When I would go in and get the quotations from the board, I would go around in the other room, where Mr. Anderson stayed, to make my trade, when I wanted to go and trade there. I believe Mr. Danne was staying there, and I gave the money to him. Yes; I have paid money to Mr. C. N. Anderson—I have no idea how many times, but 30 or 40 times, I suppose—since the 1st of January, 1907. When I would go and get the quotations from the blackboard and wanted to buy a commodity, I would usually go in and give it to Mr. C. N. Anderson. If the market went up, I got my money from Anderson; if it went against me, I don't know where it went. If it went against me, and I wanted to stay in the market, I would put up more money. When I would put up more money in order to stay in the market, I would give it to Mr. Anderson usually. \* \* \* I am a member of the Atlanta Commercial Exchange. The only good that membership did me was the information it gave me by seeing quotations on the blackboard. That is the reason I went into it. I wanted to see the market. We were not required to trade with C. N. Anderson & Co., not confined to him at all. We could have went anywhere and traded we wanted to. It is true it was explained to us that if we wanted to trade with C. N. Anderson, that they could not act in any other capacity than our agents, and that they would act in that way, if we paid a commission. We always signed a contract to that effect to Anderson, that he was to act as our agent. Yes; we went in there with the understanding that C. N. Anderson & Co. would not act with reference to dealings in any other way, except upon employment to be paid a commission for their services. That was the understanding, and I always signed a contract to that effect—appointed him as my agent. When I put up a margin there I telegraphed through the operator, over the Western Union wire, to the Cincinnati brokers, and they had to telegraph back confirming the trade. Always when I put in an order for a trade I put the money in that way, with the order, and that money was to be forwarded by Mr. Anderson on my behalf, as my agent, when I made the trade through him. I had to put the money in for his protection. He was employed as my agent, to pay it to the people outside the state. I frequently put in orders for a trade and never got it; but I always got my money—no trouble about getting my money back. Yes; I regarded him, through all those transactions, as my representative, my agent, to place orders for me outside the state, for which I paid a compensation. That was the

understanding when I began; and when I closed the trade, if there was money coming back to me, I instructed him, as my representative, to get it back and pay it to me. That is all there was of it, and I never had any trouble. He acted mighty nice with me. I took his receipt for the money, and if I didn't get the trade I would go and give him the receipt, and he would give me the money back. I have done that often. Very frequently I would not get a trade at all. Yes; I signed all of these orders that were made and sent over the wire, and they were directed to Campbell & Co., of Cincinnati, and that is the way they were directed. I never got any actual cotton, or stocks, or bonds. I never asked for it. They never offered it to me, and I never did want it. As to whether or not I would buy 100 bales of cotton straight out, I wouldn't have that much money. I could not have paid for 100 bales of cotton. If I bought 100 bales of cotton I would pay \$100. I suppose cotton was worth about \$45 or \$50 a bale. No, sir; I never had any understanding with Campbell & Co. that they would make actual delivery if I required it, because I never expected any actual delivery. No; I had no understanding with them that they would be relieved from delivering cotton if I required it. I never had any contract of that kind at all. I have always understood they would deliver the cotton if I did require it. No; I never saw one of them in my life (referring to Campbell & Co.). The only contract I had was when I wired an order and they confirmed it. That is all; nothing at all said about actual delivery. Nothing was ever said at all about any stipulation between me and them that if they wanted to deliver the stock I would not be required to take it. I don't reckon they knew a thing about my financial responsibility. I never saw Campbell & Co. I was expecting Mr. Anderson to look after that. I have heard a good deal about Campbell & Co., and I supposed I was dealing with them through Anderson. I never settled, except on the rise or fall of the market. That is the way I settled."

The district superintendent of the Western Union Telegraph Company testified that the telegraph wire above referred to connects the defendant's office with Odell's office in Cincinnati. It is a leased wire, and the rental rate is \$25 per mile per annum. It is about 500 miles from Atlanta to Cincinnati.

The manager of the Prudential Building, in which these offices are located, testified that the lease of these rooms stands in the name of Walter Campbell, but by Campbell's instructions the rents are paid by draft on the Odell Stock & Grain Company. This includes both rooms, Anderson's office and the blackboard room. The two rooms rent for \$1,000 per year.

Another witness testified: "I am in and out there [referring to defendant's office]

two or three times a day. I have bought a little cotton up there by telegraph every day. I would sign a telegram, I think, to Cincinnati. I am not positive where it went, but I gave it to a young man there in the office, and he bought me some cotton in Cincinnati, he said. I got the quotation of the cotton, the basis for my trade, in another office, down this way next to the Neal Bank. I think just two doors between, or maybe just one door. There is one door in Mr. Anderson's office, and then I come down this way and go into the blackboard and look up there, and that is where I get my quotations. When I bought cotton I went in the room where Mr. Anderson was. I don't think I bought but 50 bales of cotton, and paid \$1 a bale for what I bought. Cotton is worth now, I suppose, about \$50 for the actual stuff. I put up \$50, and bought 50 bales. That is the way I bought it, or \$25 for 25 bales. I think I bought 50 bales up there. I think I made a little on my transaction. Mr. Anderson gave me a check, I think. Yes; in that building there. I work for the Bell Telephone Company. No; I never asked for the delivery of that cotton. They never offered to deliver the cotton to me. I would settle on rise and fall of the market, of course—on the fluctuation."

On cross-examination the same witness testified: "I was in there two or three times a day. Mr. Hamilton occupies the exchange and seems to be in charge there—a gentleman who sits at the door, old man Hamilton, I think. He seems to be manager of the place in there. He tells me he is. Yes; unfortunately, I am a member of the exchange. I pay a dollar a month for the privilege of going in and looking at the board. No; I do not pay anything for the privilege of trading anywhere. I go in and look on the board and get these quotations, and then go and trade where I please. Of course, I could trade in New York or anywhere else I wanted to. I am under no obligations to trade with Anderson any more than with Curran, or any other broker or commission merchant in the city of Atlanta; none whatever. Mr. Whittlesey is the man who puts the quotations on the board. No; I do not believe I have seen either one of those gentlemen in Anderson's office. As to these gentlemen, Mr. Hamilton and Mr. Whittlesey, going to their work every morning just like the clerks in Neal's Bank, they are there; but I don't stay there. As to whether they go home at night when they close business I do not know. I could not tell you where they go. I do not remember ever to have seen them go to Anderson's office. When I go to Anderson's office to make a trade, I just write out a telegram. Yes; I sign my name to it, and I think it goes to Cincinnati, but I am not positive. The order goes to buy or sell a certain number of bales of cotton, according to the rules of the exchange. I saw Mr. Anderson in his office, and I think probably he has

a stenographer and operator that I saw in there. No, sir; I never saw these people in the exchange office doing anything. I do not stay there. I have never seen Mr. Anderson and his force doing anything in the exchange at all. I don't remember now to have ever seen Mr. Anderson in there. Yes; that is the way I have understood it, that those two businesses were separately conducted, so far as I can see. No more connection between Anderson and this exchange than between the Neal Bank and the exchange, so far as I can see or know. Those quotations are put on a board in the exchange room. I never saw any board in Anderson's office. There are no quotations published in Anderson's office, any more than in the Neal Bank. I never gave Mr. Whittlesey, the operator in the Commercial Exchange, an order for cotton, stocks, oats, grain, barley, or anything else. As to whether or not I would have seen if anybody else had given an order while I was there, I don't pay much attention to that. I just pass in and out, you know. No; I never saw anybody give Mr. Hamilton, the secretary, an order, and I never saw anybody pay him any money for stocks or bonds or futures. In that room where the Commercial Exchange is conducted, the only business done is transacted by Mr. Hamilton, the secretary (who sits at the door and admits members and puts out nonmembers), and the receiving of quotations by Mr. Whittlesey, the operator, and putting them on the blackboard—is all I have seen done there. If anything else was done in there I would have seen it, I suppose. As you go into that room from the hallway the operator sits to your right, as you enter, and Mr. Hamilton sits to the left, close to the door, with a table to his left, and the members of the exchange sit and watch the board, or come in or go out. This is all I have ever seen done in that room—the operator posting the quotations on the board, and Mr. Hamilton, the secretary, admitting the members and keeping out nonmembers. I don't think I ever traded for anything but a little cotton. I think I gave my orders to Mr. Anderson or the operator. I am not positive which. I don't remember exactly, but I think my telegrams were addressed to Cincinnati, Ohio, to buy a certain number of bales of cotton at a certain price. I fixed the price. Supposing I order 50 bales of cotton, say of May deliveries, say at 9 cents, the price of the order I gave would be fixed at the place of execution in Cincinnati. If I should send a dispatch to buy me 50 bales of cotton at the market quotation, the price would be the quotations at Cincinnati, I would think. I went by the prices on the board in the Commercial Exchange room, but it was confirmed in Cincinnati. I suppose, when I would go in and see the price of cotton, if May delivery was 9.50, and I would send a telegram to Cincinnati, to buy me a certain number of bales, I suppose they would buy it at the

market where the concern was that was representing it. I suppose they would buy it at the market they had there, in the state of Ohio. Yes; before my order was executed I would get a return wire from Cincinnati, confirming my trade, telling me they had executed my order in Cincinnati, at 9.50, or 9.45, or whatever the price might have been. I suppose that is the way it is done. Yes; in this transaction Mr. Curtis Anderson, the broker, was simply my agent executing my order. That is what he said. Of course, he was my agent. I was trading through him. I paid him a commission to represent me. It cost me so much to make the trade. No; I never did go into Mr. Anderson's place of business and telegraph an order to any other place in Georgia for execution; but I always telegraphed my order outside of the state. That is my understanding. The \$50 I would put up for 50 bales of cotton, I suppose, was just the margin in the trade, you know. I don't remember that I saw the contract under which I purchased that cotton. They handed me a telegram, I think. They always gave you a contract. No; I have not a copy of one of those contracts. No; I don't know what the intention of Campbell & Co., or anybody else that I bought this cotton from, was. There was no agreement between me and my agent, C. N. Anderson & Co., or between the firm in Cincinnati, that there was not to be a delivery of this cotton; no contract between us at all; no actual agreement about it; nothing that I know of. I bought this amount of cotton, and paid this amount of money, the amount named in the contract, for future delivery, and that was the whole contract; all I know about it. Just buy so many bales of cotton, and pay so much money. I have been told that there were about 100 members of this exchange. That is all I know. I see the members of this exchange in there, when I would go in from time to time. The members of the exchange go in there and look at the quotations, and then go out and send their orders anywhere they please. Yes, sir; there are a great many members of this exchange who are dealing in grain and other commodities, flour men and so on, who go in there; but I couldn't say whether they made trades or not. I would see them in there with other members."

For the defense several gentlemen testified that they were members of the Atlanta Commercial Exchange, and that they themselves had no relation with the defendant. They did not buy or sell futures; but, being in the actual business of dealing in grain, etc., desired the market quotations for business purposes.

The defendant's statement is as follows: "I am a member of the firm of C. N. Anderson & Co., who are general brokers in the city of Atlanta. We consulted attorneys before we ever began our business, and believed that we were within the law of Georgia,

and we had no intention of violating the laws and would not do so if we knew it. We are purely brokers; got no interest in these transactions you have heard about whatsoever, except to receive our commission. We require every customer who places one of these orders to sign a power of attorney, authorizing us to act as their agent, before we place any orders whatsoever. Campbell & Co. are brokers in Cincinnati, and trade on the different exchanges throughout the country, not for themselves, but for their clients. We have no connection whatever with Campbell & Co. of Cincinnati, not the slightest. The only connection whatsoever we have with them is to get our commission from our customers. We pay them a part of that commission to handle these orders for our customers. We pay our rent to Walter Campbell. As to the commercial agency, I don't know anything about their rent. Their business is entirely separate from mine, and we have no connection with them whatsoever."

Samples of the contracts signed by the defendant's customers were introduced. They were in the following terms: "I do hereby constitute and appoint C. N. Anderson & Co. my lawful agents and brokers, with authority to place for me such orders as I may give them, with such persons and in such markets as they may select, located outside of the state of Georgia, for the purchase or sale of bonds, stocks, cotton, grain, and other produce, either for present or future delivery, and I agree to pay them the usual and customary commission allowed by brokers for like services, for all such services rendered to me by them; and, in cases of orders for future delivery, I agree to furnish them with the usual and customary margins required, to be placed for my account with those to whom said orders are given, provided that the said agents and brokers shall not be bound to place any orders given to them by me, unless they so desire."

The defendant also introduced samples of the statements sent by Campbell & Co. to Anderson & Co., showing daily transactions. These statements contained, at the head thereof, the following language: "Below we submit a statement of business transacted for your account as ordered. On all marginal business the right is reserved to close transactions when margins are running out, without giving further notice; we being governed in this by the market quotations as received at our office. We solicit and receive no business, except with the understanding that the actual delivery of the property bought or sold upon orders in all cases is contemplated and understood. All unfilled orders expire with the day, unless ordered open."

Defendant also put in evidence the articles of association of the Atlanta Commercial Exchange, in substance as follows: "The undersigned do, by subscribing this agree-

ment, hereby associate ourselves together in good faith, as a trade organization or association, for the purposes hereinafter stated, agreeing among ourselves to do and perform the matters and things hereinafter set out; and we consent and agree that any person or persons who may hereafter duly sign this agreement, or any correct copy thereof, shall become a member of the organization, or association. The purpose of this association or organization is to establish a place and conduct an office, or offices, for the posting and publishing of market quotations or prices of commodities, stocks, bonds, and securities, upon blackboards or otherwise, for the mutual benefit and advantage of the members of the association. It is agreed and distinctly understood that the organization or association shall neither directly nor indirectly purchase or sell, for future delivery on margin, any of the articles or things the market prices of which are quoted and published thereby; nor shall it, directly or indirectly, permit any person, or persons, or corporation, to use its offices, or in connection with the association, in the purchase or sale, for future delivery on margin, of any such articles or things. The publication in its offices of market quotations, or prices, as aforesaid, is to be strictly for the advantage and benefit of the members of the association or organization, and each of them, in the conduct of their private affairs, and in conformity with the act of the General Assembly of Georgia, relative to dealing in 'futures,' approved August 20, 1906. It is agreed and understood that, so soon as practicable, the association or the members thereof shall be duly incorporated under the laws of Georgia, under the name and style of 'Atlanta Commercial Exchange,' or such other name or style as may hereafter be agreed upon. It is further agreed and understood that a president, or other executive of the association, shall be forthwith elected, as also a secretary and treasurer, who shall hold their position, with such duties attached thereto as are usual in connection with such offices, until the association shall be duly incorporated, organized, and regular officers elected. Such president or executive head to receive a monthly salary of \_\_\_\_\_ dollars, and such secretary and treasurer to receive a monthly salary of \_\_\_\_\_ dollars. It is agreed that the president or executive head may employ an operator, rent offices, and equip the same, and undertake any other expense, within reason, as he may deem necessary to the proper operation of the offices and the conduct of the business of the association, until the due incorporation thereon. Our attorneys, Messrs. Anderson & Anderson, of Atlanta, Georgia, are herewith authorized forthwith to proceed to incorporate said association, in accordance with the spirit of this agreement, and to prepare by-laws for its operation, and submit the same to the incorporators upon the organization of the

company. This the 28th day of December, 1906." Signed by C. N. Anderson and about 75 others.

1. Since it is the duty of this court to certify to the Supreme Court, for instructions, any questions as to the constitutionality of the statute under which the defendant was indicted, if such a question is properly made and is necessary to the determination of the case by this court, we have first investigated the record with the view of ascertaining whether any such questions are so made. We find the following assignments of error in which apparent attempts to attack the constitutionality of the Boykin act, or portions thereof are made. In the bill of exceptions, in assigning error upon the exceptions pendente lite, the following ground is set forth: "That the court erred (and the verdict of the jury was void) for that said act of the Legislature of Georgia, known as the 'Boykin Act,' is absolutely void, in that it contravenes the Constitution of the state of Georgia, because it is a special act prescribing a rule of law where there are general provisions of law covering the case, and because said act violates the Constitution of the United States, in that it denies to persons falling under the operation of the law the equal protection of the laws; and because said act, as a whole, opposes and nullifies the fundamental rule of law in American criminal jurisprudence, that a person charged with crime is presumed to be innocent until proven guilty by the prosecuting power beyond a reasonable doubt." This fails to raise a constitutional question, for two reasons: Reviewing courts will not pass upon the constitutionality of an act of the General Assembly, unless it appears that the question was made or presented in the court below and was passed upon by the trial judge; nor unless it clearly appears from the record what clause or paragraph of the Constitution it is claimed that the statute violates. *S. F. & W. Ry. Co. v. Hardin*, 110 Ga. 433, 437, 35 S. E. 681; *Jones v. Oemler*, 110 Ga. 209, 35 S. E. 375; *Brown v. State*, 114 Ga. 60, 39 S. E. 873; *Newkirk v. So. Ry. Co.*, 120 Ga. 1048, 48 S. E. 426; *State v. Henderson*, 120 Ga. 781, 48 S. E. 334 (7); *Henderson v. State*, 123 Ga. 466, 51 S. E. 385; *Moore v. Houston County*, 124 Ga. 898, 53 S. E. 506; *Prey v. Oemler*, 120 Ga. 224, 47 S. E. 546 (2); *Laffitte v. Burke*, 113 Ga. 1000, 39 S. E. 433. See, also, *Vanderford v. Brand*, 126 Ga. 72, 54 S. E. 822; *Sowell v. State*, 126 Ga. 108, 54 S. E. 916; *Seale v. State*, 126 Ga. 643, 55 S. E. 472.

In one of the grounds of the motion for a new trial error is assigned upon the court's having instructed the jury, in the language of the Boykin act, that "wherever it is proven that any person, association of persons, or corporation has, either as principal or agent, an established office or place where are posted or published, from information received, the fluctuating prices of cotton, grain, provisions, stocks, bonds, or other com-



modity or thing of value, or either of them, this shall constitute prima facie evidence of guilt of the offense prohibited in section one of this act," and as ground of error it is set out that "the portion of the charge complained of was also error, because the section of the Boykin act which provides that proving that one has an office, or place of business, where there are posted the fluctuating prices of the market, constitutes prima facie guilt of maintaining or operating an office or other place of business for the purpose of carrying on and engaging in the business commonly called 'dealing in futures on margins,' is void. It violates the fundamental principle which has come down to us from our forefathers, and which applies to all criminal cases, that one charged with crime should be presumed to be innocent until proven guilty beyond a reasonable doubt. The provision of the act referred to absolutely makes the doing of a thing, not only innocent under the act, but distinctly permitted by the act, an evidence of the commission of a crime; that is to say, it makes the proof of an innocent thing prima facie evidence of the commission of a thing entirely distinct and separate which is made penal. Said provision of the Boykin act is also void because it is a special act prescribing a rule of law where there are general provisions of law covering the case. It makes a particular rule of evidence, and raises a particular presumption as to a certain offense made penal, whereas there are general provisions of law (1) to the effect that in all criminal cases the defendant must be proven guilty beyond a reasonable doubt; (2) that in all criminal prosecutions which rest upon circumstantial evidence the circumstances must be sufficient to exclude every hypothesis other than guilt; otherwise, there can be no conviction. The provision of the Boykin act above referred to, therefore, violates the Constitution of the state, that any special legislative enactment, where there is a general law applicable, is void." Although presented to the trial court, this assignment fails to properly present the constitutional question, since no clause or paragraph of the Constitution is specified therein. We may be pardoned for saying, obiter, that, if these questions had been properly presented, the constitutional objections could hardly have been regarded as meritorious, in the light of the decisions of the Supreme Court in *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007, and *Loeb v. State*, 75 Ga. 263, and of this court in *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.

2. In regard to the point raised by demurrer, as to the first count of the indictment, that it does not negative the idea that in the business alleged to have been carried on by the defendant the actual delivery of commodities was contemplated, it will be noted that the title of the act does not incorporate this exception, and, if this exception exists

at all, the act has nevertheless declared in general terms the dealing in futures on margins to be unlawful. The spirit of the following cases so clearly confutes this point that a citation of them seems sufficient: *Williams v. State*, 89 Ga. 483, 15 S. E. 552; *Rumph v. State*, 119 Ga. 121, 45 S. E. 1002; *Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Kitchens v. State*, 116 Ga. 847, 43 S. E. 256; *Tigner v. State*, 119 Ga. 114, 45 S. E. 1001; *Sowell v. State*, 126 Ga. 105, 54 S. E. 916 (2); *Kemp v. State*, 120 Ga. 158, 47 S. E. 548 (4); *Seale v. State*, 121 Ga. 745, 49 S. E. 740; *Oglesby v. State*, 121 Ga. 602, 49 S. E. 708. The first section of the act, in general terms, makes criminal the maintenance of an office or place of business for the carrying on of the business commonly called "dealing in futures on margins"; and the words, "forbidden by this act," are merely in the nature of an epithet, and do not limit the generality of the section. The second section of the act is a legislative amplification of the definition of the words, "commonly called dealing in futures," but does not have the effect of taking from them anything adhering in their ordinary meaning. Not only is it unlawful to do those things commonly called "dealing in futures," as the words in their ordinary acceptance mean, but also to do any of the other things mentioned in the second section of the act, if they are not already included in the ordinary meaning of the words "dealing in futures." An indictment is sufficient which states the offense in the terms and language of the statute, or so plainly that the nature of the offense charged may be easily understood by the jury. Pen. Code 1895, § 929.

3. The contention in the demurrer that the act prescribes no penalty is altogether without merit. A violation of its provisions is declared to be a misdemeanor; and by Pen. Code 1895, § 1039, a definite punishment for "every crime declared to be a misdemeanor" is prescribed.

4. Error is assigned upon the following charge of the court: "If the defendant conducted an establishment where transactions of the kind just described were permitted (that is, dealing in futures on margins, contrary to the Boykin act), allowed, and encouraged, to the defendant's knowledge, and with his participation therein, or, that is, if persons came together and bought or sold commodities, with an agreement for future delivery, when it was not in good faith intended to deliver the commodities, and when the undertaking of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement, then the defendant, if that is established beyond a reasonable doubt from the evidence in this case, would be guilty of maintaining a gaming house, as defined in the second count of this indictment." This raises the distinct question whether one who operates an office where "futures" are bought

and sold is guilty of the offense of keeping a gaming house. We do not think that at common law such an office would have been a gaming house. We also recognize the distinction between the meaning of the words "betting," "wagering," "gaming," and "gambling." Yet we are constrained to hold that by judicial evolution and legislative enactment the common-law offense of keeping a gaming house has been so broadened in its scope as to include any place wherein persons are allowed to assemble for the purpose of betting, wagering, gaming, or gambling, and especially where such practices are encouraged by the proprietor. We cannot give full credit to the spirit of the cases of *Thrower v. State*, 117 Ga. 753, 45 S. E. 126, and *Jones v. State*, 120 Ga. 186, 47 S. E. 561, without reaching this conclusion. It may be that in the cases just cited the Supreme Court gave to the meaning of the word "gaming house" an unwarranted extension (we do not say they did, or did not), and it may be that a strained distinction may be drawn between the business under consideration in this case and that denounced in those cases; but if we give those cases full faith as precedents, as not only propriety, but also the Constitution itself, requires us to do, we are obliged to hold that a gaming house is no longer to be regarded as a place prohibited, as at common law, because the spirit of amusement found there entices laborers and apprentices from their wonted toil, but as a place which it is criminal to keep because persons congregate there to wager or to hazard money or other things of value, whatever be the device whereby it is accomplished, whether by games of amusement or otherwise. However, it may be noted that by English statute antedating our adoption of the laws of the mother country it was contemplated that the word "gaming house" should have a progressive meaning. By St. 33 Hen. VIII, c. 9, § 11, it is enacted that "no manner of person or persons, of what degree, quality, or condition soever he or they be, from the feast of the nativity of St. John the Baptist now next coming, by himself, factor, deputy, servant, or other person, shall for his or their gain, lucre, or living, keep, have, hold, occupy, exercise, or maintain, any common-house, alley or place of bowling, coytling, cloysh-cayles, half-bowl, tennis, dicingtable, or carding, or any other manner of game prohibited by any estatute heretofore made, or any unlawful new game now invented or made, or any other new unlawful game, hereafter to be invented, found, had or made, upon pain to forfeit and pay for every day keeping, having or maintaining, or suffering any such game to be had, kept, executed, played, or maintained within any such house, garden, alley, or other place, contrary to the form and effect of this estatute, forty shillings." 1 Hawkins' Pleas of the Crown (8th Ed.) 721. In the case of *Rex v. Howell* (K. B. 1872) 3 Keble, 510, "the defendant being convicted of keeping a

common cock-pit six days, the court conceived it an unlawful game and took their measure by St. 23 Hen. VIII, of 40s. a day, though the indictment were at common law."

As to whether buying and selling cotton futures is within this category of gaming, wagering, and gambling, we quote from the opinion in *Cunningham v. National Bank*, 71 Ga. 403, 51 Am. Rep. 266: "But what is the transaction termed 'futures'? It is this: One person says that I will sell you cotton at a certain time in the future for a certain price. You agree to pay that price, knowing that the person you deal with has no cotton to deliver at the time, but with the understanding that when the time arrives for delivery you are to pay him the difference between the market value of that cotton and the price you agreed to pay if cotton declines, and if cotton advances he is to pay you the difference between what you promised to give and the advance market price. If this is not a speculation on chances, a wagering and betting between the parties, then we are unable to understand the transaction. A betting on a game of faro, brag, or poker cannot be more hazardous, dangerous, or uncertain. Indeed, it may be said that these animals are tame, gentle, and submissive, compared to this monster. The law has caged them and driven them to their dens. They have been outlawed, while this ferocious beast has been allowed to stalk about in open mid-day, with gilded signs and flaming advertisements, to lure the unhappy victim to its embrace of death and destruction. What are some of the consequences of these speculations on 'futures'? The faithful chroniclers of the day have informed us, as growing directly out of these nefarious practices, that there have been bankruptcies, defalcations of public officers, embezzlements, forgeries, larcenies, and death. Certainly no one will contend for one moment that a transaction fraught with such evil consequences is not immoral, illegal, and contrary to public policy. In the case of *Rudolf v. Winters*, 7 Neb. 126, the Supreme Court of that state held 'that a contract to operate the grain options, to be adjusted according to the difference in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is contra bonos mores, and against public policy.' We recognize this ruling to be sound, and we adopt the same. This was also ruled by the Supreme Court of Illinois. *Pickering v. Cease*, 79 Ill. 328. Likewise in Wisconsin. *Everingham v. Melghan*, 55 Wis. 354, 13 N. W. 269; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Gregory v. Watowa*, 58 Iowa, 713, 12 N. W. 726; *Hawley v. Bibb*, 69 Ala. 52; *Rumsey v. Berry*, 65 Me. 574; *Yerkes v. Salomon*, 11 Hun (N. Y.) 473; *Story v. Salomon*, 71 N. Y. 420; *Peabody v. Speyers*, 56 N. Y. 230; *Knapp v. St. Louis, K. C. & N. Ry. Co.*, 6 Mo. App. 206;

Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390, s. c. 40 Mich. 432; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Clarke v. Foss, 7 Biss. 540, Fed. Cas. No. 2,852; In re Green, 7 Biss. 338, Fed. Cas. No. 5,751; Beveridge v. Hewitt, 8 Ill. App. 467; 5 Moore, 571; Thompson Bros. v. Cummings & Co., 68 Ga. 124; Porter v. Massengale, 68 Ga. 296."

The same decision also quotes approvingly from Brua's Appeal, 55 Pa. 298, as follows: "Anything which induces men to risk their money or property, without any other hope for return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called."

It is insisted, however, that since the current tax act (Acts 1905, p. 28) levies a tax of \$1,000 upon all persons engaged in the business of buying or selling futures, such legislative sanction has been given to this business as to prevent the maintenance of an office for that purpose from being a gaming house. It is true that it was held in *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335, that, "irrespective of whether a purely speculative transaction in cotton is a 'gaming' contract, within the meaning of Civ. Code 1895, § 3671, inasmuch as the General Assembly permits one paying a license tax to engage in the business of buying and selling 'futures,' he cannot be subjected to the penalty imposed by that section, which declares that 'money or property delivered up upon' a gaming consideration 'may be recovered back from the winner by the loser, if he shall sue for the same in six months after the loss,' or, if he shall fail to bring suit within that period, 'by any person, at any time within four years (thereafter), for the joint use of himself and the educational fund of the county.'" However, by the Boykin act all legislative sanction is expressly withdrawn from such transactions. See *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173. The Boykin act, being the latest expression of the legislative mind, controls; and it pro tanto repeals so much of the tax act as previously had the effect of sanctioning, for any purpose, dealing in futures.

The point is also made that this charge is entirely unjustified by the evidence; and it is contended that the evidence shows, without conflict, that Anderson was a broker, pure and simple, who acted only for parties in the state of Georgia, upon their employment, as their agent, for a commission paid by them; that he dealt only with parties outside the state in executing orders for future delivery; and that in all cases the parties outside of the state and C. N. Anderson contemplated actual delivery. A very similar contention was disposed of in *Jones v. State*, supra. As was said there: "When a man desired to make a bet, he filled out an application to be telegraphed to Roots in New Orleans, and at the same time handed in the amount of money he wished to risk on the

horse selected. This money was received by Jones, or one of his agents. So far as appears from the record, the applicant never received any notice, before the race was run, as to whether his bet was accepted or rejected. After the race was over, the result of the race was announced, and another agent of Jones, in the same house, paid the winnings to those who had won. Where the bet was lost, the money which had accompanied the application was deposited by Jones to the credit of Roots. Under this state of facts we think that the money was hazarded in the house in question. The bettor deposited it there, and lost it if he failed to win, or regained it if he did win. The whole transaction as to the money took place in this house. This was the very object for which the house was kept. It was of itself an invitation to the people to go to that place and make their offers to bet, depositing their money with the proprietor of the house. While there is no law in this state to punish the bettors, there is a law for the punishment of the proprietor of such a house in which people can meet daily to bet on horse races and hazard their money thereon. The money was not sent to New Orleans. It was placed in the keeping of the accused, and he kept it if the bettor lost, or repaid it, together with the winnings, if the bettor won. It is clear to our minds that the money was hazarded in the house kept by Jones. The fact that Roots had the right to accept or reject an offer to bet makes no difference. The proof shows that he did accept bets from several of the witnesses, or at least that they were paid or not according to the result of the race. It seems to us that the whole system was a mere device or sham to evade the criminal law upon this subject—an effort to evade, based upon a technical definition of the word 'betting,' and an artificial distinction as to where the bet was consummated. As was once said by Judge Bleckley: 'It is something easier for an offender to baffle the dictionary than the Penal Code; for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men.'" The facts of this case are so very similar to those of the *Jones Case* as to make further comment unnecessary.

We are not unmindful of the fact that in the case at bar the defendant furnished to his customer a statement of business on which was printed the words: "Actual delivery of property bought or sold upon orders in all cases is contemplated and understood." But we are not forgetful of the fact that in all the transactions of the defendant's office no actual delivery ever took place. If actual delivery was "contemplated," its inchoate entity never developed into tangibility. If it was "understood," the temptation to ridicule becomes irresistible. One of the definitions of the word "understand" is "to supply men-

tally as in explanation of an ellipsis," and the course of dealings which took place through defendant's office will not authorize a wider meaning, for from the evidence there was an entire ellipsis of actual deliveries. Such devices rarely fool intelligent judges or juries. Only the very simple would be deceived into believing that a house of assignation was a respectable hotel because there might happen to be a notice posted at the door stating that "Ladies accompanied by gentlemen other than their lawful husbands will not be furnished accommodations here."

5. We have set out at great length, we fear unduly so, the evidence in this case. But we think that through this full statement of the facts as shown on the trial any impartial mind will be able to discover that a device, elaborate in detail, was planned for the evasion of the law, but that, despite it all, the defendant failed to conceal plain and unmistakable evidences of his guilt. We have no hesitancy in saying that the evidence authorized the verdict under both counts; but, since it will be unnecessary for us to pass upon errors in instructions given or refused as to matters relating only to the first count, if the conviction can be upheld under the second count (for only one sentence was imposed), we may rest our judgment upon the sufficiency of the evidence as to the conviction on that count alone. In this view of the case, errors, if any were committed, which relate only to the first count are immaterial, and therefore would not authorize a reversal. Having held that one who keeps an office for the purpose of affording an opportunity to persons to buy and sell futures on margins can be convicted of keeping a gaming house, irrespective of whether the contracts are telegraphed out of the state or not, we have no difficulty in sustaining the conviction. It is not necessary that we should pass upon the question whether it is essential that the wagering intent—the intent to speculate, without bona fide contemplation of actual delivery—should be present in the minds of both the contracting parties before the transaction is unlawful; for in every trade which took place through the defendant's office, so far as the evidence discloses, and, therefore, so far as the legality of this conviction is concerned, it is conclusively shown that no actual deliveries were had, and that no such intention bona fide existed in the mind of either party. When one of the defendant's customers lost, the other party to the contract did not require delivery. He took the money deposited with the defendant. When the customer won, this undisclosed counter party did not tender delivery; but Anderson at once paid over to the customer the amount of his winnings. In such a course of dealings the irresistible inference is that both parties acted upon the contract as a purely wagering transaction, and that the defendant was the mere go-between, the mutual agent of both parties. If two gentlemen had met in the

defendant's office, and had called for cards and poker chips, and the defendant had furnished them, charging so much for the chips, being stakeholder as it were, and at the end of the game had cashed these chips, would he be heard to assert, in defense to an indictment for keeping a gaming house, that one of the gentlemen did not intend to play for money, that he was merely playing for amusement, that in fact, at the very time of paying for his chips, he signed a written statement that it was always contemplated and understood that the playing was for amusement only, and not for money or other thing of value? No matter how solemnly either one or both of these gentlemen who played at this game of futures may have asserted that actual delivery was contemplated and understood, as matter of fact they did not play that way. The record discloses the identity of some of the gentlemen who played on one side of this fascinating game, but it is silent as to who was the counter party or parties. Be that as it may, it is very clear that this undisclosed player had a representative present in the transaction, who took care of his winnings and who paid his losses—the defendant. He may not have known the defendant, and the defendant may not have known him; but one may be an agent for an unknown and unseen principal.

These outlawed occupations often attempt to conceal their true inwardness by devious ways and indirect dealings; but the law looks only to the real substance of the transaction. Think of the shrewd device by which, on January 1, 1907, when the Boykin act went into effect, the door between the two rooms formerly used en suite by the defendant was closed and nailed up, and the room, in which continued those acts denounced by the statute as evidences of guilt, was transferred to the apparently complete custody of the Atlanta Commercial Exchange, an organization containing in its membership several excellent gentlemen who needed market quotations for absolutely legitimate purposes, as well as several others who had no such legitimate uses for them; e. g. telephone employes who bought and sold cotton. But who paid for the maintenance of this room where the fluctuating market was represented on the blackboard? Will it be contended that the office rent, the wages of the employes, and the annual rental, of approximately \$12,500, for the leased wire to Cincinnati, were paid out of the modest sum of \$1 per month contributed by each of the 100 members of this exchange? Is there not some significance in the fact that a telegraph instrument in the defendant's office ticked simultaneously with the other on the same wire in the quotation room, and that the Odell Stock & Grain Company paid the drafts for the rent of both rooms; that the Odell Company paid the rent, though the lease stood in the name of Campbell, and that to Campbell the defendant's customers telegraphed; and that from

Campbell came the statements in return, and that this telegraph wire had one terminus in Odell's office in Cincinnati and the other in this quotation room, touching the defendant's office en passant? Such a tangled web to be so innocent! Perhaps the jury may have conceived the idea that the defendant and Campbell were merely the Odell Company's agents; that this same Odell Company was the undisclosed principal, whose losses the defendant paid, whose winnings he collected. If they did, we shall not say that they have thereby outraged logic.

We find the trial free from material error, and the verdict well supported by the evidence.

Judgment affirmed.

(2 Ga. App. 53)

**VINSON v. WILLINGHAM COTTON MILLS.**

**WILLINGHAM COTTON MILLS v. VINSON.**

(Nos. 233, 234.)

(Court of Appeals of Georgia. May 24, 1907.)

**1. MASTER AND SERVANT—DUTY TO PROVIDE SAFE MACHINERY.**

It is not incumbent upon persons or corporations using machinery in the prosecution of their business to procure the best and safest machinery which can be made. It is sufficient if the machinery is of a kind in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. "No manufacturing or business establishment is bound at its peril to make use only of the best implements and the best machinery and the safest methods." *Cooley, J., in Michigan Cent. R. Co. v. Smithson, 7 N. W. 793, 45 Mich. 219.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

**2. SAME—WARNING AND INSTRUCTING SERVANT—INEXPERIENCED AND YOUTHFUL EMPLOYÉ.**

An employé 18 years of age, who has had 7 months' experience and 2 months' special instructions in her particular line of work, and in connection with the special kind of machinery used in such work, is not an inexperienced child of tender years, so as to impose upon her employer any exceptional degree of care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 141.]

**3. SAME—CONTRIBUTORY NEGLIGENCE.**

In a suit by a servant against his master for personal injuries, the burden is upon the servant to show negligence, causing the injuries, by the master; and a servant, while working with dangerous machinery, is bound to exercise due diligence to avoid any casualty to himself, and if he fails to exercise such care he cannot recover, though the master himself may have been at fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 674.]

**4. NEGLIGENCE—PROXIMATE CAUSE.**

Negligence, to be the basis of a recovery, must be the proximate cause of the injury; and if the injury would have occurred, regardless of the negligent act, there can be no recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69, 71, 73.]

**5. SAME—EVIDENCE—SUFFICIENCY.**

The evidence introduced by the plaintiff, and all reasonable deductions therefrom, failed to establish the allegations of negligence against the master, but, on the contrary, showed that

the servant's injury was caused by her own neglect to exercise ordinary and due care in connection with her work.

**6. SAME.**

Under the foregoing well-settled principles of law, the judgment granting a nonsuit was right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 987-994.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Lella Vinson, by next friend, against the Willingham Cotton Mills. Judgment for defendant, and plaintiff brings error. Defendant assigns a cross-bill. Judgment affirmed on the main bill of exceptions, and the cross-bill dismissed.

Glawson & Fowler, Jos. H. Hall, and J. E. Hall, for plaintiff in error. Hardeman & Jones and John P. Ross, for defendant in error.

**HILL, C. J.** Plaintiff in error, a minor 18 years of age, by next friend, sued her employer, the defendant in error, for injuries sustained while engaged at the work she was employed to do. Her petition alleged that she was operating a loom, and, while so employed, was struck in the eye with a shuttle, which was thrown out of its place. Her employer was alleged to have been negligent in the following particulars: (1) In failing to provide a shuttle guard, an appliance in general use in cotton mills of similar character; (2) in failing to instruct and warn its employé of the great danger attending her work as a loom operator because of the absence of a shuttle guard on the loom, the employé, by reason of immaturity and inexperience, not knowing and having no opportunity to know of this danger. These two allegations of negligence, although somewhat elaborated by the allegations and the evidence in support thereof, present substantially the charges of negligence made against the employer. We will consider these two grounds in their order.

The machinery was not alleged to have been defective or out of repair, and there was no latent defect; but, because of the defendant's failing to provide a shuttle guard, it was charged that the machinery was not equal in kind to that in general use, and was not reasonably safe for all persons to operate it with ordinary care and diligence. A shuttle guard is a steel rod fixed to the "reed cap," directly over the shuttle as it passes from side to side of the loom. This guard extends directly over the path of the shuttle, and is a device in general use in all cotton mills. It prevents the shuttle from flying up while the loom is in operation. It does not prevent it from flying out. The flying shuttle strikes the guard, and is thus deflected from its course, and is prevented from flying up, and made to fly out on the side by the guard. The loom in use by the defendant was of the Crompton & Knowles manufacture, and they

make the best and most modern types of looms. These looms were used for the manufacture of hose and belting duck, and no shuttle guards are ever used on these looms in the manufacture of such material; but, in the place of a shuttle guard, there is used what is called a "reed cap," projecting above the race board of the shuttle, and occupying, with reference to the shuttle, the place of the shuttle guard. In other words, a reed cap on the Crumpton & Knowles loom for the manufacture of hose and belting duck, such as were used in the defendant's mills, performs the same functions as the shuttle guard. The evidence on this allegation of negligence, as introduced by the plaintiff, therefore, established the fact that the machine in question was manufactured by machinists of the best skill and character, was of the best and most modern type, and had the usual appliance attached to such looms for the protection of operatives from flying shuttles. It is a general rule of law that the master is not required to provide an absolutely safe machine, but only one equal in kind to that in general use. Civ. Code 1895, § 2611; Ala. Midland Ry. Co. v. Guilford, 119 Ga. 523, 46 S. E. 855; Davis v. Augusta Factory, 92 Ga. 712, 18 S. E. 974. As illustrating the danger or safety in operating this character of looms, the plaintiff testified that during the six or seven months in which she had been occupied operating one of the looms only one shuttle had flown out, from over 100 looms in operation, and that this one was from a loom which was out of fix. We therefore conclude that the testimony failed to support the allegation of negligence as to the dangerous character and condition of the machinery used by the master.

But, if not having a shuttle guard was a dangerous defect, it was perfectly patent to the operator. It is insisted that she was a minor of tender years, and inexperienced in the use of such machinery, and that her employer was guilty of negligence in failing to instruct and warn her of the danger attending her work as a loom operator because of the absence of shuttle guards on the looms. The evidence for the plaintiff showed that she was 18 years of age, and she was not shown to have been deficient in intelligence. She had been running a loom for 6 or 7 months, and had 5 months' experience in running the loom by which she was injured and 2 months' special instruction by her employer before she was permitted to run the loom. It is therefore fair to presume that she knew how to operate a loom. She knew that shuttles did sometimes fly out of the looms; for one flew out of her loom once before. She knew that it was the duty of the operator to watch the shuttle, so that, if the thread broke or got tangled, she could stop the loom and fix it; and she knew that, if the broken threads got tangled or "wadded up," it would cause the shuttle to fly out. The evidence showed that the shuttles do not fly out in

front, where the operator should stand when operating the machine, but that they do fly out either to the right or left. The plaintiff's testimony on the foregoing points shows that she was not inexperienced. It shows that she knew how to operate a loom. She stated that she had been in the habit of operating two looms, but that on the day she was injured she was only operating one; that while her loom was in operation she took her seat upon the stool on the side of the loom, and with her back to it, and was reading a newspaper or book. She knew that her duties required her to constantly watch the shuttle to prevent an accident if the threads broke or got tangled. Her own expert witness testified that such conduct on her part was unsafe. "It was unsafe for the weaver to sit in front of the loom, with her head on a level with the shuttle, and be engaged in reading at the time, and not watching the shuttle for the purpose of filling the shuttle and repairing the breaks. It is the duty of the operator to watch the work, to repair such breaks as soon as they occur. It is unsafe for the operator to run a loom, paying no attention to the loom, and leave breaks in a warp thread unrepaired, and then sit down with her head on a level with the shuttle course or lath of the loom." It might, therefore, be conceded that the master was negligent in not providing a shuttle guard, yet, as shuttle guards do not prevent shuttles from flying out at the slides, but only out at the front, the plaintiff's own negligence was the proximate cause of her injury. It cannot, under her own testimony and that of her expert witness, be reasonably contended that she was in the exercise of due care; but her own carelessness was the cause of her injury. This evidence overwhelmingly shows that the safe way to operate a loom was to stand up in front and constantly watch, and that the unsafe way was to sit down at the end of the loom and become absorbed in reading. It can hardly be doubted that, if the plaintiff had been watching to prevent the result of broken threads, she would not have been hurt. Having, with her experience and knowledge, voluntarily selected the unsafe way to perform her work, she cannot recover. Civ. Code 1895, § 2612; Brush Electric Co. v. Wells, 103 Ga. 515, 30 S. E. 533; McDaniel v. Acme Brewing Co., 113 Ga. 80, 33 S. E. 404; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110.

In addition to what has been stated, it may be said that the proof is clear that the absence of a shuttle guard in no wise contributed to the injury of the plaintiff. If there had been a shuttle guard, it would have prevented the shuttle from flying out towards the front and have deflected it to the side. In other words, with a guard the shuttle would have taken the same course that it did take, and it is not unreasonable to suppose that the reed cap, which on this type of machine occupies the same place that the

shuttle guard does to other machines, did prevent the shuttle from flying out to the front, and did deflect it to the side. It seems, therefore, inevitable that the shuttle guard in this case would not only have prevented the injury to the plaintiff, but, in connection with her own careless conduct, would actually have caused the injury. "It needs no citation of authority to sustain the proposition that negligence, to be the basis of a recovery, must be connected with the injury which is the subject of the suit." *Moseley v. Schofield's Sons Co.*, 123 Ga. 199, 51 S. E. 310. It must have been the proximate cause of the injury to the servant, or the master is not liable therefor. *Richmond, etc., R. Co. v. Dickey*, 90 Ga. 491, 16 S. E. 212; *Hamby v. Union Paper Mills Co.*, 110 Ga. 1, 35 S. E. 297.

We therefore conclude that under no view of the proof submitted by the plaintiff in support of the allegations of negligence, and all fair and reasonable deductions therefrom, under well-established principles of law, would a verdict for the plaintiff have been supported; and the court did not commit an error in granting the motion to nonsuit.

Judgment affirmed on the main bill of exceptions; cross-bill of exceptions dismissed.

(2 Ga. App. 181)

JOHNSON v. STATE. (No. 436.)

(Court of Appeals of Georgia. June 20, 1907.)

1. CRIMINAL LAW—CERTIORARI—SERVICE OF NOTICE.

Failure to serve the Solicitor General with a notice of the sanction of a petition for certiorari in a criminal case within the time prescribed by law, except in case of "unavoidable cause" preventing such service, is ground for dismissal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2725.]

2. SAME—UNAVOIDABLE CAUSE.

Where several months elapse between the date of the death of counsel for the plaintiff in certiorari and the expiration of the time within which notice could regularly have been given, such death will not be considered as unavoidable cause.

(Syllabus by the Court.)

Error from Superior Court, Quitman County; W. C. Worrill, Judge.

Lonnie Johnson was convicted of swindling, and brings error. Affirmed.

Raines & Gurr, for plaintiff in error. J. A. Laing, Sol. Gen., by Arnold & Arnold and J. B. Ridley, for the State.

POWELL, J. The accused was convicted of the offense of cheating and swindling under the acts of 1903. Gen. Laws 1903, p. 90. Under decisions of this court and of the Supreme Court, he was not guilty, because he was a minor and was prevented from performing his contract by parental authority. See *Heywood v. State*, 1 Ga. App. 530, 57 S. E. 1025; *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022; *Patterson v. State*, 1 Ga. App. 782, 58 S. E. 284; *Howard v. State*, 126 Ga. 538, 55 S. E. 239; *Anthony v. State*, 126 Ga. 632, 55 S. E. 479 (2). We regret, there-

fore, that the result of our judgment herein must be to leave in force the punishment imposed. However, we cannot look to the merits when they have not been presented in the manner prescribed by the statutes. In criminal matters, we have no extraordinary or equitable jurisdiction, whereby we may relieve an innocent defendant who, through his negligence, has been caught in the meshes of legal technicalities. Chancery jurisdiction in criminal cases, if the figure of speech be allowable, is conferred upon the Governor and the prison commission, and not upon the courts.

The judge of the superior court dismissed the certiorari brought by the accused to set aside the illegal conviction, and this judgment we must affirm. The conviction was had in the county court, petition for certiorari was duly presented, sanctioned and filed, and the writ was issued and answered. Upon the call of the case on the certiorari docket, the Solicitor General moved to dismiss, because the notice of the sanction and of the time and place of hearing required by Civ. Code 1895, § 4644, had not been given. It was shown to the court that in August, 1906, soon after the sanction of the certiorari, counsel for the applicant became ill and died. The writ was returnable to the March term, 1907, and at that term the present counsel were employed. They could not say whether the notices had been given or not. The Solicitor General stated that he had no recollection of ever having received the notice.

The burden of showing service of the notice was upon the plaintiff in certiorari; and the showing made did not establish the fact. *Jones v. Gill*, 121 Ga. 93, 48 S. E. 688. Failure of service, unless prevented by providential cause, is fatal. See *Butts v. State*, 90 Ga. 450, 16 S. E. 96; *Moore v. State*, 96 Ga. 309, 22 S. E. 960; *McElhannon v. State*, 112 Ga. 221, 37 S. E. 402. The statute says that "in default of such notice (unless prevented by unavoidable cause) the certiorari shall be dismissed." "Unavoidable cause" means more than "excusable negligence," and relieves against the default only when prompt measures are thereafter taken. *Southern Railway Co. v. Carr*, 118 Ga. 355, 45 S. E. 409. Sickness or death of counsel for applicant are primarily to be classed as unavoidable cause; so, also, would be the death or absence of the Solicitor General in a criminal case; but the service must be prevented by this cause, and not by the applicant's neglect to take prompt measures after such cause has been ascertained and can be relieved against. In this case counsel for the applicant died in August or September, 1906. The time for service did not expire until March, 1907. Hence the failure to serve must be attributed to negligence, and not to unavoidable cause.

Judgment affirmed.

some length the situs of contracts, and by the law of what place they are determined. We think, however, that the discussion is not relevant. It withdraws our consideration from the Constitution and statute of Alabama; and it is manifest the contention based upon it, if yielded to, would defeat their purpose. The prohibition is directed to the doing of any business in the state in the exercise of corporate functions; and there can be no doubt that petitioner considered that it was exercising such functions in the state. \* \* \* The application of Denson was presumably solicited as other applications were, and, if what was done in pursuance of it did not constitute doing business in the state, the effect would be, as expressed by the Circuit Court of Appeals, that petitioner and other foreign associations, engaged in the same business of loaning money on real security may safely flood the state of Alabama with soliciting agents, make all the negotiations for the loans, take real estate securities therefor, and fully transact all business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business, or any authorized agent within the state, nor pay any license tax or fee, as required of nonresident corporations doing business therein."

2. The next question to be determined is whether the act of 1904, as hereinafter mentioned, is in violation of the contract by which the petitioner was permitted to do business in this state. When the petitioner was granted permission to carry on its business in this state, the acts of 1888 and 1892 were of force, certain provisions of which were incorporated in the Code of Laws as section 1800, and are as follows: "Every foreign insurance company of any class—fire, life, marine, surety, security, guarantee, hailstorm, live stock, accident, plate glass, and other like insurance companies—foreign land associations, foreign building and loan associations, foreign banking associations, and all other like classes of like business not incorporated under the laws of South Carolina, except national banks and except benevolent institutions organized under the grand lodge system, shall each, before transacting any business in this state, pay an annual license fee of one hundred dollars to the Comptroller General, on or before the thirty-first day of March in each year, to be deposited by him in the treasury of the state. It shall be unlawful for any such foreign companies, as are required to pay license fees, to transact any business in this state, until they shall have and keep some duly appointed resident agent in this state, on whom legal process may be served, so as to bind the company he represents, and service of process upon this agent at his main office, shall be sufficient to give jurisdiction to the court issuing same, in any county in this state. The license issued by

the Comptroller General, shall give to the company obtaining the same, power and authority to appoint any number of agents to take such risks, or transact any business of insurance in each and every county of the state, and the same shall be so granted as to expire on the 31st of March of each year. But the Comptroller General must be notified of such appointment before such agent takes any risks or transacts any business, as aforesaid, giving the postoffice address, residence and a certified copy of the resolution, appointing such agent or agents, duly signed by the president and secretary of such company." The petitioner paid the license fee therein mentioned. The act of 1893 (21 St. at Large, p. 409) was effective at the time the petitioner was allowed to do business in this state, and contains the provision "that foreign corporations duly incorporated under the laws of any state of the United States, or of any foreign country, in treaty and amity with the said United States, are hereby permitted to locate and carry on business within the state of South Carolina, in like manner as the natural born citizens of the states of the United States, or of such foreign country might do under the law, existing at the time, subject, nevertheless, to the terms and conditions in this act hereafter set forth." This provision became section 1779 of the Code of Laws. Section 7 (page 410) of the act of 1893 was as follows: "All and every such foreign corporation carrying on business or owning property in this state, shall be subject to the laws of this state, but nothing herein contained shall be construed to permit any such foreign corporation, to exercise any franchise or enjoy any privilege or immunity, other than the right to own property and carry on business in like manner as individuals, natural born citizens of such state of the United States, or of foreign countries, might do, and subject to the terms and conditions of this chapter."

This is now section 1790 of the Code of Laws. The act of 1893 was amended in 1904 by an act entitled "An act to amend section 1779 of the Civil Code [being volume 1, Code of Laws 1902], relating to the formation of foreign corporations" (24 St. at Large, p. 435), so as to read as follows: "Foreign corporations duly incorporated under the laws of any state of the United States, or of any foreign country in treaty and amity with the said United States, are hereby permitted to locate and carry on business within the state of South Carolina, in like manner and with like powers as corporations of like kind and class created under the laws of this state, subject, nevertheless, to the terms and conditions in this chapter hereafter set forth." Sections 4 and 5 (page 464) of the act of 1904 (the title of which has already been set out) are as follows: Section 4: "Every corporation organized under the laws of this state to do business for profit, other than railroad companies, express



companies, street railway companies, navigation companies, water works companies, power companies, light companies, telephone companies, telegraph companies, parlor, dining and sleeping car companies, shall, upon the filing of the report required of them in section 1, pay to the State Treasurer, on or before the first day of April, in each year, an annual license fee of one-half of one mill upon each dollar paid in to the capital stock of said corporation, said license fee to be not less than five dollars in any case." Section 5: "Upon the filing of the report required of foreign corporations in section 2, the Comptroller General shall, from the facts thus reported, and any other facts coming to his knowledge, determine the value of the property of such corporation used within this state by them in the conduct of their business, and shall file a statement of the value so determined, with the license tax payable thereon, with the State Treasurer, who shall charge and collect from such companies, in addition to the initial fees provided for in the Code of Laws for South Carolina, in 1902, and acts amendatory thereto, an annual license fee of one-half mill upon each dollar of the value of the property of such corporation used within this state in the conduct of its business."

The petitioner's attorneys rely upon the case of *Am. S. & R. Co. v. Colorado ex rel. Lindsley*, 27 Sup. Ct. 198, 51 L. Ed. 393, in which it was held that a right to do business in the state, without being subject to any greater liabilities than those imposed upon domestic corporations, was acquired by a foreign corporation upon its admission into the state of Colorado, under the laws then of force, which subjected foreign corporations to the liabilities, restrictions, and duties imposed upon domestic corporations of like character, and such right was impaired by an act of that state subsequently enacted, which required such corporations to pay an annual license fee in double the amount of that imposed upon domestic corporations. The court uses this language: "A provision in a statute of this nature, subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character, must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation, upon coming in the state, should be subjected to all the liabilities of a domestic corporation, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words, the liabilities, restrictions, and duties upon domestic corporations constitute the measure and limit of the liabilities, restric-

tions, and duties which might thereafter be imposed upon the corporations admitted to do business in this state. It was not a mere license to come in the state and do business therein, upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporations at the same time and the same extent. \* \* \* Nor is this a case where the power given by the state Constitution to the General Assembly to alter, amend, or annul a charter is applicable. The act does not alter the charter, or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed upon all foreign corporations doing business in the state. \* \* \* It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such tax, while others decide upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important, so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in that of the domestic. And in regard to the case of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are greatly aided by the former cases regarding taxation and legislative contract."

The respondent's attorneys, however, contend that section 7 of the act of 1893, heretofore mentioned, prescribes the terms upon which foreign corporations were permitted to do business in this state, to wit, that they should be subject to the laws in like manner as corporations chartered under the laws of South Carolina. It will be seen by reference to sections 1 and 7 of said act that they are inconsistent, and it would be difficult to reconcile them. It seems that the Legislature did not entertain the view that it placed foreign and domestic corporations on the same footing; hence the necessity for passing the act of 1904 (page 435) amending it. But, conceding that such was the effect of section 7, the act of 1904 (page 462) distinguishes between domestic and foreign corporations. Section 4 of that act provides for an annual license fee of one-half of one mill upon each dollar paid in to the capital stock of a domestic corporation, while in the case of a foreign corporation it is required, in addition to the initial fees, to pay a license fee of one-half of one mill upon each dollar

of the value of the property used within the state in the conduct of its business.

But the respondent's attorneys also contend that the state has the right to prescribe the conditions upon which foreign corporations shall be permitted to do business in the state, even when they are more burdensome than those imposed upon domestic corporations (which cannot be denied); that the license granted the petitioner in 1894 expired on the 31st of March, 1895, and, when the license was granted in each subsequent year, it expired on the 31st of March of the year next ensuing; that the granting of the license in each year was a new contract, and, when in 1904 the petitioner took out a new license, it was subject to the provisions of the act of 1904 (page 462), which was approved on the 29th of February, 1904. They cite the cases of *Security L. Ins. Co. v. Prewitt*, 200 U. S. 446, 28 Sup. Ct. 314, 50 L. Ed. 545; *Security L. Ins. Co. v. Prewitt*, 202 U. S. 246, 28 Sup. Ct. 619, 50 L. Ed. 1013; *Ph. F. Ins. Ass'n v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342. In the last-mentioned case the court uses this language (page 119 of 119 U. S., and page 113 of 7 Sup. Ct. [30 L. Ed. 342]): "This Pennsylvania corporation came into the state of New York to do business by the consent of the state, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change conditions of admission at any time for the future, and to impose as a condition the payment of a new tax, or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given." After most careful consideration, we have reached the conclusion that this objection must be sustained.

It is also contended that the petitioner had not complied with the requirements of the statute in 1894 when it received a license, and that it has no right to carry on its business in this state. The objection, however, cannot be sustained, as each license was a new contract, and the petitioner complied before the last license was granted.

It is the judgment of this court that the petition be dismissed.

(77 S. C. 454)

#### JENNINGS v. TALBERT.

(Supreme Court of South Carolina. Aug. 2, 1907.)

#### 1. WILLS—NATURE OF ESTATE.

A testatrix's devise to her husband for life, "investing him with power to rent or lease," to collect rents, and conferring power of sale

"and to distribute the proceeds of such rents and sales between my two daughters and their heirs," gives the husband a life estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1418-1430.]

#### 2. SAME—PATENT AMBIGUITIES.

Ambiguities in a will are patent where the uncertainty arises upon the words of the will, and before any attempt is made to apply them to the object which they describe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1036.]

#### 3. SAME—LATENT AMBIGUITY.

Where there is no defect on the face of a will, but there is an uncertainty in attempting to put it into effect, the ambiguity is latent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1036.]

#### 4. SAME.

Where the ambiguity in a will is latent, parol testimony is admissible to reach a correct conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1036.]

Appeal from Common Pleas Circuit Court of Abbeville County; Purdy, Judge.

Action by Lillie May Jennings against R. J. Talbert, individually and as executor. Decree for plaintiff, and defendant appeals. Reversed.

Wm. J. Thurmond, for appellant. Wm. N. Graydon, for respondent.

POPE, C. J. Mrs. Georgia A. Talbert died in September, 1900, seised of certain real estate in Abbeville county. According to her last will and testament, she willed, devised, and bequeathed certain property "to my beloved husband, Dr. R. J. Talbert, during the term of his natural life, investigating [investing] him with power to rent and lease said lands and building, and collect rents for the same, and I further confer upon him power to sell, make, execute and deliver titles to all singular, the property above described or any part thereof, and to distribute the proceeds of such rents and sales between my two daughters, Anna P. Robinson and Lillie May Jennings, and their heirs, share and share alike." In October, 1906, plaintiff, Lillie May Jennings, commenced this action against R. J. Talbert, individually and as executor of the estate of Mrs. Talbert, and against Anna P. Robinson, who refused to join as plaintiff. The complaint alleged concealment of the will by Dr. Talbert; that, according to its terms, he held the property in trust for plaintiff and Anna P. Robinson; that defendant Talbert had committed waste by selling timber off of said land. It demanded a judgment against him for one-half of the rents and profits of said real estate and for timber and other property disposed of; that defendant be enjoined from further waste; that he give bond for the faithful performance of his duties as trustee or be removed; and, finally, that plaintiff have judgment against him for one-half of the rents and profits of the real estate and for one-half the value of timber and other prop-

erty disposed of. Defendant answered and gave notice that, upon the calling of the case, a demurrer would be made to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, in that it appeared upon the face of the will that defendant, R. J. Talbert, had a life estate in the property. After hearing the motion, Judge R. O. Purdy refused to sustain the demurrer or construe the will, saying: "That in a case of this kind, where the language bears two constructions, it would be committing an injustice for the court to undertake to pass upon the rights of the parties without knowing something of the circumstances relating to the property or the parties." By agreement the question as to waste was omitted in this hearing. The defendant appeals.

In his conclusion we think the circuit judge committed error. That there is some unclearness or ambiguity about the will is undeniable. Ambiguities, however, are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed, or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. 2 Ency. of Law, 388. Thus, where there is conflict in words or clauses of a will or other instrument, the ambiguity is patent. Where, however, there is no defect upon the face of the paper, but, when attempting to put it into effect, it appears that there is uncertainty, as for instance where there are two legatees of the same name or two pieces of property which the description fits equally well, the ambiguity is latent. In the former case the construction and intention must be derived solely from the words contained in the instrument. In the latter case parol testimony may be received to enable the reaching of a correct conclusion. 30 Ency. of Law, 678; *Donald v. Dendy*, 2 McM. 130; *Patterson v. Leith*, 2 Hill. Ch. 17. The ambiguity here is too clearly patent to require discussion. Therefore parol testimony could not be received for enlightenment on the subject.

The words in which doubt occurs are those quoted above. It will be noticed that by the first words used an absolute estate for life is conferred upon the defendant. Continuing, the testator invests him with power to rent and lease the said lands and collect rents for the same, and, in case he saw fit, to even sell all, or any part thereof, and to distribute the proceeds of such rents and sales between testator's daughters. The most that can be said of these additional clauses is that they invest defendant with certain discretionary powers. It seems reasonable to suppose that had Mrs. Talbert wished her husband to hold

the property in trust for her daughters, as plaintiff contends, she would have said so, thus removing all doubt. A more reasonable inference is that on account of the high regard in which she held her husband, and resting implicitly on her confidence in him, she chose to leave it to his discretion as to the best way in which her daughters' interests in the property should be guarded. In regard to plaintiff's contention, we remark there is a tendency in modern decisions to restrict within very narrow limits the implication of trusts where they are not expressly declared; the ground being that any ordinary person wishing to create a trust would do so in mandatory words, that method being simplest and most certain. Mr. Pomeroy, in his work on Equity Jurisprudence (section 1015) says: "Judges for some time past have shown a decided leaning against the doctrine of precatory trusts and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds. Many of the earlier decisions would certainly not be followed at the present day." He further adds, in the following section: "Upon the authority of the more modern decisions, the whole doctrine may be summed up in a single proposition: In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure, as though he had given the property to hold upon a trust declared in express terms in the ordinary manner." To the same effect is Story on Equity Jurisprudence, § 1068b. The rule adopted in this state, and in a number of other jurisdictions, is that, where an absolute and unqualified estate is first created in words which import absolute uncontrollable ownership, words relied on to show that the testator intended to cut down such an estate, or to affect it with any trust, must not only be mandatory, but must in themselves show the manner in which they are to operate, so that the purpose of the testator may be clearly apparent—how or in what degree he intended to cut down the estate previously created, or what was the precise nature of the trust he intended to impress upon it. *Howze v. Barber & Drennan*, 29 S. C. 470, 7 S. E. 817, and authorities; 30 Ency. of Law, 687, and authorities.

Viewing the words now under consideration in the light of these rules of law, we think plaintiff's contention cannot be sustained. It is admitted by all that the first clause standing alone would vest the defendant, R. J. Talbert, with a life estate. In order to cut down the estate, the language must be mandatory; that is, a clear command, or, in the language of the criterion above quoted, the terms taken in connection with the whole will must show the testator's intention to establish a trust as clearly as if he had declar-

ed a trust in express terms. Certainly there is nothing mandatory in the terms used, nor showing a clear intention to create a trust. The terms "investing him with power to rent," etc., "and further conferring upon him power to sell," etc., as was said above, imply absolute discretion in the matter. But granting that they are mandatory, even more is required; they must go further and show in what manner they are to operate, how or in what degree the testator intended to cut down the estate previously granted, or what was the precise nature of the trust he intended to impress upon it. This condition is also unfulfilled. By reference to the words, it is almost impossible to reach the testator's intention should we adopt the view of the implication of a trust. Suppose, for instance, instead of renting the property under consideration, defendant should have utilized it for his own purposes, would he be responsible for rents? Again, when are the rents to be distributable? Numerous other difficulties might conceivably arise if we endeavor to impress upon the property a trust.

We think, and therefore hold, that Mrs. Talbert's intention was to invest her husband with a life estate in the property. That much is clear. In construing the remaining clauses, if we take into consideration the esteem in which she, according to the language of the will, held her husband, a very probable inference is that it occurred to her that the defendant would at all times have the welfare of his daughters in mind and that possibly circumstances might arise in which he might wish to rent the land or even sell it for their benefit. In that case she wished him to have the power to utilize the property as he saw fit. Of course, the grant of the life estate gave him power to rent and collect the rents so long as the property was in his possession, but by expressing the power it cannot be said that the necessary inference was that he should hold the property in trust for his daughters. The testator seemed to rest entirely upon her husband's discretion. Hence we think plaintiff has no right to complain of his actions so long as he does not injure her future estate. The ground of the demurrer is well founded, and should have been sustained.

It is the judgment of this court that the judgment of the circuit court be reversed.

(77 S. C. 480)

**JONESVILLE MFG. CO. v. SOUTHERN RY.**  
(Supreme Court of South Carolina. Aug. 5, 1907.)

#### 1. TRIAL—NONSUIT.

If there is any evidence to go to the jury, or if plaintiff makes out a prima facie case, a nonsuit will not be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 359.]

#### 2. EVIDENCE—LAW OF OTHER STATE—PRESUMPTIONS.

The law of Wisconsin not having been proved, it will be presumed to be the common

law as understood and enforced by the courts of South Carolina.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

#### 3. CARRIERS—FREIGHT—NOTICE TO CONSIGNEES.

Where it was shown that it was the custom of defendant carrier to notify consignees of arrivals of their goods, the presumption is that, if the goods for the loss of which plaintiff sued had arrived, notice would have been given.

#### 4. COMMERCE—INTERSTATE COMMERCE—LIABILITY OF INITIAL CARRIER.

Code 1902, § 2178, makes the initial carrier liable for loss of goods shipped over its line and connecting lines unless a receipt in writing is produced from the connecting carrier. *Held*, that the act is not unconstitutional, as seeking to impose any burden on interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 84.]

#### 5. CARRIERS—INITIAL CARRIERS—RECEIPT FROM CONNECTING CARRIER.

A receipt within Code 1902, § 2178, making initial carrier liable for loss of goods shipped over it and connecting lines unless it produces a receipt in writing, is not required to be in any particular form, and evidence of a freight agent of the railroad company testifying from a record of his office, known as the "per diem sheet," that the goods shipped were received on a waybill on a certain date and transferred to a car of another railroad company for such railroad company, and were receipted for by them at a certain hour on that day, was sufficient.

Appeal from Common Pleas Circuit Court of Union County.

Action by the Jonesville Manufacturing Company against the Southern Railway. Judgment for plaintiff, and defendant appeals. Reversed.

Sanders & De Pass and Townsend & Townsend, for appellant. J. Ashby Sawyer, for respondent.

POPE, C. J. This action was begun on August 4, 1905, by the plaintiff to recover of the defendant railroad company the value of five cases of hosiery delivered to it at Jonesville, S. C., consigned to Kaufer, Smithing & Co., Millwaukee, Wis., the same being five of a shipment of seven cases. The defendant admitted the receipt of the goods, but alleges that they were lost by a connecting carrier, and produced in evidence a contract of carriage, signed by both parties, by which it was agreed defendant's liability should be limited to its own line. Also, by its amended answer, it set up loss by the act of God. The case came on for trial before his honor, Judge Geo. E. Prince, and a jury at the June, 1906, term of court for Union county, and resulted in a verdict of \$318.39 for the plaintiff. A motion for a new trial having been refused, defendant appealed.

1. The first question we consider is whether a nonsuit should have been granted. If there is any evidence to go to the jury, or if the plaintiff makes out a prima facie case, a nonsuit will not be granted. *Norris v. Clinkscales*, 44 S. C. 315, 22 S. E. 1; *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757; *Springs*

v. Railway, 46 S. C. 104, 24 S. E. 166, and numerous other cases. Here plaintiff proved delivery to the defendant and that the goods were not received by the consignee. Defendant contends, however, that there was no evidence showing the goods did not arrive at Milwaukee, and therefore the presumption is that they did arrive; that the circuit judge was in error in charging that it was incumbent upon the railroad to give the consignee notice of the arrival of the goods at their destination. The last contention must be sustained. The law of South Carolina does not require notice. *Bristow v. Railway*, 72 S. C. 44, 51 S. E. 529. The law of Wisconsin, not having been proved, will be presumed to be the common law as understood and enforced by the courts of this state. But, apart from this, it was shown that it was the custom of the defendant to notify Kaufer, Smithing & Co. of the arrival of their goods, as was done in the case of the two cases received. The presumption, therefore, is that, if these goods had arrived, notice would have been given to the consignee. Hence, plaintiff having shown delivery to the defendant and that Kaufer, Smithing & Co. never received any notice of their arrival, a prima facie case was made out and the nonsuit was properly refused.

2. The controlling question in the case is the construction of section 2176 of the Civil Code of 1902, which provides: "In case of loss or damage to any article or articles delivered to any railroad corporation for transportation over its own or connecting roads, the initial corporation or corporation first receiving the same, shall in every case be liable for such loss or damage, but may discharge itself from liability by the production of a receipt in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event, the said connecting road or roads shall be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage." The circuit judge charged and held, in overruling the motion for a new trial, that under this statute defendant was absolutely liable if it failed to produce a receipt from its connecting carrier. Defendant attacked the constitutionality of the act as applied to carriers beyond the borders of the state. We think the act is constitutional. It does not seek to impose any burden on interstate commerce. There is no attempt in any way to try to prevent the carrier from making a contract limiting its liability to its own road.

Where such a contract is entered into, however, the road remains responsible until it proves that it did not cause the loss or damage. The act in question was intended only to establish a rule of evidence by which the connecting carrier could relieve itself of such liability, which, according to the case of *Richmond, etc., Railroad v. Patterson Tobacco Company*, 160 U. S. 312, 18 Sup. Ct. 335, 42 L. Ed. 760, a state has a right to do.

The question arises, then: What constitutes a receipt in writing? The term usually implies a formal paper signed by one party and delivered to another. This was doubtless the meaning of receipt in the mind of the circuit judge when he charged the jury in this case. We do not, however, think that such a limitation should be put upon the act. Its purpose was to enable railroads to relieve themselves from liability for loss of goods by showing by written evidence that they had been delivered to a connecting carrier. In the case of *Miller Bros. v. Railway*, 33 S. C. 359, 366, 11 S. E. 1093, 1959, 9 L. R. A. 833, in which objection was made to the admission of certain evidence, thus raising the identical question raised here, the court said: "Without now undertaking to decide whether there are circumstances under which parol testimony may be admissible to prove the delivery of property by one carrier corporation to its next connecting line, we think the testimony of Cudworth as to the receipt of the property by the steamship line cannot be said to be 'merely oral.' He said 'he recollected the receipt of the goods by referring to my receipts.' Being shown the paper, dated October 4, 1887 (Exhibit C), he said: 'That is the original in my handwriting. These [describing the property] are checked off as received. They are records of my office; duplicates were furnished the South Carolina Railway Company,' etc. We do not understand that the act requires the receipt spoken of to be in any particular form. The intention was to require the delivering company, in order to discharge itself, to produce such written evidence of the receipt of the property by the connecting carrier to which it is delivered as will shift the liability to account for the property to that company. As it seems to us, the paper dated October 4, 1887, and signed by Alfred Cudworth 'for steamer,' sufficiently identifies the property received, and is substantially such 'receipt in writing' as to be a discharge to the railroad company." Applying this language to the case now under consideration, we think there is such production of a receipt as will prevent the circuit judge from holding that there was a total failure on the part of the defendant to produce a receipt in writing, and therefore it could not possibly get a verdict in its favor. Witness Pollard, the freight agent of the Mobile & Ohio Railroad Company at St. Louis, testified from a record of his office, known as the "per diem sheet," that "the seven cases billed K. F. pro-

ducts were received at East St. Louis, June 4, 1903, in Southern car No. 24082, from Corinth, Miss., on waybill 25, dated June 1, 1903; that they were transferred, on June 5, 1903, into C. & A. car, No. 15173, which was delivered to the Terminal Railroad Association at East St. Louis, Ill., for the C. & A. road on June 6, 1903, and were re-ceived for by them at 3:45 that day." According to the testimony, the per diem sheet accompanies all cars transferred from one railroad company to another, and is signed by the agent for both receiving and delivering roads, and it is an acknowledgment of the receipt of the car by the receiving company. It is to establish the delivery of cars to the railroad interested. This sheet was also introduced in evidence and was, according to the language of the court above cited, of itself apart from other records and testimony based upon them, sufficient receipt of the goods by the Mobile & Ohio Railroad Company.

This conclusion, we think, is decisive of the case. There are other exceptions, but the decision of this question either decides them or makes consideration of them un-profitable.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

(77 S. C. 493)

#### KIRVEN v. VIRGINIA-CAROLINA CHEMICAL CO.

(Supreme Court of South Carolina. Aug. 5, 1907.)

##### 1. JUDGMENT—RES JUDICATA—IDENTITY OF ISSUES.

A judgment in the United States court on a note for fertilizers is not res judicata in an action in a state court for damages to defendant's crops, caused by the use of such fertilizer, where the same question was raised in the United States court, but was withdrawn by consent of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1244, 1263.]

##### 2. SAME—MATTERS LITIGATED.

Under the rulings of the United States Supreme Court, a judgment is not res judicata in a second action on a different cause of action, unless the question was actually litigated in the original action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1244.]

Pope, C. J., and Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Darlington County; Klugh, Judge.

Action by J. P. Kirven against the Virginia-Carolina Chemical Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Wilcox & Wilcox, W. F. Dargan, Dargan & Coggeshall, and Mitchell & Smith, for appellant. E. O. Woods, Geo. W. Brown, and Stevenson & Matheson, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff as the result of using certain fer-

tilizers in the cultivation of his crops, manufactured and sold to him by the defendant.

As the main question herein is whether the issues raised by the pleadings had already been adjudicated in an action between the same parties, in the Circuit Court of the United States, it will be necessary to state briefly the proceedings in the two cases.

On the 15th of November, 1898, the Virginia-Carolina Chemical Company, as plaintiff, filed a complaint in the court of common pleas for Darlington county, state of South Carolina, against J. P. Kirven, as defendant, in which it was alleged that on the 14th of March, 1898, the defendant made his certain note, whereby he promised to pay to the order of S. M. McCall \$2,228 on the 25th of October thereafter, that the said note was indorsed for value to the plaintiff, and that no part thereof had been paid. On the 30th of November, 1898, his honor, Judge Watts, on motion of plaintiff's attorneys, granted an order that the cause be discontinued, without prejudice to the right of the plaintiff to commence another action at such time as it might be advised. On the 11th of April, 1903, the Virginia-Carolina Chemical Company filed a complaint in the United States Circuit Court, setting forth the facts mentioned in the first complaint. On the 30th of May, 1903, the defendant, J. P. Kirven, served an answer to the complaint, in which he set up the following defenses: First. That S. M. McCall was the owner of the fertilizers for which said note was given; that at the time the note was assigned to the plaintiff, and at the time of the commencement of said action, S. M. McCall and the defendant, J. P. Kirven, were residents and citizens of the state of South Carolina, and therefore that the Circuit Court of the United States was without jurisdiction. Second. That the plaintiff was a foreign corporation, and could not maintain the action, for the reason that it had failed to comply with the requirements of the statute relative to foreign corporations doing business in this state. Third. "That the note sued upon in this action was given by the defendant to S. M. McCall for fertilizers, for which he agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers in making a crop for the year in which the said note was given, but the said fertilizers were so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that, instead of being of benefit to the crops of defendant and his tenants and customers to whom he furnished the same, they were deleterious and destructive to the crops and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note." On the 12th of April, 1904, his honor, W. H. Brawley, United States judge, granted leave to the defendant, J. P. Kirven, to file such additional answer or counterclaim as he might be ad-

vised. On the 6th of March, 1905, the defendant, J. P. Kirven, filed his answer, reciting that he "by leave of the court first had and obtained files this, his supplemental answer, hereby withdrawing any former answer heretofore filed by him herein."

The amended answer contained the first two defenses hereinbefore mentioned, and as a third defense, by way of counterclaim, alleged that under attachment proceedings in North Carolina the plaintiff had in his possession the proceeds of 70 bales of cotton, amounting to \$2,450, belonging to the defendant, J. P. Kirven, and for which he demanded judgment. But the third defense, hereinbefore mentioned, was withdrawn by leave of the court, and no reference was thereafter made in the pleadings to the defense of failure of consideration. Consequently, during the progress of the trial, when the defendant, J. P. Kirven, commenced to testify about the crops, his honor, the United States judge, promptly ruled that such testimony was not admissible, and excluded it. In that action the jury rendered a verdict in favor of the plaintiff for \$911.07, and on the 4th of April, 1905, judgment was duly entered thereon. On the 11th of October, 1906, a certified record of the said judgment was filed in the office of the clerk of the court of common pleas for Darlington county. On the 8th of February, 1904 (before judgment was entered in the Circuit Court of the United States), J. P. Kirven commenced the present action in the court of common pleas for Darlington county against the Virginia-Carolina Chemical Company, alleging that said defendant caused damage to his crops in the sum of \$1,995 by reason of selling to him acid phosphate and dissolved bone which "had been manufactured with such gross negligence and want of skill that, instead of being advantageous to the crops to which they were applied, they destroyed the same in large part, and were not only worthless to the plaintiff, but by destroying his crops damaged him very heavily." The answer of the defendant to this complaint was practically a denial. Subsequently, however, leave was granted for it to file a supplemental answer, whereupon it set up as a defense that the issues in this action were adjudicated, or could have been determined, in the action in the Circuit Court of the United States. The jury rendered a verdict in favor of the plaintiff for \$1,995.

In their argument the appellant's attorneys state that the main issue in the case is whether the judgment rendered in the Circuit Court of the United States on the note given for the fertilizers, and here alleged to have destroyed plaintiff's crop, did not adjudicate all issues between the same parties in this cause. As a preliminary question, it will be necessary to determine what force and effect is to be accorded the judgment rendered in the Circuit Court of the United States. When the court derives its jurisdiction from the citizenship of the parties, and

no question is raised in the case involving a right under the Constitution or laws of the United States, then the judgment of the court of the United States is only entitled in a state court to the force and effect it would have had if it had been rendered in the state court. But in all other cases the court of the United States will determine the question of *res judicata* upon principles settled by the Supreme Court of the United States. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; *Deposit Bank v. Frankfort*, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276; *Gunter v. Railroad*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. Ed. 477. In the case heard by the Circuit Court of the United States the question was presented under a statute of the United States whether the assignee of the note had the right to maintain the action. When the judgment was urged as a bar to the action in the state court, a federal question was presented, and must be determined in accordance with the decisions of the United States Supreme Court.

The appellant's attorneys in their argument say: "Speaking generally, it may be said that the decisions of these courts establish that, when the second suit involves the same claim as the first, the judgment in the first case is an absolute bar, not only to the matters actually litigated, but as to every matter that might have been litigated; that, if the second suit is upon an entirely different claim, the estoppel only extends to the matter decided"—and cite the leading case of *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, in which Mr. Justice Field, in behalf of the court, thus states the principle: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel, against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegations are as conclusive, so far as future proceedings at law are con-

cerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever. But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The present action and that in the Circuit Court of the United States, it is true, were between the same parties, but upon a different claim or demand; one being upon a promissory note and the other for unliquidated damages, arising from the destruction of plaintiff's crops, through the alleged gross negligence on the part of the defendant in the manufacture of the fertilizers used upon said crops. Therefore plaintiff is not estopped from raising this question unless it was actually litigated and determined in that action. The record, however, shows that the claim upon which this action is based was withdrawn and not abandoned, and that, when J. P. Kirven offered to introduce testimony as to the crops, his honor, the presiding judge, ruled that it was incompetent.

The first and second exceptions are overruled:

The third exception cannot be sustained, for the reason that, when the charge is considered in its entirety, it will be seen that it is not susceptible of the inferences which the appellant has drawn from it.

The fourth exception must be overruled, as the fact that in a number of instances in which the fertilizers were used the crops were destroyed afforded some evidence tending to show that the fertilizers were worthless and deleterious to the crops.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (concurring). The question of res judicata is close and difficult, but I think the conclusions reached by Mr. Justice GARY are right on principle and authority. The Virginia-Carolina Chemical Company, defendant in this action, sued the plain-

tiff, Kirven, in the federal court on notes aggregating \$2,228, given for the purchase money of fertilizers. Kirven set up, among other defenses, failure of consideration, in that the fertilizers were not only worthless, but positively deleterious. Subsequently this defense was withdrawn, and on the trial of other issues the defendant recovered judgment for \$1,723.40. While the suit on these issues was pending in the federal court, Kirven commenced action against the Virginia-Carolina Chemical Company in the court of common pleas for Darlington county to recover damages to his crop from the use of the fertilizer for which the notes were given; the essence of the complaint being contained in this paragraph: "That the said fertilizers, to wit, acid phosphate and dissolved bone, had been manufactured with such gross negligence and want of skill that, instead of being of advantage to the crops to which they were applied, they destroyed the same in large part and were not only worthless to the plaintiff, but, by destroying his crops, damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn, by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of \$1,995 and costs." The Virginia-Carolina Chemical Company answered by a general denial, but, after the determination of the suit on the notes, by supplemental answer alleged that the claims set up by Kirven had been adjudicated in the action on the notes in the federal court. Having introduced the record in the federal court, on this ground the defendant requested the state court to direct a verdict in its favor. It is clear that Kirven's claim might have been set up as a counterclaim in the federal court; and the appellant first contends that the Code of Civil Procedure of 1902 expressly requires all counterclaims to be set up in the answer. This position is thoroughly unsound.

Section 170, which is relied on, is: "The answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or a counter-claim, in ordinary and concise language, without repetition." All that this means is that any paper purporting to be an answer must contain either a denial of a material allegation of the complaint or new matter constituting a defense or a counterclaim, or it will be no answer. It cannot in any view be considered a legislative enactment that any separate cause of action which might have been, but was not, used as a counterclaim, shall not be available in a separate action. There are such enactments in the Codes of some states, but they are very different from section 170 of our Code. The Codes of California and Minnesota are examples. *Brosnan v. Kramer*, 66 Pac. 979, 135 Cal. 36; *Lowry v. Hurd*,



7 Minn. 356 (Gil. 282). Mr. Pomeroy clearly lays down the rule that provisions for the counterclaim, such as are contained in our Code, do not preclude the defendant from bringing a separate suit on a cause of action which might have been set up as a counterclaim. Pomeroy's Rem. § 804.

Counsel for appellant strongly argued, however, even if this is true, as a general rule "this rule does not apply where the subject-matter of the set-off or counterclaim was involved and adjudicated in the former action in such wise that the judgment therein necessarily negatives the facts on which the defendant would have to rely in order to establish his demand." This statement of an exception to the general rule, taken from 23 Cyc. 1202, may be accepted as true, yet I do not think this case falls under it. Had Kirven gone to trial on the plea of failure of consideration, saying nothing of his counterclaim for damages, and had lost on that issue, the judgment would have been conclusive that there was no failure of consideration, and hence obviously no basis for a separate action for damages for injury done by the fertilizer sold. The case in that condition would have been within the exception. But he had his election to use the fact, if fact it be, of the worthlessness of the fertilizer as a defense by pleading failure of consideration, or, by separate suit, assert as a distinct cause of action the fertilizer to be positively deleterious, and claim damages for the injury which resulted from its use. Inasmuch as he did not submit the issue of failure of consideration in the federal court, the judgment in that court did not adjudicate that there was no defect in the goods or injury from their use. It only precluded Kirven from setting up defects as a defense ever thereafter on the familiar rule that a defendant must set up all his defenses or lose the benefit of them. Therefore, as a defense, failure of consideration was gone. But when Kirven elected not to use, as a defense, the fact of worthlessness, which might have been available in the action of the Virginia-Carolina Chemical Company against him, he was not precluded from using the very different facts of deleteriousness and positive injury caused by appellant's alleged negligence in the manufacture of the fertilizer as the basis of an independent cause of action. Having such a cause of action against the Virginia-Carolina Chemical Company, Kirven had a right to choose his own time and his own tribunal for asserting it, and could not be forced to assert it at the time and before the tribunal chosen by the company. This conclusion is, I think, in accord with the principles laid down in *Hart v. Bates*, 17 S. C. 40. The reason for it is thus clearly stated in the lucid opinion of Judge Sanford, in *Brown v. Bank*, 132 Fed. 450, 452, 66 C. C. A. 293: "The reason for this rule is that the damages resulting from the plaintiff's wrongful act may be indeter-

minate, or may not have entirely accrued, when he brings his action, and it might be unjust or inequitable to permit him to determine the time when the defendant must present and prove his claim for the damages which he has suffered from the breach of the plaintiff's contract." In *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, Justice Field uses this language: "But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." This language is quoted with approval in *Willoughby v. Railroad Co.*, 52 S. C. 174, 29 S. E. 629, where, however, the doctrine of *res judicata* was held to apply because the very questions made in the second suit had been actually litigated and decided in the first.

It has been repeatedly held that a judgment for the purchase price of goods does not preclude a separate action against the seller for breach of warranty, and the principle has been extended to other like cases, unless the purchaser had set up the breach as a defense or counterclaim. *Black on Judgments*, §§ 761-769; *Van Fleet on Former Adjudication*, §§ 168-170; 23 Cyc. 1202; *Pomeroy's Rem.* § 804; 24 Am. & Eng. Enc. 785; *Riley v. Hale*, 33 N. E. 491, 158 Mass. 240; *Dewsnap et al. v. Davidson*, 26 Atl. 902, 18 R. I. 98; *Jones v. Witousek et al.*, 86 N. W. 59, 114 Iowa, 14; *Uppfalt v. Woermann et al.*, 46 N. W. 419, 30 Neb. 189; *Kennedy v. Davisson*, 33 S. E. 291, 46 W. Va. 433; *Van Epps v. Harrison* (N. Y.) 40 Am. Dec. 326, note; *Johnson v. Reeves* (Ga.) 37 S. E. 980, 112 Ga. 690; *Pub. Ass'n v. Fisher*, 54 N. W. 759, 95 Mich. 274; *Green v. Bank*, supra. Cases like *Ryan v. Association*, 50 S. C. 185, 27 S. E. 618, 62 Am. St. Rep. 831, are not opposed to this conclusion. There *Ryan* sued to recover double the sum alleged to have been received by the defendant association for usurious interest. The charging of usurious interest was under the statute a defense to the action on the debt, but the penalty was recoverable as a counterclaim or in a separate action only for usurious interest actually received. Before any action was brought on the debt, usurious interest had been charged, but not received. To this action, therefore, *Ryan* had a defense for usury, but no counterclaim for a penalty. He did not set up the defense, and therefore it was held, after judgment against him on the

debt, the defense of usury was forever shut off, just as the defense of payment would have been. It was held, further, that the excess of interest having been received, not on the contract, but on the judgment into which the agreement had been merged, the penalty could not be recovered. But it was not held nor intimated that, if usurious interest be received on a contract before judgment, the debtor could not bring a separate action for the penalty, though he had chosen not to set up the defense of usury against the suit on the contract. On the contrary, the opinion was expressed that he could bring such an action without having set up the defense of usury. It is difficult to understand how the failure of the crops on the land, where the fertilizer in question was used, could have been caused by negligence in its manufacture, but there was much evidence for the consideration of the jury on that point, and the judgment, therefore, cannot be reversed for an entire lack of testimony to sustain it.

POPE, C. J. (dissenting). Being unable to concur in the opinion of Mr. Justice GARY, I state briefly my views.

The Code of Civil Procedure of 1902 (section 170) provides: "The answer of the defendant must contain: (1) A general or special denial \* \* \*. (2) A statement of any new matter constituting a defense or counter-claim in ordinary and concise language, without repetition." Section 171 provides: "The counter-claim mentioned in the last section must be one existing in favor of the defendant, against a plaintiff between whom a several judgment might be had in the action, and arising out of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as heretofore have been denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished."

For a proper understanding of the spirit which prompted these sections, it will be necessary to refer briefly to the state of procedure as it existed at the time of the adoption of the Code. It will be remembered that prior thereto tribunals for the trial of questions of law were separate and distinct from those which had to deal with equity issues. Likewise there were numerous forms in accordance with which it was necessary to bring the various classes of cases then existing.

Consequently all procedure was fraught with much technicality. Choice of a wrong form or failure to distinguish between legal and equitable issues often proved fatal to causes of action. With the progress of the science, however, it was impossible that such a state of affairs could continue. Formality had to give place to materiality. The relief sought was embodied in the Code, which provided for the abolition of all distinction between suits in equity and actions at law and the abolition of all common-law forms and the establishment of one form to be known as the civil action. It was intended that the new procedure should be highly remedial. Instead of having to split action and bring law issues in law courts and equity issues in equity courts, or law defenses in law courts and equity defenses in equity courts, there was to be but one action, in which all joined in interest must be made parties and every question connected with the case was to be adjudicated. Litigation would be thus convenience and multiplicity of suits prevented.

Proceeding to carry out this design, the framers of this legislation were met with cases in which, although it might be an advantage to litigants to pursue a certain course, yet there was no special advantage to be gained as a matter of public policy. Others occurred in which justice and public policy demanded certain methods of procedure. In providing for the former permissive words were used, while in the latter cases the language is mandatory. Attention is called to this for the purpose of emphasizing the word "must" in the act now under consideration. The Legislature having used the term, this court must take for granted that it was used advisedly and for the purpose of remedying some existing evil. It has no authority to hold that the term was used inadvertently. The act also provides that the defendant may set up as many defenses or counterclaims as he has, however inconsistent they are with each other. This is to give him the benefit of all his claims. Construing this clause with the whole act the strong implication is, if he fail to set up any one of his defenses or counterclaims, he is after judgment precluded from again asserting what might have been his right. This is the only construction consistent with the mandatory injunction as to what the answer shall contain. Of course, it does not apply to defenses or claims not included in the statute. The law gives the defendant an opportunity, but does not attempt to compel him to take advantage of it; that is, it does not attempt to say that he shall set up all of his claims and defenses. Under our statute one action makes a finality. Pomeroy in his work on Remedies (section 804) says, in the absence of statutory provision, it is not necessary to plead counterclaims in defense. Implicitly, however, where statute does re-

quire it, all claims and defenses must be set up.

Is the statute above quoted applicable to the case now under consideration? Section 171 provides, among other things, that counterclaims mentioned in the preceding section must exist in favor of the defendant against the plaintiff, and must arise out of the same transaction or be connected with the subject-matter of the suit. This language, while to some extent indefinite, is sufficiently clear to remove all doubt from this case. It seems plain that the claim on which the action here is brought arose out of the transaction as to the fertilizer. But, if this be doubted, certainly no one can doubt but that it is connected with the subject-matter of the former suit. The fertilizer sold was productive of the alleged damage here sought to be recovered for. Therefore it should have been set up as a defense. There are no cases exactly in point, but *McAlley v. Barber*, 4 S. C. 48, and *Rice v. Mahaffey*, 9 S. C. 282, to some extent support the position taken.

But, aside from the statutory provision, there is a strong ground for holding that the plaintiff here cannot now maintain this action. The general rule will not be doubted that a direct final judgment of a court of competent jurisdiction on the same subject-matter, between the parties and privies in law or estate, is conclusive, and cannot be re-examined in a subsequent action in the same or any other court. *Manigault v. Deas*, *Bailey's Eq.* 293; *McDowall v. McDowall*, *Bailey's Eq.* 326; *Davis v. Murphy*, 2 Rich. Law, 560, 45 Am. Dec. 749; *Hart v. Bates*, 17 S. C. 35. The difficulty, however, arises in the application of the rule. What constitutes the same subject-matter and what are the issues decided? The rule as laid down by *Taylor on Evidence* (volume 2, § 1513), that, "except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time, is supported by much authority. 24 A. & E. Ency. of Law, 781; *Outram v. Morewood*, 3 East, 346; *Gould v. Railway*, 91 U. S. 528, 23 L. Ed. 416; *Henderson v. Henderson*, 3 Hare, 115; *Stafford v. Clark*, 2 Bing. 382; *Miller v. Covert*, 1 Wend. (N. Y.) 487; *Bagot v. Williams*, 3 B. & C. 241; *Roberts v. Helm*, 27 Ala. 678; *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; and numerous other United States cases. Equally well founded is the principle that a party cannot split up his defenses. *Beloit v. Morgan*, 7 Wall. (U. S.) 619, 19 L. Ed. 205; *Henderson v. Henderson*, *supra*; *Gunter v. Railway*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. Ed. 477.

Without passing on these questions, how-

ever, we proceed to the principle that seems conclusive of the case. Without conflict are the authorities in holding that where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim, which he might have presented in the first suit, but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. *Black on Judgments*, § 676; 23 Cyc. 1202; *Ryan v. Association*, 50 S. C. 187, 27 S. E. 618, 62 Am. St. Rep. 831; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Bigelow on Estoppel* (2d Ed.) p. 36; *Reichert v. Krass*, 41 N. E. 835, 13 Ind. App. 348; *Dunham v. Bower*, *supra*; *Association v. Wellington (C. C.)* 116 Fed. 100; *Fayerweather v. Ritch*, 195 U. S. 301, 25 Sup. Ct. 58, 49 L. Ed. 193. This rule is founded on grounds of reason and public policy. Without it the conclusiveness of judgments would become a will-o-the-wisp, a mere phantom existing in the imagination of minds. The second court obtaining jurisdiction, if it sustains the claim of the plaintiff, would in effect reverse the decision of the former court, and make it a mere nullity in many cases. A state of facts found to exist by a jury of 12 men could be declared by 12 others not to exist. Never could a plaintiff, who recovered judgment in an action, feel assured that the defendant was not keeping back some counterclaim by which he meant to make his judgment of no effect. Courts of justice would be robbed of much of their justice-dispensing power, and great multiplicity of suits would result.

With this principle in view, let us examine the facts of the present case. There can be no doubt that, although the former action in this case was brought upon a note, it was in fact for the recovery of the value of the fertilizer here alleged to have caused the damage. Plaintiff himself in the record admits this. What issue was decided then in that former case? Plaintiff there alleged that it had sold to the defendant fertilizer to the value of a certain sum. This defendant denied. The issue went to the jury, and they found for the plaintiff. Interpreting their verdict, they in effect say that plaintiff did sell the defendant fertilizers, that they were valuable to him to the amount claimed, and, therefore, defendant should pay plaintiff such amount. The defendant now brings this action, alleging damages arising from the deleterious quality of the fertilizers. This would have been a perfect defense to the action above referred to if defendant could have proved it. He could even have claimed his damage, and the jury, instead of finding that the fertilizers were of value to him, could have found that they did him damage, and could have given him a judgment against the plaintiff.

This case is identical in principle with the

case of *Blair v. Bartlett*, supra. In that case plaintiff brought an action for malpractice. Prior to this action the defendant had brought an action against him in which he recovered the full amount claimed for his services. To this action he pleaded *res judicata*. The court sustained this plea, saying that the former case had established the facts of the rendition of the services, and that they were valuable to the defendant since he was compelled to pay for them. But, if of value, they could not have been useless; and, if of use, they could not have been harmful. Identical are the facts found here. The former action settled, beyond all question, that plaintiff received the fertilizers and that they were of value to him. Applying the reasoning of the court above, if they were of value, they could not have been useless, and, if of use, they could not have been harmful. Value and harm are antipodal terms. They cannot coexist in the same material. The former action having found that the fertilizers were valuable, if the plaintiff is now allowed to recover in this action, he must necessarily impute error to the former finding of a court of competent jurisdiction, a thing which, according to the authorities and as a matter of public policy, he will not be allowed to do.

For these reasons I think the judgment should be reversed.

JONES, J. I concur in the view that there should be a reversal upon the ground last discussed in this opinion.

Remittitur is held up to permit appellant to take this case to the United States Supreme Court.

(77 S. C. 528)

#### FLEMING v. POWER, Auditor.

(Supreme Court of South Carolina. Aug. 7, 1907.)

#### TAXATION—LEVY OF TAX—INJUNCTION—REMEDY AT LAW.

An application to enjoin a county auditor from collecting an income tax, under Civ. Code 1902, §§ 328-331, will be denied, plaintiff having a complete remedy under Civ. Code 1902, § 413, authorizing payment under protest and an action against the county treasurer for the recovery of the same.

Application by J. O. C. Fleming for injunction against C. A. Power, auditor of Laurens county, to restrain him from levying income tax. Petition dismissed.

Dial & Todd, for petitioner. M. P. De Bruhl, Asst. Atty. Gen., for the respondent.

POPE, C. J. This is an application by the petitioner, J. O. C. Fleming, to this court, in its original jurisdiction, for a writ of injunction against the respondent, as auditor of Laurens county, to enjoin him from proceeding under an act of the General Assembly entitled "An act to raise revenue for

the support of the state government by the levy and collection of a tax on incomes," approved the 5th day of March, 1897, and now incorporated in the Code of Laws of South Carolina, 1902 (Civil Code), volume 1, as sections 325 to 331, inclusive, to assess and charge against the petitioner a tax of 1 per cent. on each dollar of his income over and above the sum of \$2,500, to wit, the sum of \$30, and from adding thereto 50 per cent. thereof as a penalty for petitioner's failure to make a return of his income. A rule to show cause having been granted, the cause was heard by this court upon the facts stated in the petition, and in the answer and return of the respondent. There is no dispute in regard to matters of fact. The questions in issue are questions of law.

However interesting the merits of the case might be, this court will not consider them. It is well settled that, where there is an adequate remedy at law, courts of equity will not interfere. Therefore, in this case, if petitioner has an adequate remedy at law the injunction will not issue. Section 413 of the Civil Code of 1902 provides: "In all cases in which any county, state, or other taxes are now or shall be hereafter charged upon the books of any county treasurer of the State against any person, and such treasurer shall claim the payment of the taxes so charged, or shall take any step or proceeding to collect the same, the person against whom such taxes are charged, or against whom such step or proceeding shall be taken, shall, if he conceives the same to be unjust or illegal for any cause, pay the said taxes notwithstanding, under protest, in such funds or moneys as the said county treasurer shall be authorized to receive by the act of the General Assembly levying the same; and upon such payment being made, the said county treasurer shall pay the taxes so collected into the state treasury, giving notice at the same time to the Comptroller General that the payment was made under protest; and the person so paying said taxes may, at any time within thirty days after making such payment, but not afterwards, bring an action against the said county treasurer for the recovery thereof in the court of common pleas for the county in which said taxes are payable; and if it be determined in said action that such taxes were wrongfully or illegally collected, for any reason going to the merits, then the court before whom the case is tried shall certify of record that the same were wrongfully collected and ought to be refunded, and thereupon the Comptroller General shall issue his warrant for the refunding of the taxes so paid, which shall be paid in preference to other claims against the treasury: Provided, that the county treasurers shall be required to receive jury and witness tickets for attendance upon the circuit courts of the state receivable for taxes due the county in which the said services are rendered." Why this remedy is inadequate in this case

we are unable to see. Petitioner having brought his action for recovery the court can then proceed to an inquiry as to the validity of the act, and, if it is found to be null and void, his money will be returned.

Petitioner contends, however, that even if in this instance he recovers the taxes so paid the above quoted remedy would be insufficient, for the reason that each year there would be an illegal assessment and collection, and as often he would be compelled to bring an action for recovery and would thus be put to much annoyance and expense. Clearly this contention cannot be upheld. The idea of county or state authorities attempting to collect a tax under a law declared void by the courts is absolutely repugnant to the principles upon which our government is founded. The power of the courts to pass upon legislative acts and declare them unconstitutional, if necessary, is regarded as one of the bulwarks of liberty and of the protection of property, and any action which in effect nullifies such authority or brings it into contempt will not be likely to occur.

In our opinion the petitioner has a full and adequate remedy at law, and therefore his petition is dismissed.

(77 S. C. 511)

**McMILLAN et al. v. McMILLAN.**

(Supreme Court of South Carolina. Aug. 6, 1907.)

**1. SPECIFIC PERFORMANCE—CONTRACT—DEFINITENESS.**

Unless the material stipulations of a contract are made out with sufficient definiteness for the court to do justice concerning them, it will not undertake to decree specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 61.]

**2. SAME—PAROL CONTRACT—PAYMENT OF PRICE.**

Payment of the purchase money alone cannot support an action for specific performance of a parol contract to convey land, where the possession was not changed after the alleged contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 126.]

**3. SAME—IMPROVEMENTS.**

Improvements of such an extent that a reasonable man would not incur the expense of making them, except in reliance on a contract of purchase, are necessary to a suit for specific performance of a verbal contract on the ground of part performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 132, 133.]

**4. SAME—RELIEF AWARDED—RECOVERY OF PRICE PAID.**

Where a complaint in an action for specific performance of a parol contract to convey land stated that plaintiff was to have possession and use of the home place, support his mother, and pay off a mortgage, and on payment of the debt was to receive a conveyance of one-half interest in the entire tract, and the evidence was insufficient to permit a decree of specific performance, plaintiff could recover the money paid on the price of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 419.]

Appeal from Common Pleas Circuit Court of Chesterfield.

Action by M. E. McMillan, individually and as administrator of John A. McMillan, and others, against M. J. McMillan. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. P. Pollock, for appellants. Stevenson & Matheson, for respondent.

WOODS, J. This action was brought against the defendant, Mrs. M. J. McMillan, by the plaintiffs, the widow and children of her deceased son, John A. McMillan, for specific performance of an alleged agreement to convey to John A. McMillan one-half interest in a tract of land containing 637 acres. On the testimony taken and reported by a referee, the circuit judge dismissed the complaint, and the plaintiffs appeal.

This tract of land with two others, of 124 acres and 10 acres, belonging to Thos. E. McMillan, the husband of defendant and father of John A. McMillan. Having been unsuccessful in a mercantile business investment, John A. McMillan in February, 1893, moved with his family to the home of his father. On his father's death, in November following, he became administrator of the estate and continued on the land with his mother until his own death, in October, 1901. The plaintiffs, his widow and children, remained until 1904, and since leaving have rented out and received the income from part of the place. In 1894, after the death of Thos. E. McMillan, the three tracts of land belonging to his estate were sold under an order of the court for the payment of his debts, and purchased by his widow, the defendant, for \$1,100. To obtain the money to comply with her bid, she executed a mortgage to F. M. Welsh for \$755. John aided her in arranging for the purchase of the property and in the negotiation of the loan. The complaint alleges a parol contract made between John A. McMillan and his mother, by which John was to have possession and use of the entire home place of 637 acres, support his mother, who was living with him, and pay off the mortgage, and, upon payment of the debt, he was to receive from his mother a conveyance of one-half interest in the entire tract. The question is: Was there a definite parol contract made out by the clear preponderance of the evidence with such partial performance as to take it out of the statute of frauds?

1. We do not think there was any inconsistency or variance in the evidence of the plaintiff's witnesses as to the subject-matter of the alleged contract. The principal witness, Welsh, testified: "Mrs. M. J. McMillan told me in the presence of John A. McMillan that, when John A. McMillan paid up the mortgage debt, she was going to convey to him one-half of the home tract." This did not necessarily mean one-half of the area of the tract, and is not inconsistent with the

explanation by the witness, on being recalled, that "Mrs. McMillan said when the mortgage was paid she would transfer him one-half interest in the land." Indeed, it seems clear that all the plaintiff's witnesses, who undertook to state the contract, though using different language, meant to testify to a contract to convey a one-half interest and not one-half in area. Nor do we think the contract attributed to Mrs. McMillan was too indefinite as to the time within which the mortgage was to be paid. Time is not usually of the essence of such agreements. When no time for payment is mentioned, it should be considered that either immediate payment or payment in a reasonable time, according to the circumstances of the case, is intended. The failure to show an express stipulation as to the time of performance, especially as to payment of money, standing alone, should not be allowed to defeat a parol agreement for the sale of land, which is sufficiently definite in other respects. *Thompson v. Dulles*, 5 Rich. Eq. 387; *Prothro v. Smith*, 6 Rich. Eq. 332; 29 Am. & Eng. Enc. 37. In this case the mortgage, which it is said John A. McMillan was to assume, was payable at a future day, and it is a fair inference that he was to pay it at maturity.

There is more difficulty on the part of definiteness with respect to the period for which Mrs. McMillan was to live with her son, and receive support from him. It was not fixed by any of the witnesses. When a widow contracts to convey land either in fee or for her life for the consideration of her support, the obligation for support extends to the end of her life; but, when she makes no deed and only contracts for her support, in consideration for the use of agricultural lands without fixing the period for which the arrangement is to continue, the court cannot bind either party to any definite time, and either may terminate the arrangement at the end of any agricultural year. Here the agreement attributed to Mrs. McMillan contemplated the conveyance of a half interest in the land to John A. McMillan and his use of the whole, for which he was to pay the mortgage and support his mother. Nothing appears in the imputed contract as to how long the support was to continue. This was an important feature, not severable from the other elements of the contract. It was not pretended that there was one contract that John A. McMillan should pay the mortgage and have one half the land, and another that he should have the use of the whole land, or the remaining half, for the support of his mother. The court cannot, therefore, refer the support to the consideration of the use of the land exclusively, and say it was to end at the will of either party. Nor can it refer the support exclusively to the alleged promise to convey, and hold it was to continue for the life of the mother. In this essential feature the contract was alto-

gether indefinite. Unless the material stipulations of a contract are made out with sufficient definiteness for the court to do justice concerning them, it will not undertake to decree specific performance.

But, assuming a sufficiently definite parol contract to have been made, there was no proof of such partial performance as would take the case out of the statute of frauds. John A. McMillan, it is true, at the time of his death, had paid all of the mortgage debt except about \$200. This balance was paid by his mother after his death; and, before the commencement of this action, the plaintiffs tendered to her the amount so paid, and interest. Payment of the purchase money alone, however, cannot support an action for specific performance. Possession was not changed. John A. McMillan after his father's death continued to live on the place, managing the farm. This condition as to possession continued after the alleged contract of purchase. As a general rule, change of possession is necessary. *Hatcher v. Hatcher*, McMul. Eq. 318; *Poag v. Sandifer*, 5 Rich. Eq. 181; *Charles v. Byrd*, 29 S. C. 559, 8 S. E. 1. If the possession be not changed, there must be some act of the purchaser showing with equal clearness an assertion of dominion over the land in his own right as purchaser; and of such act the plaintiff must have notice. There was evidence of some building, ditching, and perhaps other improvements made by John A. McMillan. But the nature and extent of the improvements taken in connection with the relation of the parties did not indicate an assertion of exclusive title by John A. McMillan. He was one of three children, with an expectation of inheritance of all his mother's lands. The rental income of the lands used by him was from \$350 to \$400, and the only charge for it was his mother's board, and that for only a portion of the time. The improvements were for the comfort of his family, and for increasing the productiveness of the land, which he had the prospect of retaining for an indefinite period. Improvements of such extent that a reasonable man would not incur the expense of making them, except in reliance on a contract of purchase, must add strength to a claim of part performance of a verbal contract of purchase, especially if made with the consent or knowledge of the legal owner. But John A. McMillan, as a reasonable man, might well have made these improvements, expecting to receive the benefit of them without respect to any contract of purchase. There is no proof that the improvements and the support given to Mrs. McMillan were worth so much more than the use of the land, or that John A. McMillan had been induced by a verbal contract to so change his condition or prospects that it would be a fraud upon him not to enforce the alleged contract. Thus far the case has been considered solely on the version of the

contractual relations between the defendant and her son, John, given by F. M. Welsh and other witnesses on behalf of plaintiffs, and we think this evidence, leaving out of view the evidence for the defendant, does not make out a case for specific performance. When the evidence for the defendant is considered, the terms of the agreement between John and his mother become involved in the greatest doubt and uncertainty. Mrs. McMillan flatly denied the contract of sale, and testified, on the contrary, that John was to pay the mortgage, and, as compensation, to have the land for three years. And her evidence is not without corroboration in the statements which other witnesses say were made to them by John A. McMillan. The evidence, therefore, as to the nature of the contract under which John A. McMillan occupied the land and made payments on the mortgage is contradictory, and does not produce any clear conviction that Mrs. McMillan agreed to convey him one-half interest in the land. It was to just such cases as this that the statute of frauds was intended to apply.

To sum up, specific performance must be denied for these reasons: (1) The existence of a parol contract to convey is not established by evidence clear and convincing. (2) Assuming such a contract to have been made, it is so indefinite in some of its material elements that the court could not do justice between the parties in a decree for specific performance. (3) There was no change of possession, and the acts relied on as a part performance of the contract to convey, contended for by the plaintiffs, are not inconsistent with the contract for a limited use of the land, testified to by the defendant.

2. Finally, the plaintiffs contend, if they have failed to make out a case for specific performance, the plaintiff M. E. McMillan, as administratrix of the estate of John A. McMillan, is entitled to recover the money paid by him on the purchase price of the land. We think the complaint is broad enough to cover such relief. But, as the relief specially asked in the complaint was a decree for specific performance and not a judgment for the recovery of money, the defendant should be allowed, if so advised, to set up the pleas of statute of limitations and laches. In ascertaining what amount, if any, is due by the defendant for money paid by John A. McMillan for her benefit on the purchase price of the land, she should be allowed credit for the reasonable rental value of the land, less the value of John A. McMillan's contribution to her support, and less the increased value imparted to the land by any substantial betterments placed on the land by him while occupying it.

With this modification, the judgment of the circuit court is affirmed, and the case remanded to that court for such further proceedings as may be necessary.

## TODD v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Aug. 7, 1907.)

## 1. APPEAL AND ERROR—TRIAL COURT'S DISCRETION—CONTINUANCE.

After motion to amend complaint during trial was granted, a refusal to continue the case on account of surprise is not reversible error, unless abuse of discretion is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

## 2. TELEGRAPHS—DELIVERY—PUNITIVE DAMAGES.

In an action for delay in delivery of telegram, where the evidence was undisputed of an effort to deliver it and the delay was long, and it was not finally delivered because the addressee was located too late to render the message of any avail, the company is not liable for punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 71.]

## 3. SAME—MENTAL ANGUISH.

In an action for delay in delivering a telegram directing the recipient to furnish a carriage at a railway station, plaintiff cannot show mental anguish on account of not being able to get the carriage for his wife and children, where they were not mentioned in the telegram.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 69.]

Appeal from Common Pleas Circuit Court of Spartanburg County.

Action by H. L. Todd against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed.

Geo. H. Feasons and Evans & Finley, for appellant. Johnson & Nash, for respondent.

GARY, J. This action is based upon the failure to deliver a telegram. The allegations of the complaint material to the questions involved are as follows: "That on the 29th day of June, 1904, the plaintiff was at Clinton, S. C., with his family, consisting of his wife and several small children. At half past 8 o'clock in the morning of said day he delivered to the defendant, at its office in Clinton, a message directed to R. M. League, at White Stone, directing said R. M. League to meet him that afternoon at Glendale Mills with a carriage. That plaintiff then and there informed defendant of the importance of said message, and requested that it be sent immediately, so that he and his family would not be left at Glendale Mills, several miles from home, without means of conveyance. The defendant received said message, and promised to promptly transmit and deliver same as directed. That, although said R. M. League, who is a servant and employé of the plaintiff, was at his well-known place of business during the whole of said day, when said message could, and ought to have been delivered to him, and although said place of business was within 200 yards of the office of defendant at White Stone, and within the regular delivery limits of said office, said defendant wilfully, wantonly, with

gross negligence, and in utter disregard of the rights of plaintiff failed to transmit and deliver said message, and said message has never been delivered to R. M. League, or to any one for him until this day, and no attempt even to do so has ever been made. That, if defendant had promptly and properly delivered said message, as it was its duty to do, R. M. League could and would have met plaintiff at Glendale Mills with a closed and comfortable carriage, and conveyed him and his family home to White Stone, without exposure to the inclement weather, and plaintiff would have been spared great mental stress and anguish, to which he was subjected by the wanton, willful, and negligent acts of the defendant." The defendant denied the allegations of negligence and willfulness, and set up as a defense "that if plaintiff suffered any damage, as alleged in the complaint, it was by reason of the negligence of plaintiff, and his failure to take advantage of the means at his command for preventing such damage." During the progress of the trial, the plaintiff's attorneys made a motion to amend the last of said paragraphs of the complaint, so as to make it read: "If they had delivered the telegram to R. M. League, he would have sent a closed carriage to Glendale, as directed by Mr. Todd." The motion was granted, whereupon the defendant's attorney made a motion for a continuance, on the ground of surprise, which was refused. The jury rendered a verdict in favor of the plaintiff, and the defendant appealed.

1. Error is assigned in permitting the amendment, and in refusing thereafter to continue the case, but the exceptions raising these questions are overruled, for the reason that it has not been made to appear that there was an abuse of discretion.

2. The next question for consideration is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. The message was transmitted from Clinton, by way of Spartanburg, where it was received some time during the morning of the 29th of June, and shortly thereafter sent by telephone to White Stone Springs, about three miles from White Stone railroad station, which is about three miles, also, from Glendale Mills. White Stone Station was formerly known as Rich Hill, and the telegraph office at White Stone had been established only a short time. There was no telegraph office at White Stone Springs. The plaintiff testified that he arrived at Glendale Mills about 4 o'clock in the afternoon.

C. L. Mingus, a witness for the defendant, thus explains why the telegram was not delivered: "Q. Where did you live the 29th day of June, 1904? A. Spartanburg. Q. What was your occupation? A. I was manager of the Western Union Company. Q. State whether or not you received the telegram from H. L. Todd to R. M. League? A. Yes, sir. Q. Have you got the telegram? A. Yes, sir. Q.

State whether you received it at Spartanburg? A. Yes, sir; received it at Spartanburg. Q. State what was done with it? A. The message was received in the regular course of business, and telephoned to White Stone. Q. What time was it received? A. 10:24 in the morning. Q. And sent when? A. It was 'phoned two minutes later to White Stone Hotel. It was known in the telegraph rule book as White Stone. Q. You had a telephone connection with White Stone Hotel, and when you got a message you 'phoned it? A. Yes, sir. Q. All messages were 'phoned there? A. I had been 'phoning them always, because all the messages we had handled at the time addressed to White Stone went to White Stone Hotel. So far as I remember this is the first that I have ever found that was not really intended for White Stone Hotel addressed that way. Q. It was 'phoned down there and left with whom? A. Hotel clerk, Mr. Fox. Q. Did he receive it? A. Yes, sir; 10:20 a. m. He is the man who took the messages almost all the time. Q. What date was that message received? A. June 29, 1904. Q. Was it received at 10 o'clock on the 29th? A. 10:20, and two minutes later 'phoned to White Stone Hotel, and received by Mr. Fox, the hotel clerk. Q. Was that message returned to you? A. Some hours after that—I don't know the time of the day either, I made no record of it—but some hours after that time, as well as I remember, probably 3:30 to 4 o'clock, somewhere along there, the hotel called up and said they were unable to deliver the message—couldn't find any one about the hotel with that name. I asked them if they had sent it to the water house where they were shipping water, and there they found that they didn't know anything about this man League. And it was, I think, in the neighborhood of an hour—I won't say as to the time—they called again, and said they didn't know him there, but there was a man by the name of League at White Stone Station, and I looked at the message and I saw that Mr. Todd had gone there, and I saw it was entirely too late to accomplish the purpose, and to have forwarded it to White Stone Station under our rules and custom would have incurred an expense of 25 cents, additional, and, if it hadn't been paid there, it would have fallen on me to pay it, but it was entirely too late to carry out the purpose of the telegram, according to my information given in the telephone message." While there was long delay, there was undisputed evidence of an effort to deliver the message, and the reason it was not finally delivered was because it would then have been useless.

These facts bring the case within the principle announced in *Roberts v. Telegraph Co.*, 73 S. C. 520, 53 S. E. 985, and *Key v. Telegraph Co.*, 76 S. C. 284, 56 S. E. 949, that mere delay in delivering a telegram is not sufficient to send the case to the jury on the question of punitive damages when there is



undisputed evidence of an effort to deliver. This assignment of error is sustained.

8. The last question for consideration is whether there was any testimony tending to show that the plaintiff suffered mental anguish. The plaintiff testified as follows: "Q. Did you suffer any mental anguish or distress? A. I did. Q. State the facts why you were worried? A. I was greatly worried and put out from the fact that it was threatening, and I had my wife with me— (Mr. Evans: Now, your honor, he is simply trying to get in this irrelevant testimony before this jury, which he has no right to do after the court has held that he cannot testify to that. Court: Don't say anything about your suffering with reference to your wife.) Witness: I was greatly worried from the fact that I could not get any conveyance, and it was coming on night, and all the teams were out from Glendale, and we had no way to get home." His honor, the presiding judge, ruled that the plaintiff could not introduce testimony for the purpose of showing mental anguish on account of not being able to get the carriage for his wife and children, as they were not mentioned in the telegram. The case of *Capers v. Telegraph Co.*, 71 S. C. 29, 50 S. E. 537, decides that the mental anguish statute has reference to social and personal matters, as distinguished from business transactions; and, when the presiding judge ruled out the testimony as to the wife and children, there was no element of mental anguish, and it became purely a business transaction. The case is different from that of *Toale v. Telegraph Co.*, 76 S. C. 248, 57 S. E. 117, in which the jury was allowed to consider the fact that the plaintiff informed the defendant's agent, when he delivered the message for transmission, that he was anxious to reach home, so as to be with his family. This assignment of error is also sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(77 S. C. 517)

**SPEEGLE v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD et al.**

(Supreme Court of South Carolina. Aug. 6, 1907.)

**INSURANCE — BENEFIT INSURANCE — BENEFICIARY.**

The certificate of membership of a mutual benefit society provided for payment of \$3,000 on the death of a member to the beneficiary named, who under the by-laws must be either the wife, children, adopted children, parents, etc., and, if the member outlived the beneficiary named and died without naming another beneficiary, the benefit was to go to the member's next living relation in the order named. A member named his wife as beneficiary, and she died and he married again, leaving a second wife, without having changed the beneficiary. *Held*, that the second wife took the benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, § 1943.]

Appeal from Common Pleas Circuit Court of Greenville County.

Action by Hattie K. Speegle against the Sovereign Camp of the Woodmen of the World and others. Judgment for all defendants, except the first, and plaintiff appeals. Reversed.

B. M. Shuman, for appellant. Cothran, Dean & Cothran, for respondents.

POPE, C. J. On June 19, 1896, J. E. Speegle became a member of the defendant corporation, Woodmen of the World, and received from it a benefit certificate for \$3,000, payable at his death to his wife, Susan Speegle, subject to the conditions named in the constitution and by-laws of the corporation. The beneficiary, Susan Speegle, died in March, 1900, leaving seven children. No new beneficiary was named in the certificate. Thereafter J. E. Speegle married the plaintiff, Hattie K. Speegle, who is now his surviving widow; he having died on the 17th of October, 1905. She began this action on the 22d day of March, 1906, to recover the amount named in the certificate. The defendant corporation filed a petition for interpleader, alleging a dispute between the plaintiff, Hattie K. Speegle, and the above-named children of J. E. Speegle, deceased, as to who was entitled to the benefit provided for in the beneficiary certificate, and prayed that it be allowed to pay the fund into the court, and that the children of J. E. Speegle be made parties defendants, and contests with the plaintiff the right to the benefit. The petition having been granted, the children appeared and answered. After hearing the case, his honor, Judge R. C. Watts, held that they were entitled to the fund. The plaintiff appealed.

Section 3 of the constitution and by-laws of the defendant corporation, the section germane to this discussion, is as follows: "The objects of the order shall be to combine white male persons of sound bodily health, exemplary habits and good moral character, between the ages of fifteen and fifty-two years, into a secret, fraternal, beneficiary and benevolent order; provide funds for their relief, comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; create a fund from which, on reasonable and satisfactory proof of death of a beneficiary member, who has complied with all of the requirements of the order, there shall be paid a sum not to exceed three thousand dollars, to the person or persons named in his certificate as beneficiary or beneficiaries, which beneficiary or beneficiaries shall be his wife, children, adopted children, parents, brothers, sisters, or other blood relations, or to persons dependent upon the member. \* \* \* The name or names of the beneficiary or beneficiaries shall be written in every beneficiary certificate issued. In case such benefits are payable to

one of the relations named herein, who shall at the time of the death of a member be also deceased, and no new designation has been made—as hereinafter provided during life, the benefits shall be due and payable to the member's next living relation in the order named in this section; if there be no such relative surviving, then said benefits shall be forfeited to and remain in the beneficiary fund." Taking into consideration the philanthropic views stated in this by-law, we premise that one of the purposes uppermost in the minds of the founders of the organization was the protection of those near and dear to the members of the order from want in case of death. Therefore, subject to the general rules, that construction should be adopted which is most consistent with this view. The by-law permits the member to make any one of the above classes his beneficiary, but we do not think it going too far to say that the presumption was that the party nearest and most likely to be in need, should the insured die, would be named in the certificate as beneficiary. In case the person so named should die prior to the death of the member, then continuing the presumption that the benefit should be received by the person next closest to the member, it was provided that in such case "the benefit shall be due and payable to the member's next living relation in the order named in this section." Thus the rule of kinship is laid down by the certificate and necessarily binds the court (it being the contract of the parties) in arriving at a conclusion as to who is entitled to the benefit of the policy.

Difficulty arises, however, over the word "next," as used in the section quoted. Defendants contend that it refers to the beneficiary, and means the next class after that named in the certificate as beneficiary, while appellant contends that it is used as a synonym of "nearest" and refers to the member. There can be no doubt that there is a shade of difference between the words "next" and "nearest." It is likewise equally true that this shade of difference is often disregarded. Therefore, if by using the terms as synonymous the proper intention can be arrived at, we can legitimately do so. Evidently, as was said above, the intention was to see that the immediate connections of the member, that class nearest to him, should not suffer. This being the purpose, "next" must have the meaning of "nearest" and have reference to the member, not the beneficiary, otherwise the very nearest would often go unprovided for. The presumption being that the beneficiary was the person closest to the insured, then in case of death of the beneficiary, and afterwards of the insured, no change of beneficiary having been made, the by-law sought to provide for the next closest relation. In this sense we may give "next" the meaning contended for by the respondents; that is, the implication of a

third person coming between. Thus in case the dying beneficiary was insured's wife, and there was a second wife at the time of his death, she, in the eyes of the framers of the by-law, was construed to be the relation next nearest to the member. Again, in the absence of a second wife, the children would be the nearest, and so on through the classes. The law works automatically, so to speak, there being no members of one class, the next class taking.

The respondents contend, however, that upon the death of the wife the benefit became practically vested in the children; and, further, that, by his failure to designate a new beneficiary, the deceased exhibited his intention that the children should be beneficiaries. These contentions cannot be sustained. In the first place, it is admitted by the respondents that the insured had the power to change the beneficiary at any time he saw fit; the matter being entirely under his control. Therefore, until his death, until he was no longer able to change his mind as to who should be his beneficiary, no one could be said to have a vested interest in the benefit. Even if there had been no second wife, the greatest interest that the children could possibly have had prior to the death of J. E. Speegle, in the absence of being expressly delegated as beneficiaries, was a mere expectancy or contingency.

As to the second contention, who can say that the deceased was not of the opinion that by failure to designate a new beneficiary the benefit would fall to his wife at his death. Clearly we think this opinion on his part as probable as the one contended for by the respondents. The certificate especially provided that, in case of the death of the named beneficiary, the next relation, beginning with the wife, should take. By his second marriage the deceased practically named, or rather made in the light of the by-laws, a new beneficiary, and thus caused the expectancy of the children to lapse. *Mattison v. Woodmen of the World*, 60 S. W. 897, 25 Tex. Civ. App. 214; *Harris v. Harris* (Tex. Civ. App.) 97 S. W. 504.

It is the judgment of this court that the judgment of the circuit court be reversed.

(45 N. C. 13)

**CITY OF WASHINGTON v. EUREKA LUMBER CO.**

(Supreme Court of North Carolina. Sept. 11, 1907.)

**LICENSES—SUBJECTS OF TAXES—OCCUPATIONS.**

One operating a band sawmill, the product of which is lumber, and a box and roller factory, is engaged in two distinct businesses, taxed separately by an ordinance imposing an annual tax on sawmills and an annual tax on box or roller factories.

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by the city of Washington against

the Bureka Lumber Company. From a judgment for plaintiff defendant appeals. Affirmed.

W. C. Rodman, for appellant. Bragaw & Harding, for appellee.

CLARK, C. J. The ordinances of the town of Washington under authority of law prescribed among the subjects of taxation "mills and factories of all kinds, including band sawmills \$25 per year; circular sawmills \$20; barrel, box or roller factories \$25 per year." The defendant has two buildings, 160 feet apart, built and formerly owned by distinct companies, but now connected by steam pipes and operated by the same company. In one of these buildings, which is a band sawmill, the finished product is lumber, in the other, the product is boxes and rollers. This last mill uses logs from which the product is made direct; only a very small percentage of its output being dressed lumber which comes in the rough state from the other mill.

From the above agreed facts, it is clear that there are two distinct businesses, taxed separately by the town ordinance. That both are conducted by the same company does not exempt one of them. *Aray v. Commissioners*, 138 N. C. 500, 51 S. E. 41, is exactly in point.

Affirmed.

(145 N. C. 36)

#### WHITE v. ELEY.

(Supreme Court of North Carolina. Sept. 11, 1907.)

**ACTION—NATURE—ELECTION TO SUE IN TORT.**

The complaint in an action brought in a court not having jurisdiction if it is on contract, alleging that plaintiff placed with defendant a horse to sell for him, that defendant received for it \$149, which he has converted to his own use, and asking for recovery of such sum, and for arrest and bail of defendant, will be treated, in favor of jurisdiction, as an election to sue for that tort.

Appeal from Superior Court, Bertie County; Lyon, Judge.

Action by T. W. White against Thomas Eley. Judgment for defendant. Plaintiff appeals. Reversed.

Winston & Matthews, for appellant. St. Leon Scull, for appellee.

CLARK, C. J. The complaint alleges that plaintiff placed with the defendant a horse to sell for him, that the defendant received for the horse the sum of \$149, which he has converted to his own use, and asks for recovery of the sum so converted and for arrest and bail of defendant. The defendant demurred ore tenus that the superior court had no original jurisdiction because this is an action on contract. The court sustained the demurrer and dismissed the action.

There is error. "When the action can be fairly treated as based either on contract or in

tort, the courts in favor of jurisdiction will sustain the election made by the plaintiff." *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711; *Schulhofer v. Railroad*, 118 N. C. 1093, 24 S. E. 709. The plaintiff could sue either for the tort, the unlawful conversion, or on the contract. Bringing the action in one court when he might have brought it in the other is *prima facie* such election. *Sams v. Price*, 119 N. C. 574, 26 S. E. 170; *Parker v. Express Co.*, 132 N. C. 130, 43 S. E. 603. In such cases the plaintiff may waive the tort and sue in contract. *Bullinger v. Marshall*, 70 N. C. 520; *McDonald v. Cannon*, 82 N. C. 245; *Wall v. Williams*, 91 N. C. 477; *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. 792; *Timber Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315. Or he may elect to sue for the tort. *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452; *Purcell v. Railroad*, 108 N. C. 424, 12 S. E. 954, 956, 12 L. R. A. 113; *Thompson v. Express Co.*, 144 N. C. 389, 57 S. E. 18. In *Froelich v. Exp. Co.*, 67 N. C. 1, it was held that the complaint showed that the plaintiff had elected to sue on the contract for a sum less than \$200, notwithstanding the action had been brought in the superior court.

The judgment dismissing the action is reversed.

(145 N. C. 43)

#### PATTERSON v. NORTH CAROLINA LUMBER CO. et al.

(Supreme Court of North Carolina. Sept. 11, 1907.)

##### 1. MASTER AND SERVANT—RISKS ASSUMED—ACTS OUTSIDE OF EMPLOYMENT.

Where a servant employed in a planing mill to straighten boards leaves his work without the order or request of the master, and as a favor to another servant in charge of a planer undertakes to operate the same, and is injured, the master is not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 654.]

##### 2. SAME.

A master is under no legal obligation to anticipate a servant's deviation from his instructions and the possible danger which may arise to him therefrom, and consequently to provide means for averting it.

##### 3. TRIAL—INSTRUCTIONS—PRESENTATION OF THEORY OF CASE.

It is error to refuse a special instruction asked as to a particular phase of the case presented by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 473.]

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by Louis Patterson against the North Carolina Lumber Company and others for personal injuries. Judgment for plaintiff, and defendants appeal. Reversed for new trial.

This was a civil action which was tried before Lyon, J., and a jury at March term, 1907, of Halifax superior court. The plaintiff was employed by the defendant to straighten boards in its planing mill. He

alleged, and there was evidence tending to prove, that, where any employé, who operated a planing machine, called upon him to take his place, while he was absent, he had been ordered by the manager to do so; that McWynn who had charge of one of the planers, left his place and requested the plaintiff to operate the machine while he was away. Plaintiff undertook to do so, and, while feeding the machine, his hand was cut and lacerated by a revolving cylinder; the machine being, as he alleged, in a defective condition, and to recover damages for the injury he brings this suit. There was evidence tending to show that the plaintiff had received no order to take McWynn's place, but that his duty was confined to straightening the boards. Among the several instructions requested by the defendant was the following: "Where an employé undertakes to do something not his duty to do, the master is not negligent; and, if the jury should find from the evidence that the plaintiff was acting outside the scope of his employment when he was injured, they will answer the first issue (as to negligence), 'No,' and the second issue (as to contributory negligence), 'Yes.' This instruction was refused, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Day, Bell & Allen and F. H. Busbee & Son, for appellants. Geo. C. Green and Albion Dunn, for appellee.

WALKER, J. (after stating the facts as above). We think the defendant was clearly entitled to the instruction which was refused. Where the employé steps outside the line of his duty, or goes beyond the scope of his employment, and does something he is not required to do, he cannot recover from his master for any consequent injury, for in that particular he is not his servant, and his contract does not provide for the new risk which he thus assumes and to which he exposes himself. The result is the same, where the servant, without the order or request of his employer or his representative, or contrary to his orders, or at the request of another employé, who has no authority from the master to make it, undertakes to do something not assigned to him. In such a case he assumes all the risk of injury. The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work and so long as he continues therein and confines himself to what he is employed to do. The duty of the master to furnish safe and suitable implements and appliances, which due care for the protection of his servant would suggest, extends only to those employés who are required, permitted, or expected, in the course of the

employment, to make use of the instrumentalities provided by him, or who, while in the performance of their work, may be injured by them if they are defective. Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is then analogous to that of a trespasser, or perhaps of a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions and the possible danger which may arise to him therefrom, and consequently to provide means for averting it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform. He must therefore take things as he finds them, and suffer the consequences of his own error. The master cannot be held liable therefor, as the law will not, on obvious grounds of justice, compel the master to answer in damages for an injury which the servant has brought on himself by undertaking to do that which he was not directed or required to do, and it refers his injury not to the fault of the master but to his own unnecessary and gratuitous act. Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master, for a breach of which he would be liable, it follows that there is nothing upon which to rest any claim for damages, because no cause of action arises from a failure to perform a mere act of humanity, or for the violation simply of a moral obligation, not involving any legal duty. This principle is well established, if not elementary. It is grounded in wisdom and justice. It is perfectly fair to the master and to the servant, and moreover is supported by the highest authority. 4 Thompson on Negligence, §§ 4677, 4678; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17. It has been crystallized into one of the leading maxims of the law; for in applying the same doctrine in the case last cited (page 90 of 134 N. C., page 19 of 46 S. E.) we said: "The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim '*Volenti non fit injuria*.'" There are other expressions in that case illustrating the principle, which are directly applicable to the facts of this one. *Mellor v. Manufacturing Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; *Railway v. Hall*, 105 Ala. 599, 17 South. 176; *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810; *Parent v. Manufacturing Co.*, 70 N. H. 199, 47 Atl. 261; *Walker v. Railway*, 104 Mich. 606, 62 N. W. 1032. The recent

case decided in this court of *Martin v. Manufacturing Co.*, 128 N. O. 264, 38 S. E. 876, 83 Am. St. Rep. 671, is exactly in point. The identity of the two cases is striking.

Applying the principle we have stated to the facts of this case, we conclude that there was proof to sustain a finding for the defendant under the instruction, which was refused, namely, that the plaintiff had left the place of his work and, as a favor to McWynn, had undertaken to perform his duty in feeding the machine, when he was hurt, and the fact that there was evidence to the contrary cannot deprive the defendant of the right to have the disputed question submitted to the jury. It only made it the more necessary that such a course should have been taken. We have just held that, if a special instruction is asked as to a particular phase of the case presented by the evidence, it should be given by the court in substantial conformity to the prayer. *Baker v. Railroad*, 144 N. O. —, 56 S. E. 553. We so hold in this case, as the rule is manifestly a just and a most reasonable one. *Horne v. Power Co.*, 141 N. C. 50, 53 S. E. 658, and cases cited.

We have examined the general charge of the court with the greatest care, and can find therein no substantial or adequate response to the rejected prayer, if there is any reference to it at all, and we think there is not. The charge, therefore, does not supply the omission to give the special instruction. The refusal to give the instruction, which the defendant requested, was error and entitles it to another trial. The questions involved in the other errors assigned may not again be presented, and, for this reason, we forbear to discuss them.

New trial.

(145 N. C. 31)

### RIDDICK v. DUNN.

(Supreme Court of North Carolina. Sept. 11, 1907.)

#### 1. APPEAL—REVIEW—PRESUMPTIONS.

Where, in an action for wharfage charges against a consignee, it appeared that wharfage charges had always been paid by the consignees for goods delivered at a wharf, and the bill of lading was not made a part of the case agreed on appeal from a judgment for plaintiff, it must be assumed that there was nothing in the bill of lading inconsistent with the custom as to the party liable for wharfage charges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 3675.]

#### 2. WHARVES—WHARFAGE—RIGHT TO.

A wharfinger is entitled to make a charge for the use of his wharf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Wharves, §§ 13-17.]

#### 3. CUSTOMS AND USAGES—APPLICATION AND OPERATION.

Plaintiff was a wharfinger, and his wharf was the only place at a certain port for the delivery of goods from the boats of the transportation company which carried the goods on which it was sought to collect wharfage charges. Prior to and at the time of the shipment of these goods he had always made wharfage charges, which were paid by consignees of goods delivered at his wharf. The charge sought to be

collected was the customary one, and reasonable, and the custom to impose the same on consignees was well known to defendant consignee. The tariff rates of the company transporting the goods made no reference to wharfage charges. Held, that defendant was liable for the wharfage charges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 23, 24.]

#### 4. WHARVES—RIGHT TO ESTABLISH AND MAINTAIN.

A riparian owner has a right to erect and maintain wharves subject to Revisal 1905, § 1696, declaring that navigation shall not be obstructed, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Wharves, § 1.]

#### 5. SHIPPING—CARRIAGE OF GOODS—DELIVERY.

Where a consignee of goods did not inform a transportation company of his intention not to be bound by the established custom at a certain port to make wharfage charges against consignees and not against the carrier, the carrier was entitled to unload the goods at the wharf, which was the usual place of deposit, instead of delivering them out of the ship or at its side.

Appeal from Superior Court, Gates County; W. R. Allen, Judge.

Action by R. M. Riddick against Joe Dunn. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action heard upon a case-agreed by W. R. Allen, judge at March term of Gates superior court. The plaintiff brought the suit to recover the amount of wharfage charges upon goods shipped on a vessel of the Albemarle Steam Navigation Company from Franklin, Va., to Gatesville, in this state. He was lessee individually of a wharf at the latter town, which was the usual and only place for the delivery of goods from the boats of the said company, plaintiff being its agent at Gatesville. It was admitted that the charge for wharfage was the customary one and also reasonable, and that such charges have always been made and paid by the owners of goods delivered from the company's steamers on the wharf. The defendant had received goods himself and paid the wharfage charges, but notified the defendant that he would not do so in the future and not to receive any more of his goods on the wharf. The plaintiff insisted on their payment, and the defendant has since received goods from the wharf and paid the charges thereon, though, at the time, he refused to pay the charges now claimed, or any others thereafter. The goods on which the charges now sued for were made, have been delivered to and received by him from the plaintiff's wharf. The published rates of the Navigation Company contained no reference to a charge for wharfage. Upon the case-agreed the judge decided with the plaintiff, and from the judgment the defendant appealed.

W. M. Bond and A. Pilston Godwin, for appellant. L. L. Smith, for appellee.

WALKER, J. (after stating the case). We do not see why the defendant is not liable

for the sum demanded. The plaintiff was a wharfinger and dealt with his patrons according to a general custom or usage, which had been recognized and acquiesced in by all of the consignees, including the defendant, at the port of Gatesville, whose goods were carried by the ships of the Navigation Company, namely, that the charges for wharfage should be paid to the plaintiff by them. The bill of lading was not made a part of the case-agreed, and, as we are not permitted here to presume anything against the correctness of the court's ruling, it must be assumed that there is nothing therein inconsistent with the custom or usage as to the party liable for wharfage charges. Indeed, it is stated in the case that there is no reference to such charges in the company's tariff of rates which would seem to imply that the latter were made with reference to the local custom at Gatesville, and that the rates of transportation were lower than they would have been if the company had undertaken to pay the terminal charges for wharfage. We cannot infer that carriers will voluntarily and gratuitously pay wharfage charges, which, in some cases, may be as much as the freight on the goods. That is not their custom, we believe; and, as they are entitled to charge for the entire service rendered, including any expenditures for terminal facilities, provided they are reasonable, we must take it that the company did not intend that the freight charges should cover any amount to be paid to the plaintiff for wharfage, for there is no evidence that this is so, and the custom which is admitted to have existed at Gatesville would tend to show that it is not true, but that, on the contrary, the parties—consignor, consignee, and carrier—were all dealing with each other in view of the custom and expected to be governed thereby. If the carrier agreed to pay the wharfage, or all terminal charges, either in the bill of lading or otherwise, it was easy to have inserted the fact in the case-agreed, or to have proved it, if the parties could not have agreed in respect to it. In the absence of any more definite statement of the facts, we must hold that the parties contracted with reference to the custom and are bound by it, the same as if it had been expressly stated in their agreement. *Miller v. Tetherington*, 6 H. & N. (Exch.) 278. That case decides that, when a custom is well known to exist, the parties must be considered to have contracted with reference to it, so as to import its terms into their agreement, or to require that the latter should be interpreted by it. *Brown v. Byrne*, 3 El. & B. (77 E. C. L.) 703, is perhaps more to the point, it bearing a closer resemblance to our case in its facts and the precise question presented. See, also, *Buckle v. Knoop*, L. R. 2 Exch. 125, *Wigglesworth v. Dallison*, 2 Smith's L. Cases (Ed. 1888) 842, and especially the notes at page 853; and, as bearing somewhat on the question, *Vaughan v. Railroad*, 63 N. C. 11, *Norris v. Fowler*, 87 N. C. 9, and 9 Cyc. 582.

Wharfage is a mere charge made by the owner of the soil or shore for the use of a portion of it, which charge he has a right to make. The price, perhaps, may be subject to municipal regulation, but the right to charge is undoubted. *O'Conley v. Natchez*, 9 Miss. (1 Sm. & M.) 81, 40 Am. Dec. 87; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577, 22 L. Ed. 417. Right to compensation for the use of a wharf may be claimed upon an express or implied contract according to the circumstances. If the price has not been agreed upon, the proprietor recovers what is just and reasonable for the use of his property and the benefit conferred as in other like cases. 1 *Farnham on Waters*, 570. A riparian owner had, at common law, a qualified interest in the water frontage belonging by nature to his land, and, consequently, the right to construct thereon wharves, piers, or landings as far as deep water, subject however to certain restrictions in their construction and use imposed by statute (Revisal 1905, § 1696), one of which is that navigation must not be obstructed. *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281. This originated the right to compensation for wharfage or for the use of the wharf, pier, or landing. Lord Mansfield said: "Every body that pays has a benefit, for if they go to the wharf they have the benefit of it, and if they land their goods elsewhere within the manor they land upon the plaintiff's property." *Colton v. Smith*, 1 Cowper, 47. In the case of *Fitzsimmons v. Milner*, 32 S. C. (2 Rich. Law) 370, it was held that, though it was shown to be customary for the factor to pay the wharfage charges for goods shipped to his consignee, yet the latter is also liable as owner, if the former failed to pay them, because of his right of property and the benefit received from the care of the goods and the use of the wharf. It is also said in that case: "That it is the rule of law, as well as the custom, for the consignee to pay the wharfinger, may, we think, be gathered from the cases." Whether that be so or not, we conclude that, upon the facts agreed, the plaintiff has derived a benefit, as far as appears, from the use of the wharf, and upon a well-settled principle should pay its reasonable value, which is admitted in the case to be the amount claimed, though the precise nature of the use is not disclosed. This court has recognized the right of a wharfinger to charge the owner of goods for the use of his wharf. *Wooster v. Blossom*, 50 N. C. 244, 72 Am. Dec. 549. It does not appear distinctly whether the charge against the defendant was for dockage or berthage, strictly speaking, or for wharfage, using the former terms in the sense of a charge against a vessel for the privilege of mooring to a wharf or pier, which is one of the usual and customary port charges against the vessel, and the latter as denoting a charge against merchandise for the use of a wharf which is said to be one of its meanings. 30 Am. & Eng. Enc.

(2d Ed.) 497; *People v. Roberts*, 92 Cal. 659, 28 Pac. 689; *Wharf Case*, 3 Bland (Md.) 373; *Rodgers v. Stophel*, 82 Pa. 111, 72 Am. Dec. 775. We infer from all the facts and circumstances that the charge in this case was of the latter kind.

We have not discussed the question as to the liability of the carrier, upon general principles, for wharfage charges, because we think the parties must be considered as having dealt with each other upon the basis of the established custom, and the freight rates may have been, and no doubt were, calculated and fixed with reference thereto. The defendant may not be paying more than he would be required to pay, if the company had agreed to pay, or should be held liable for, all terminal charges, as it would, in all probability, increase its rates by the amount so expended for that purpose, and this, as we have said, it would have a right to do, if the rates for the whole service are reasonable, under all the circumstances, for they cannot exceed what is a fair return for the capital invested.

We have not overlooked the fact that the defendant never informed the Navigation Company of his intention not to be bound by the established custom at the port of Gatesville. The contract was between him and that company, as the carrier, and the latter had every reason to suppose that the defendant was willing to abide by the custom in the carriage of the particular goods for the care of which the charge was made by the plaintiff. This gave the carrier the right to unload the goods on the wharf, which was the usual place of deposit, instead of delivering them out of the ship or at its side.

The ruling of the court upon the facts was correct.

Judgment affirmed.

(145 N. C. 1)

#### ALSTON et al. v. CONNELL.

(Supreme Court of North Carolina. Sept. 11, 1907.)

#### 1. SPECIFIC PERFORMANCE—RELIEF—ACCOUNTING—RATE OF INTEREST.

A purchaser of land on foreclosure executed to plaintiff an option to purchase the land at any time prior to a date named. Within an extension of time agreed on by the parties plaintiff tendered the amount required to complete the purchase, which was refused. Plaintiff sued to enforce the option, and on appeal it was held that he was entitled to a conveyance of the land, subject to an accounting for use and occupation, etc. *Held*, that the option and not the deed of trust constituted the correct basis for the accounting, and hence 6 per cent. interest being the legal rate, on the balance due from complainant, was properly allowed, and not 8 per cent. stipulated for in the deed of trust.

#### 2. SAME—IMPROVEMENTS TO LAND—BASIS OF ALLOWANCE.

On an accounting between one entitled to a conveyance of land under an option and the owner for use and occupation, etc., the basis of an allowance for improvements to the land is not the cost thereof, but the amount by which the value of the land has been enhanced.

#### 3. SAME.

A purchaser of land on foreclosure executed to plaintiff an option under which plaintiff was entitled to purchase the land at any time prior to a date named. Within an extension of time agreed on by the parties plaintiff tendered the price, which was refused. The option provided that the purchaser on foreclosure was to remain in possession and to expend a sum fixed for improvements, such sum being included in the contract price. *Held*, on an accounting between plaintiff and the purchaser, that any expenditure for improvements beyond the amount named in the contract and any made after the time when the purchaser wrongfully withheld possession and after notice that plaintiff intended to assert his right could not be compensated for.

Appeal from Superior Court, Warren County; Lyon, Judge.

Action by P. G. Alston and others against Thomas Connell. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. Polk, B. G. Green, W. A. Montgomery, and I. I. Hicks, for appellant. F. S. Spruill and O. W. Bickett, for appellees.

HOKE, J. On a former appeal in this cause it was held that the plaintiff P. G. Alston had a valid and binding option on the land, the subject-matter of litigation, and known as "Tusculum," at the contract price of \$3,502, subject to an accounting between the parties, for use and occupation, etc., as indicated in the decree, affirmed on the said appeal. See 140 N. C. 485, 53 S. E. 292. This decision having been certified down in obedience thereto, the referee, A. C. Zollicoffer, Esq., proceeded to take and state the account, and upon the evidence and findings of fact declared the true account and the rights of the parties to be as follows:

"Upon the foregoing facts, and feeling himself bound by the contract between the parties as to the option, and the opinion of the Supreme Court rendered in this action since his appointment, as he understands and construes the said opinion, the referee doth hold and conclude that the account between the plaintiff and defendant should be stated as follows:

To amount option price for "Tusculum," due January 1, 1901.....	\$3,502.00
To interest on same, 6 per cent., from January 1, 1901, to 11th February, 1907 .....	1,284.05
By rent since January 1, 1901 .....	\$1,500.00
By interest on same, 6 per cent., to February 11, 1907 .....	235.00
By hickory timber cut and sold from land.....	69.00
By interest on same to February 11, 1907.....	24.95
By balance due February 11, 1907.....	2,957.10
	<hr/>
To balance due Feb. 11, 1907, brought down....	\$4,786.05    \$4,786.05
	<hr/>
	\$2,957.10

"That the defendant is entitled to recover of the plaintiffs the sum of \$2,957.10, with in-

terest on the same from the 11th day of February, 1907, at the rate of 6 per cent. per annum until paid, and upon the payment thereof the plaintiffs are entitled to specific performance of the contract to convey the "Tusculum" farm as prayed for in the complaint herein."

Defendant excepted and assigns for error (1) that the referee should have allowed interest at the rate of 8 per cent. on \$2,441.62, the amount of the original indebtedness, this being the rate stipulated for in the original note and the deed of trust on the property, given to secure it. A reference to the former opinion is made for a more extended statement of the facts. The exception cannot be sustained for the reason that the original contract of indebtedness and the deed of trust given to secure it are not the correct basis for the present accounting between the parties. The evidence and findings of fact established that, under and by virtue of the power given in the deed of trust, a sale of the farm was held at which defendant, Thomas Connell, became the purchaser and received the title. *Monroe v. Fuchtlar*, 121 N. C. 104, 28 S. E. 63. And holding this title he executed to P. G. Alston the option declared on in this present action, and this option, and the material and relevant facts attending it, furnish the data, and the only data, for a correct and true accounting. The pleadings, testimony, issue, and verdict set out in the former appeal all show that both plaintiff and defendant desired and intended that this should be so, and the opinion states this position as follows: "This position, however—that of the right to redeem—is not open to the plaintiff in the present condition of the record, for the reason that the suit was originally instituted by P. G. Alston, and complaint filed seeking to enforce his rights under his written agreement of date December 5, 1898, and under which Thomas Connell obligates himself to convey the property. The heirs at law of B. C. Alston make themselves parties plaintiff and seek the same relief, and, while the pleadings set forth the entire fact and some evidence is offered tending to sustain a claim in behalf of these heirs, the issues framed and passed upon are not decisive of those rights, but are addressed to the question of this written agreement and the facts especially bearing thereon, and are only determinative of the interest arising thereunder. The rights of the parties therefore are considered as they may arise upon this written paper, and the issues determined in reference to the same." This being true, and the option at \$3,502 making no express stipulation for a lower rate, the referee properly allowed the lawful rate, 6 per cent., from the time the obligation matured.

Defendant makes further assignment of error that the referee failed to allow the defendants the sum of \$1,500 for permanent and valuable improvements put upon the land by Thomas Connell, while he was in posses-

sion of same, and after he had given P. G. Alston the option declared on and established by the verdict and judgment in the cause. Even if this claim for improvements was valid, the proper allowance would not be for the amount of their cost, but the amount by which the value of the land was enhanced. But the claim is not valid. It is set up as a claim for betterments, an equitable defense now generally provided for by statute, and arising when one in the actual occupation of real estate under color of title, believed by him to be good, and without notice of a superior title, makes permanent improvements on the land, by reason of which the value of same is enhanced. The doctrine is usually applicable in the case of claimants under adversary titles, and only in the rarest instances can it exist where the occupant is in possession under a contract which defines the rights of the parties and limits the length of the tenure. This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by Ashe, J., in the case of *Wharton v. Moore*, 84 N. C. 482, 37 Am. Rep. 627, as follows: "This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity; and, while it has been adopted in many of the states, it is not recognized in others. But it may now be considered as an established principle of equity that, whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements upon the principle that he who seeks equity must do equity." Here it will be noted that the claimant must be an innocent person; and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith; that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner. It would be difficult to suggest a case when an occupant could establish such a claim after he had received notice that the real owner intended to assert his rights, but certainly this should never be allowed, when such occupant, having entered under a contract which expressly defined his rights, wrongfully remained in possession in violation of his contract, and made the improvements after notice that the true owner intended to insist upon and assert his claim, and so it is here. By the contract between the parties, as extended, the defendant was to remain in possession till January 1, 1901. He was to expend for improvements during this time, by express stipulation, the sum of \$250 and no more, and this was included in



the contract price, which has been charged against the plaintiff, the holder of the option. Any expenditures for improvements beyond this amount were not authorized by the contract, and any made after that time were made when defendant wrongfully withheld the possession, and after notice that plaintiff intended to assert his rights, and the same cannot therefore be allowed as a credit against plaintiff's demand.

We were referred by counsel to the case of *Gillis v. Martin*, 17 N. C. 470, 25 Am. Dec. 729, as authority to sustain their position, but we do not so understand this decision. There the defendant on the evidence was declared a mortgagee by the decree of the court, and in taking the account was allowed for improvements put on the property while he was in possession. The court stated the general rule to be that a mortgagee in possession is not allowed for improvements over and above necessary repairs, and made the case then before it an exception on testimony which showed that the improvements were required for the enjoyment of the property; that they were made when the defendant believed and had good reason to believe he was the true owner, and at a time when the defendant had no notice or reason to believe that the claimant intended to assert any right or interest in the property. The decision, therefore, is not favorable to defendant. On the contrary this and other authorities fully support the ruling of the referee in disallowing the claim, and there is no error in the judgment confirming the report. *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659; *Southerland v. Merritt*, 120 N. C. 318, 26 S. E. 814; *Dunn v. Bagby*, 88 N. C. 91; *Cleland v. Clark*, 123 Mich. 179, 81 N. W. 1086, reported also in 81 Am. St. Rep. 161, with a full and learned note by the editor.

There is no error, and the judgment below is affirmed.

Affirmed.

CLARK, C. J., did not sit.

(145 N. C. 14)

### BRISCOE v. PARKER.

(Supreme Court of North Carolina. Sept. 11, 1907.)

#### 1. WATERS—DIVERSION OF SURFACE WATERS.

It is a diversion of waters onto plaintiff's land, to its detriment, which is not permissible, where water is collected by defendant's ditches, and carried by them through his land and that of the next lower proprietor, and there ceases to be carried further to a natural water way, but is allowed to ooze through and water-sob plaintiff's land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 131-134.]

#### 2. SAME—REMEDY.

Plaintiff for the diversion onto his land of water by defendant's ditches may sue for damages; not being restricted to the remedy by proceedings under Revisal 1905, § 3963, for the cutting of a ditch to drain their lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 133.]

### 3. APPEAL — PRESUMPTIONS — INSTRUCTIONS — OBEDIENCE BY JURY.

Where, after the court had excluded a paper offered by plaintiff, his counsel on permission of the court reopened the argument, and in the course of it stated the contents of the paper, and the court adhered to its ruling and told the jury not to consider the contents of the paper or the statements of counsel in regard thereto, the jury will be considered to have understood and obeyed the instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3757.]

Appeal from Superior Court, Gates County; W. R. Allen, Judge.

Action by J. R. Briscoe against Hardy W. Parker. Judgment for plaintiff. Defendant appeals. Affirmed.

This was an action by a lower proprietor against an upper for increasing the flow of water in such way as to obstruct and throw it on plaintiff's land and water-sob it.

There was evidence offered by plaintiff tending to show that defendant had collected water that fell on his own land and by means of ditches had conveyed the water into a ditch called "Haw Tree Branch" on his own land, which ditch ran across the land of one Mullen and which ditch was for the purpose of draining the land of the defendant and which he was under obligation to keep in good order; that the lower end of said ditch ran up to the land of the plaintiff, and if kept open and clear would have caused the water, which the defendant, by his ditches, cut to drain his own land, had emptied into said Haw Tree branch ditch, to flow through the land of the plaintiff and into a certain canal; that defendant had failed and refused to keep open said Haw Tree branch ditch at its end close to the land of this plaintiff and had allowed same to become clogged and dammed up, thereby causing the waters which his ditches had emptied into Haw Tree branch ditch to overflow the banks of said ditch and spread upon and submerge and drown the land of the plaintiff, thereby causing him injury and damage. There was evidence introduced by the defendant to the contrary. There was also evidence tending to show that Haw Tree branch was a natural water course, and that defendant's ditches emptied into it at a place not on his own land.

The court, among other things, charged the jury if defendant, the upper tenant, collects the surface water falling on his land in ditches and discharges the ditches on the land of the lower tenant, the plaintiff, otherwise than by natural water courses on his own land, and thereby increases the flow of water on the land of the lower tenant, he is liable therefor, and, if you so find by a greater weight of the evidence, answer the first issue, "Yes," although the surface water of defendant's land would flow to land of the lower tenant. The defendant assigns that part of the charge as error.

There was evidence on both sides tending to show that there were several other land-

owners besides the defendant, whose lands drained into Haw Tree branch, or Haw Tree branch ditch, as the plaintiff called it; and there was also evidence tending to show that the plaintiff had not attempted to cultivate or clear up the land which he claimed to be damaged nor to drain the same since he went into the possession thereof about 18 years ago, and that those under whom he claimed had not attempted to cultivate it, or to drain it since the latter part of the Civil War, and that the plaintiff had sold and allowed timber trees on the land along the course of Haw Tree branch, and that the tops of the trees had fallen across the branch and had not been removed, and evidence to the contrary. There was also evidence tending to show that Haw Tree branch was a natural water course; and there was evidence on the part of the plaintiff tending to show that there had been many years ago a ditch along Haw Tree branch and that it was a ditch, and evidence on the part of defendant tending to show that there had never been a ditch along its course, but that it had always been a natural water course.

Plaintiff introduced evidence to show the injury to the land caused by the flooding of the land. The defendant moved to set aside the verdict and dismiss the action, on the ground that the plaintiff had sought the wrong remedy, and that he ought to have applied the statutory remedy, and because of the manifest injustice done the defendant by reason of the fact (1) that the damages attempted to be proved were hypothetical and not actual, and (2) that, according to all the evidence, if any damage was incurred by plaintiff as alleged, several other parties besides the defendant contributed thereto, and therefore defendant ought not to bear all the burden, and for that reason the verdict should be set aside; and this contention was presented to the court as a matter of right, and not as a matter of discretion. The court overruled the motion, and the defendant excepted. Verdict and judgment for plaintiff. Appeal by defendant.

L. L. Smith, for appellant. H. S. Ward and W. M. Bond, for appellee.

CLARK, C. J. The principle settled by our decisions is that in the interest of health and good husbandry better drainage is to be encouraged. Hence, an upper proprietor can accelerate and even increase the flow of water from his land, but due regard for the rights of the lower proprietor forbids that the flow of water should be diverted to his detriment. Hocutt v. Railroad, 124 N. C. 214, 32 S. E. 681; Mizell v. McGowan, 125 N. C. 439, 34 S. E. 538; Id., 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705; Lassiter v. Railroad, 126 N. C. 509, 36 S. E. 48; Rice v. Railroad, 130 N. C. 376, 41 S. E. 1031; Mullen v. Canal Co., 130 N. C. 502, 41 S. E. 1027, 61 L. R. A. 833. There was here evidence tend-

ing to show that the water collected by defendant's ditches and carried by them through his own land and that of the next lower proprietor there ceased to be carried farther to a natural water way, but were allowed to ooze through and water-sob the plaintiff's land to his detriment. There was conflicting evidence, but the jury so found the fact. If so, the water put upon the plaintiff's land was not in the due and orderly course of nature from the increase and acceleration of the flow from the better drainage of his farm by the upper proprietor, but was in fact a diversion of the water upon the plaintiff's land to its detriment. "The defendant had no right to collect surface water \* \* \* into a ditch not adequate to receive it, and thus flood and injure the land of another." Staton v. Railroad, 109 N. C. 341, 18 S. E. 933; Porter v. Durham, 74 N. C. 767; Jenkins v. Railroad, 110 N. C. 444, 447, 15 S. E. 193. This is not the case of draining into a natural water way, increasing its flow, which the defendant had a right to do. Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783.

For such injury the plaintiff could bring this action at his election. Mizell v. McGowan, 120 N. C. 137, 26 S. E. 783. He is not restricted to the remedy prescribed by Revisal 1905, § 3983 et seq. Indeed that proceeding is one which the defendant, the upper tenant, might well have resorted to.

The court excluded a paper, offered in evidence by the plaintiff. The plaintiff's counsel, notwithstanding, upon permission of the court, reopened the argument, and in the course of it stated the contents of the paper. The court adhered to its ruling, and told the jury not to consider the contents of the paper nor the statement of counsel in regard thereto. The jury must have understood so plain an instruction; and, furthermore, that the paper, having been excluded as evidence, and not testified to by any one, they could not consider it. If a jury is not possessed of this much intelligence, it is not a proper part of a trial court.

No error.

(145 N. C. 18.)

#### NICHOLSON v. DOVER.

(Supreme Court of North Carolina. Sept. 11, 1907.)

#### 1. FRAUDS, STATUTE OF—MEMORANDUM—SUFFICIENCY.

Letters addressed to a third person stating and affirming a contract may be used against the writer as a memorandum of the contract, and are sufficient evidence of the contract to warrant the court in giving effect to it.

#### 2. PRINCIPAL AND AGENT—RIGHTS OF UNDISCLOSED PRINCIPAL.

Where an owner of land authorized another to sell the same to a third person named, and the agent contracted to sell the same to such third person, but such third person was merely acting as agent for another, his principal was entitled to enforce the contract to the same extent that he could enforce it, notwithstanding

the owner of the land was without knowledge of the principal's interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 504.]

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by P. A. Nicholson against Joseph Dover. Judgment for defendant, and plaintiff appeals. Reversed.

Nicholson & Daniel, for appellant. Bragaw & Harding, for defendant.

**BROWN, J.** The defendant owned  $\frac{29}{30}$  of the land described in the complaint, and B. B. Nicholson owned  $\frac{1}{30}$ . Each owner seemed desirous of owning the entire tract or of selling his interest therein. Negotiations were conducted with Dover, who was a resident of Pennsylvania, by B. B. Nicholson, through W. B. Rodman, who was Dover's agent and attorney. The negotiations are embodied in 22 letters passing between Dover and Rodman and B. B. Nicholson, all of which are set out in the record, and which it is unnecessary to do more than refer to. These letters comprise the basis of the plaintiff's action. The defendant contends that there is no sufficient contract in writing or memorandum or note thereof within the requirements of the statute of frauds. Besides other letters which it is unnecessary to refer to, we think there are two which plainly authorized Rodman to enter into a contract to sell the defendant's interest in the land. On May 24, 1905, defendant wrote Rodman: "Now I want to sell, if possible, and I want you and Mrs. Nicholson to give me the very highest cent that he will pay me for the land in Chocowinity. Then I will give you and him a definite answer, and we can settle all right." In the letter of June 21, 1905, the authority to sell is confirmed. After further correspondence Dover gives Rodman in his letter of July 1, 1905, express authority to sell the land to B. B. Nicholson upon a basis of \$1,800 for the whole tract; that is to say, Dover was to have  $\frac{29}{30}$  of the \$1,800 for his interest. This proposition was accepted by B. B. Nicholson in his letter of July 30, 1905, to Rodman in behalf of his principal P. A. Nicholson, the plaintiff. We think the letters set out in the record are a sufficient compliance with the requirements of the statute. It has always been held that letters addressed to a third party, stating and affirming a contract, may be used against the writer as a memorandum of it. *Brown on Statute of Frauds*, § 354A, and cases cited. Such writings are sufficient evidence of the contract to warrant the court in giving effect to it. *Mizell v. Burnett*, 49 N. C. 254, 69 Am. Dec. 744. The principal contention of the learned counsel for defendant is that, although Rodman might have been vested with ample power to sell, the authority was to sell to B. B. Nicholson and not to this plaintiff.

The correspondence, as well as the testi-

mony of B. B. Nicholson and P. A. Nicholson, proves that the negotiations for the purchase of Dover's interest in the lands was conducted by B. B. Nicholson for the plaintiff, and that the offer of Dover made through Rodman was accepted by B. B. Nicholson for plaintiff. This was well known to Rodman, and the fact that he failed to disclose it to Dover will not avoid the contract of sale, or relieve Dover from its performance. Assuming that, so far as Dover is concerned, the plaintiff is an undisclosed principal as to him, yet the plaintiff may enforce the contract made on his behalf by B. B. Nicholson, his agent. The right of a principal to maintain an action on a written contract made by his agent in his own name without disclosing the name of the principal is well settled. *Oelrichs v. Ford*, 21 Md. 489; *Tow Boat Co. v. Tel. Co.*, 52 S. E. 766, 124 Ga. 478; *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212, 82 L. R. A. 829, 54 Am. St. Rep. 733. If Dover had personally conducted this correspondence directly with B. B. Nicholson, who was acting for the plaintiff, an undisclosed principal, the latter could enforce the contract as against Dover. The fact that he conducted it through his agent will not alter the case. "It is a well-established rule of law that, when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party." *Barham v. Bell*, by *Shepherd*, C. J., 112 N. C. 133, 16 S. E. 903; *Ewell's Evans on Agency*, 379; *Story on Agency*, 420; *Wharton on Agency & Agents*, 403. The defendant authorized Rodman to sell to B. B. Nicholson upon certain terms. The agent, not exceeding the authority conferred upon him, contracted to sell to B. B. Nicholson according to the instructions given him. B. B. Nicholson was acting, so it turns out, as the agent of the plaintiff, whose interest was not disclosed to defendant. Under these conditions the acts of the agent, Rodman, are equally binding upon the principal, Dover, as if the principal had done the act himself. In other words, so long as Rodman was obeying his instructions in selling to B. B. Nicholson, it made no difference whether the contract was made directly by Dover, the principal, or through Rodman, the agent, the effect would be the same. The principal is liable where the agent acts within the scope of his apparent authority, provided a liability would attach to the principal if he was in the place of the agent. *Navigation Co. v. Bank*, 47 U. S. 344, 12 L. Ed. 465; *Ford v. Williams*, 62 U. S. 287, 16 L. Ed. 36. The law is stated very clearly by the Supreme Court of Georgia as follows: "When an agent makes a contract without disclosing the name of his principal, the principal may claim all his rights, with the

single limitation that the other party shall not be injured thereby." *Woodruff v. McGehee*, 30 Ga. 158.

It follows that if Rodman, acting for the defendant, and within the scope of his powers, made a valid contract with B. B. Nicholson, and that the latter at the time was acting for the plaintiff, the latter may enforce the contract against the defendant to the same extent that B. B. Nicholson could enforce it, although the defendant had no knowledge at the time of plaintiff's interest. The defendant has in no way been injured. Whatever equity or claim the defendant could set up against the agent he could set up against the principal when he was disclosed. In this case the defendant has no grievance against either. He simply declines to carry out his valid contract made by an authorized agent because, as he writes Rodman on September 11, 1905, he had just received an offer of \$2,000 cash for the land. The personality of the purchaser was not the ground of plaintiff's refusal, but the fact that he could get a higher price. Taking the evidence to be true, the plaintiff is entitled in the superior court to a decree for specific performance. It is so ordered.

Reversed.

CLARK, C. J., did not sit.

(128 Ga. 789)

#### COLLINS v. TAYLOR.

(Supreme Court of Georgia. Aug. 8, 1907.)

#### LANDLORD AND TENANT—DISTRESS—PROCEEDINGS TO DISTRAIN.

An affidavit to obtain a distress warrant on the ground that the rent is due is amendable by alleging that the rent was not due at the time the affidavit was made, but at that time the tenant was seeking to remove his goods from the premises, where the distress warrant has been converted into mesne process by the tenants filing the statutory counter affidavit.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Distress warrant by R. O. Collins, as agent of one Ellington, against Cook Taylor. Judgment for defendant, and plaintiff brings error. Reversed.

Haygood & Cutts, for plaintiff in error. Greer & Felton, for defendant in error.

EVANS, J. Collins, as agent for Mrs. Ellington, sued out a distress warrant against Taylor, alleging in his affidavit that the amount claimed was due and unpaid. The defendant filed his statutory counter affidavit, denying that the sum distrained for or any part thereof was due; and the distress warrant and affidavit were returned to the superior court. When the case was called for trial, the plaintiff offered to amend by striking from the original affidavit the allegation that the rent was due and unpaid, and inserted in lieu thereof the follow-

ing: "That said Cook Taylor has rented the premises described in the original affidavit for a period of twelve months beginning September 1st, 1904, at twenty-five (\$25.00) per month, and at the time of suing out said distress warrant said Cook Taylor was seeking to remove his goods from the rented premises without paying or offering to pay the rent for the unexpired portion of said term." The court refused to allow the amendment, and the plaintiff excepted to this ruling. The plaintiff then offered evidence to the effect that the defendant had rented the premises from September 1, 1904, for the period of one year, at the monthly rental of \$25, that the rent prior to January 1, 1905, had been paid, and that the rent for January was not due until the end of the month by the terms of the contract. The distress warrant was sued out on January 25, 1905. At the conclusion of the plaintiff's testimony, the court, on motion of defendant, granted a nonsuit, and exception was taken to this judgment.

1. A landlord may distrain for rent as soon as the same is due, or before due, if the tenant is seeking to remove his goods from the premises. Civ. Code 1895, § 3124. The party distrained may in all cases file a counter affidavit, denying that the sum or some part thereof distrained for is not due, and have the issue made by his counter affidavit tried in the proper court. Civ. Code 1895, § 4819. No other pleading by the defendant is necessary to let in evidence to sustain any legitimate defense he may have to the landlord's demand. *Smith v. Green*, 128 Ga. 90, 57 S. E. 98; *Johnson v. Patterson*, 86 Ga. 725, 13 S. E. 17. The filing of the counter affidavit converts the distress warrant into mesne process, and thereafter the proceeding amounts to a suit for rent. *Hardy v. Posa*, 120 Ga. 385, 47 S. E. 947. The affidavit for a distress warrant serves the purpose of stating the plaintiff's cause of action. If it is therein alleged that the rent is due, the probata must sustain this allegation, to entitle the plaintiff to recover. Evidence that the tenant is seeking to remove his goods from the premises is not competent in such a case. *Anders v. Blount*, 67 Ga. 41; *Holt v. Licette*, 111 Ga. 810, 35 S. E. 708. In neither of these cases was the question made that the affidavit was amendable so as to make it conform to the evidence. Of course, if the affidavit was amendable so as to allege that the tenant was seeking to remove his goods from the premises, testimony supporting such allegation would be competent. The law of amendment in this respect is very liberal. All affidavits for the foreclosure of liens, or which are the foundation of legal proceedings, are amendable to the same extent as ordinary declarations. Civ. Code 1895, § 5122. This statute is remedial in its nature, and is therefore to be liberally construed and applied. Before its enactment, affidavits which were the foundation

of summary process were not amendable. *Brown v. McCluskey*, 28 Ga. 577. The manifest purpose of the Code (section 5122) was to change this rule, so as to permit amendments to affidavits upon which summary process was issued. It has been held to authorize an amendment to an attachment affidavit which alleged the ground of attachment to be that the debtor is "about to remove without the limits of the state" by adding thereto the words "and county," so as to make it read, "without the limits of the state and county." *Brumby v. Rickoff*, 94 Ga. 429, 21 S. E. 232. The Mississippi Code of 1871, § 1483, authorized amendment of defective affidavits in attachment, and the Supreme Court of the United States was of the opinion that under such a provision there could be no objection, on principle, to an amendment adding a new ground of attachment. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. Ed. 211. We cannot perceive any obstacle in the way of amending the affidavit to conform to the actual conditions existing at the time of suing out the distress warrant. Such an amendment, from the nature of things, cannot be prejudicial to the tenant. His objection to such an amendment is purely technical. It is an objection which does not raise the issue that the tenant is not liable, or that the suing out of the warrant was premature, but that the landlord is put to his election in the first instance to state on what ground he is entitled to distrain. Section 3124 affords the landlord a remedy by distress warrant, both when the rent is due and when it is not due under certain circumstances. It does not relate or refer to the rent contract which is the cause of action. An amendment of the character refused by the court states no new cause of action. The landlord is still pursuing his remedy by distress warrant, notwithstanding the proceeding has been converted into an action for rent by the tenant's counter affidavit. And he may amend by alleging facts which show that he may lawfully proceed against his tenant by distress warrant.

The plaintiff's case depended upon the allowance of the proffered amendment; and, when this was disallowed, he was unable to prove his case, and the nonsuit was inevitable. The judgment of nonsuit was the consequence of an erroneous ruling, and must be reversed on that account.

Judgment reversed. All the Justices concur.

(128 Ga. 743)

SAPP et al. v. WILLIAMSON et al.

(Supreme Court of Georgia. July 13, 1907.)

# 1. JUDGMENT—CONSENT DECREE—ENTRY IN VACATION.

What purports to be a consent decree having been entered in vacation, and there being no order in term authorizing the decree to be so entered, and the same not having been entered at

a time and place fixed under the provisions of Civ. Code 1895, § 4323 et seq., it is inoperative as a judgment of the court, for the reason that the judge was without authority to enter the same.

## 2. EXECUTORS AND ADMINISTRATORS—IMPROPER PAYMENT OF CLAIMS.

If a paper purporting to be a consent decree, in a case in which the administrator of a deceased person is a party, is inoperative as a judgment, for the reason that the court was without jurisdiction to render the decree, but operative as an agreement to which the administrator has assented, the heirs of the estate will not be concluded by the paper, as an agreement, from calling the administrator to an accounting for any matter therein which charged the estate with claims with which it was not chargeable, or which provided for a distribution of the assets of the estate in any other manner than that authorized by law.

## 3. CANCELLATION OF INSTRUMENTS—ADEQUATE REMEDY AT LAW.

Whatever may be the rights of the plaintiffs in another proceeding, with proper allegations and proper parties, there was no equity in the present petition, and the court did not err in dismissing the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 7.]

## 4. PLEADING—HEARING ON DEMURRER.

When there are several defendants to an equitable petition, and some of them file demurrers and others do not, the petition should not be dismissed as to the defendants who did not demur, even though there is no equity in the petition as to any of the defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 557.]

(Syllabus by the Court.)

Error from Superior Court, Dodge County; Jno. P. Ross, Judge pro hac.

Action by C. W. Sapp and others against A. G. Williamson and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Charles W. Sapp, George W. Sapp, Jeff D. Sapp, Wm. S. Sapp, Katie Ward, Lou Powell, and Annie Cobb brought their petition against the Merchants' & Farmers' Bank, J. C. Rawlins, administrator of Susan A. Sapp, W. B. Sapp, A. G. Williamson, J. C. Rogers, sheriff, T. B. Ragan, and Mollie H. Grace, alleging that the plaintiffs were the children of W. B. Sapp and his wife, Susan A. Sapp, and are the heirs at law of the latter, who died intestate in 1902; that at the September term, 1895, of the superior court of Dodge county, Ragan, as surviving partner of the firm of Ragan & Co., began proceedings to foreclose a mortgage on a described lot of land against W. B. Sapp, and obtained a judgment of foreclosure in 1898. The plaintiff was represented by J. H. Martin, Esq., and the defendant by Smith & Clements, as attorneys. On May 28, 1898, an execution issued on the foreclosure judgment was levied, and a claim was interposed by Susan A. Sapp, which seems never to have been disposed of. In this case the plaintiff was represented by J. H. Martin, Esq., and the claimant by E. Herman, Esq. In 1899 Ragan, as surviving partner, filed suit in the county court against W. B. Sapp as principal and D. W. Sapp as se-

curity. This case was appealed by consent to the superior court, dismissed for the want of prosecution, reinstated on the same day, and seems to have been never thereafter disposed of. J. H. Martin, Esq., represented the plaintiff, and E. B. Milner, Esq., the defendant. In 1904 Mollie H. Grace brought a petition in equity against W. B. Sapp and J. C. Rawlins, administrator, to cancel a deed from W. B. Sapp to Susan A. Sapp, bearing date September 30, 1889, to certain described lots of land; among them being the lot embraced in the mortgage above referred to, all of such lots adjoining each other, and being embraced in one tract. The deed purported to be upon a consideration of \$1,000. The petition also sought to enjoin Rawlins, the administrator, from selling the land described in the deed under an order granted by the court of ordinary, and also sought to foreclose a mortgage on one of the lots given by W. B. Sapp to Mollie H. Grace. Certain of the heirs at law of Susan A. Sapp were made parties defendant to this proceeding. J. H. Martin, Esq., represented the plaintiff, and W. M. Morrison, Esq., and Messrs. Hall & Wimberly, represented the defendant. At the same time, and in the same court, Ragan, surviving partner, brought a petition in equity against the same parties for the same purposes as indicated in the petition of Mollie H. Grace; Ragan setting up the same mortgage which he had previously foreclosed. In this case the attorneys were the same as in the case of Mollie H. Grace. In 1904 the Merchants' & Farmers' Bank obtained a judgment of foreclosure on one of the lots described in the deed above referred to against Susan A. Sapp, and the mortgage execution was levied. In this case the plaintiffs were represented by J. P. Highsmith, Esq., and the defendant was in default. In 1905 Ragan, as surviving partner, brought a petition in equity against the Merchants' & Farmers' Bank, Rogers, sheriff, and Rawlins, administrator, for the purpose of enjoining the sale under the mortgage execution of the Merchants' & Farmers' Bank, so far as it related to one of the lots therein. In this case the plaintiff was represented by Messrs. W. L. & Warren Grice, the bank by Messrs. D. M. Roberts & Son and J. P. Highsmith, Esq. The sheriff and administrator do not seem to have been represented by counsel, or to have made any defense. There was no process annexed to the petition, nor does it appear to have been filed, but the same was answered by the bank. In 1905 Mollie H. Grace brought a petition in equity against the bank, Rogers, sheriff, and Rawlins, administrator, for the purpose of enjoining the sale of another lot embraced in the mortgage of the bank. In this case no process was annexed to the petition, nor does the same appear to have been filed; but an answer was filed by the bank. The plaintiff was represented by Messrs. W. L. & Warren Grice, the bank by Messrs. D. M. Roberts &

Son and J. P. Highsmith, Esq., and the sheriff and administrator by J. E. Wooten and W. M. Morrison, Esq. Geo. W. Sapp interposed a claim to a part of the land embraced in the mortgage execution of the bank, and Charles W. Sapp also interposed a claim to a portion of the land embraced in the mortgage. While the litigation was in the stage above referred to, what purports to be a consent decree was entered. This decree bears no date, but purports to be signed nunc pro tunc as of May 16, 1905, though, as a matter of fact, it was not signed at that time, nor at the May term, 1905, nor at any term, nor in open court at a place where the court was held, but was actually signed in another county after the adjournment of court, in vacation, at chambers. The decree, after stating some, if not all, of the cases above referred to, recites that the disqualification of the presiding judge, Hon. J. H. Martin, is waived by all parties, and by consent the cases are heard and determined at the May term, 1905, by the presiding judge, without the intervention of a jury. It is then decreed that the cases be consolidated; that the claims filed by Susan A. Sapp, Chas. W. Sapp, and Geo. W. Sapp be withdrawn; that certain described lands be sold under the foreclosure judgment of the bank and Ragan and "under the Grace paper" after due advertisement. It provides the manner in which the sale shall be conducted by lots and the disposition to be made of the proceeds, the Ragan mortgage to be first paid in full, and Ragan be paid \$36.75 actual expenses incurred in the injunction matter and other matters relating thereto; that the mortgage of Mollie H. Grace be next paid in full, then the mortgage of the bank be next paid, then another debt to Ragan; and that Judge Roberts, attorney for the bank, be reimbursed for certain actual expenses in defending the injunction proceeding, and that the costs of court be next paid. After the payment of the sums above referred to, any balance remaining is to be turned over to the administrator of Susan A. Sapp for the purposes of administration. The decree then recites: "It is further understood by all the parties hereto that as this consent decree was agreed to on May 16, 1905, the same being a day during the regular May term, but for providential cause was not presented to the judge for his signature at the time contemplated, that this decree be now signed nunc pro tunc as of May 16, 1905, all parties consenting hereto." It then provided that the mortgage lien of Mollie H. Grace be displaced, and its lien attach to the proceeds in the same manner as if the mortgage had been duly foreclosed, and that the several petitions above referred to be dismissed, and that the decree supersedes all former orders in the different cases. The decree was signed by Messrs. W. L. & Warren Grice as attorneys for Ragan, G. W. Sapp, Chas. W. Sapp, and Mollie H. Grace, and by W. M. Morrison, Esq., as attorney for Rawlins, ad-

ministrator, and by Messrs. D. M. Roberts & Son and J. P. Highsmith as attorneys for the bank, and by W. B. Sapp. Upon this decree Judge Martin entered the following: "So ordered and decreed. Let this be entered on the minutes of Dodge superior court." There appears on the decree an entry by the clerk that the same was entered on the minutes of the court, on specified pages, May term, 1905.

It is alleged, in the petition, that G. W. Sapp and C. W. Sapp never consented to the terms of the decree, and never authorized the attorneys purporting to sign the decree in their behalf either to sign the same or to withdraw their claims, and that they are in actual possession of the land claimed, and have been in possession more than seven years under a parol gift of their father and mother, and by reason of the gift have made valuable improvements, and therefore claim the ownership of the land. Having learned that their claims had been withdrawn, they prepared a second claim to the property and tendered it to the sheriff, when he proceeded to sell the same under the pretended decree; but the sheriff refused to accept the claim, upon the ground that the creditors and administrator of Susan A. Sapp objected thereto. They prepared a petition setting forth the facts herein set forth, for the purpose of enjoining the sale, but it was impossible for them to reach a qualified judge before the time for the sale, and therefore they simply filed their petition, and gave notice of their claim at the sale. The petition and claim were disregarded by the sheriff and the lands were sold to Williamson, to whom the sheriff executed a deed. It is alleged that the sale was illegal, for the reason that the levy and advertisement did not state the name of any one as the owner of the land levied on. All of the petitioners aver that while the decree purports to have been granted by consent, as a matter of fact, none of them ever consented thereto, nor authorized any attorney or any other person to consent to any such decree, nor did they waive the disqualification of the presiding judge, nor did they agree for the decree to be entered during vacation without the intervention of a jury, never having been consulted in reference to any of these matters. The plaintiffs Jeff D. Sapp, Wm. S. Sapp, Katie Ward, Lou Powell, and Annie Cobb show that so far as they are concerned, although they were parties to the litigation in which the decree was rendered, the decree does not even purport to have been consented to by them, or by any person in their behalf, and, in fact, was never consented to by them or by any authorized person for them. It is alleged that the mortgage in favor of Mollie H. Grace has never been foreclosed, and the sheriff had no authority to sell the land therein mortgaged; that it was illegal to sell under the Ragan mortgage any other property than that embraced in the mortgage execution. The manner in which the proceeds

of the sale were directed to be made is attacked as being illegal and unauthorized. The payment of the expenses of Ragan is also attacked as being illegal and beyond the jurisdiction of the court. The different amounts that were ordered to be paid to different parties is alleged to be illegal for various reasons. It is alleged that Rawlins, as administrator of Susan A. Sapp, had no authority to consent for funds arising from the sale of the property of the estate to be applied to the debts of W. B. Sapp and other claims to which it was appropriated by the decree, and the administrator had no authority to bind these plaintiffs in regard to the matters embraced in the litigation. The amount of the indebtedness is set forth, as well as the value of the property. It is distinctly alleged that there has never been any necessity for the decree or for the sale of the land, for the reason that the plaintiffs, as heirs of Susan A. Sapp, have been at all times ready and willing to pay the just debts of her estate and divide the remainder among themselves, and they are still ready to do this, and they are also ready and willing to pay all the just debts of W. B. Sapp secured by liens to which the land may be legally subject. It is also alleged that the decree is illegal, because granted in vacation, at chambers, out of the county in which the litigation was pending, and by a disqualified judge. Plaintiffs have received no part of the proceeds of the sale, and the sheriff has not put Williamson, the purchaser, in possession; but Williamson has been cutting and hauling the timber from two of the lots, and is threatening to take possession of the land. The prayer is that the sheriff be enjoined from placing Williamson in possession, and that he be enjoined from taking possession; that all of the defendants be enjoined from interfering with or disposing of the land sold by the sheriff; and that the decree be declared null and void and be set aside; and for general relief and process. By amendment it is alleged that the decree was void for the further reason that there was no order granted or taken in term time providing for a hearing and disposition of the case in vacation, and there is no written consent of the parties in the premises.

Williamson, Mollie H. Grace, and Ragan filed a demurrer, in which they alleged that there was no equity in the petition; that it appears therefrom that the plaintiffs sue as heirs at law of Susan A. Sapp, and that her estate is represented by an administrator, and it is not alleged that the administrator has been discharged or that he has consented to the bringing of the suit, and there is no allegation of fraud or collusion between the administrator and the other defendants; that it does not appear that the plaintiffs are all of the heirs of Susan A. Sapp, nor what is the interest of each of them; that the allegation in reference to the irreparable damages are too general and vague; that the wrongs complained of are merely trespasses, and

there is no allegation of insolvency; that, so far as the plaintiffs Chas. W. Sapp and Geo. W. Sapp are concerned, there is no allegation that the attorneys who signed the decree in their behalf did not represent them in the claim cases; and that the order of the ordinary authorizing the sale of the land cannot be collaterally attacked.

The demurrer was sustained, and the plaintiffs excepted.

De Lacy & Bishop, for plaintiffs in error.  
W. L. & Warren Grice, D. M. Roberts & Son,  
and W. M. Morrison, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. While the record in this case contains only the petition and the demurrer, it fairly bristles with allegations of fact and averments of dates, and this is calculated to beget confusion. But, after a careful consideration of the petition, we think that the case at last can be resolved by the application of a few well-settled principles. The judges of the superior court cannot exercise any power out of term time, unless the authority to do so is expressly granted by the law, or an order has been taken in term conferring authority to render a judgment in vacation. Civ. Code 1895, § 4325. The law expressly authorizes such judges to hear and determine, in vacation, without an order passed in term, motions for new trials, certioraris, and such other matters as are not referred to a jury, provided application is made by either party, or his counsel, and 10 days' notice in writing is given to the opposite party of the time and place of hearing. Civ. Code 1895, §§ 4323, 4324. What purports to be a consent decree in the present case was not, according to the allegations in the petition, entered in term time. It does not appear that an order was taken in term authorizing the decree to be entered in vacation. The allegation of the petition is that there was no such order. The matters involved were such as, under the law, would be referred to a jury, unless, by consent, the judge was authorized to pass upon the questions of fact involved. Even if a case of this character could be heard in vacation, under the sections above referred to, providing for 10 days' notice, there was nothing to indicate that a hearing was had under this provision of the law. On the contrary, it appears from the very paper itself that the decree was not so signed, it being stated therein that the terms of the decree were agreed upon in term and the decree entered *nunc pro tunc*. While an order, judgment, or decree may be entered *nunc pro tunc* under certain conditions, this must be done in term time, except in those cases where the judge is authorized to act in vacation. Of course, it is within the power of the parties to waive the disqualification of the judge, and, when such waiver is made, he has, in the particular case, all the authority he would have if no such disqualification existed; but mere waiver of the disqualifica-

tion does not confer upon him any greater power than he already had under the law. Even if the presiding judge had not been disqualified in the present case, we think the decree would be inoperative for the reasons above referred to.

2. As the decree was inoperative as a judgment of the court, the question arises: How far is the paper binding upon the parties who have consented thereto? While what purports to be a consent decree may fail to operate as a judgment binding upon the parties on account of the want of jurisdiction in the court, or other valid reason, still, if the terms of the same were entered into upon a sufficient consideration, agreed to by the parties with a full knowledge of its contents, it would, in the absence of fraud, accident or mistake, be operative as an agreement binding upon all of the parties thereto. *Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430 (1); *Driver v. Wood*, 114 Ga. 296, 40 S. E. 257. What purports to be the consent decree is signed by counsel in behalf of at least some of the plaintiffs. It is distinctly alleged that none of the plaintiffs ever consented to the decree, but it is not denied that the counsel who signed the decree were the counsel of record of those parties whom they purported to represent. The signature of the counsel would, therefore, be *prima facie* evidence that the parties had consented thereto. The control of counsel over a case in their hands is under the law very broad, and, except in those cases where the law distinctly declares that counsel cannot bind their clients by agreement entered into in reference to a case in which they are employed, the consent of counsel will bind the client so far as the opposite party is concerned; the counsel, of course, being responsible to his client for any loss resulting from the fact that he has disobeyed instructions, or the rights of his client have been prejudiced by his negligence. But, for the purposes of this case, we will deal with what purports to be a consent decree as inoperative upon the plaintiffs, both as a judgment and as an agreement; for in our opinion, even when it is so dealt with, there is no equity in the petition. All of the plaintiffs sue as the heirs at law of Susan A. Sapp in reference to some of the matters involved. Two of the plaintiffs set up title in themselves—each to a portion of the lands in controversy.

We will first deal with the petition so far as it relates to the alleged claims of the heirs at law of Susan A. Sapp. It must be kept in mind that the estate of Susan A. Sapp is represented by an administrator. The bank had a mortgage execution upon a portion of the lands involved in the controversy; such mortgage having been given by Susan A. Sapp. A sale under this mortgage execution had been enjoined at the instance of Ragan in one proceeding, and Mrs. Grace in another. With these injunctions removed, there was no legal obstacle in the way of the bank proceeding to sell the land embraced in



its mortgage execution. The parties who had obtained these injunctions consented to the sale, and the plaintiffs had no concern in this matter. Ragan and Mrs. Grace could have dismissed their bills and the injunctions been thereby dissolved. They could have allowed their bills to remain pending, and it was no concern of the plaintiffs in this case that they had consented to the injunctions being, in effect, dissolved. Even if the bank had caused a sale to be had in violation of the injunctions, it would have been no concern of the plaintiffs, but the officers of the bank and its counsel would have rendered themselves amenable to the court for contempt, and, at the instance of Ragan and Mrs. Grace, proceedings might be had to punish them for contempt or to restore the status. But the plaintiffs had no concern whatever in reference to this matter. If the mortgage foreclosure judgment was a valid judgment against the administrator, title to the land would have passed at the sale. If it was not a valid judgment, no title would have passed. But it is said that under the terms of the consent decree the proceeds of the sale were to be divided in such way as to prejudice the heirs of Susan A. Sapp that claims were to be paid which were not charges against her estate at all, and that it provided for the payment of the debts of W. B. Sapp out of the proceeds. It is also, in effect charged that the lands not embraced in the mortgage were to be sold under the mortgage execution. There is no allegation that the administrator of Susan A. Sapp is insolvent, nor is it alleged that the securities on his bond are insolvent. If the sale under the mortgage execution of the bank was conducted in good faith and without collusion between the administrator and the bank, the sale was valid. And, even if there was collusion between the administrator and the bank, and Williamson was not a party to the collusive arrangement, but bought in good faith as the highest bidder at the sale, the sale would be valid. But, if the administrator had been faithless to his trust in any way, he must respond to the heirs of the estate for the amount which they have been damaged. If the administrator has agreed to pay claims out of the assets of the estate which he had no authority to pay, upon an accounting he will be held liable to the heirs for such amounts. The decree does not stand in the way of the heirs as a judgment, and if, as a contract, it is binding upon the administrator, the heirs may still go behind it, and show that he has entered into an agreement which was unauthorized by law, and therefore he must make good to the heirs the loss they have sustained thereby. As to all of the matters alleged as claims of the plaintiffs as heirs at law of Susan A. Sapp, they have an adequate remedy at law by suit against the administrator and the securities on his bond, and it is not necessary that the paper purporting to be a consent decree should be canceled.

3. The petition also sets up a claim of title on behalf of Geo. W. Sapp and Chas. W. Sapp, each to a different part of the lands in controversy. The decree purported to withdraw the claims which these parties had filed. There is no denial of the fact that the counsel signing the decree in their behalf represented them, and it was within the authority of counsel to withdraw their claims if they saw proper, being liable to their clients in the event it was contrary to instructions or negligence on their part. There is nothing in the decree which purports in terms to condemn the land of these two Sapps to any of the executions. It only purports to withdraw the claims; and, so far as they constituted an obstacle to the sale, such obstacle was thus removed. There is nothing in the decree which makes the land subject to the executions, if they were not already subject, and there is nothing which prevents the claimants from thereafter asserting title to the same. They claim title under a parol gift from their father and mother; such gift being followed by valuable improvements. If, at the time that their father was the owner, he gave them the land claimed, and in pursuance of this parol gift they entered in good faith and made valuable improvements, they would have a complete equity as against him and as against all persons who attempted to acquire any interest from him after they had entered into possession and made improvements, and while they were still in possession. This would also be true if their mother was the owner of the property and the gift emanated from her. It was not absolutely indispensable to the completion of their equity that their possession should continue for seven years. *Garbutt v. Mayo*, 57 S. E. 495. The allegations in reference to the parol gift and the improvements made on the faith of the same are meager, but possibly sufficient to withstand a general demurrer. But there is no prayer that the title acquired under this parol gift be recognized. The prayers of the petition are merely to restrain the sheriff from putting Williamson in possession of the land sold under the mortgage execution of the bank, and to restrain all of the defendants from interfering with any of the land mentioned in the petition, and to set aside the consent decree and the sale in pursuance thereof, and for general relief. The prayer for general relief would not authorize a decree setting up the title under the parol gift, for it is well settled that no relief can be granted under such prayer except that which is germane or connected with one of the specific prayers. *Steed v. Savage*, 115 Ga. 97, 41 S. E. 272. What might be the rights of these two Sapps in another proceeding, in which they set up their title under the parol gift and ask for an injunction to prevent the sheriff from dispossessing them, we will not now determine; but, under the prayers of the present petition, they are not entitled to a decree declaring them the own-

ers of the property as against the mortgage execution of the bank. They are not bound by the decree as a judgment, and they are not bound by the decree as a contract, for the reason that the paper does not purport to divest them of any rights which they might have in the land. They may hereafter assert their title in a proper proceeding with the proper prayers. Whether, if there had been a prayer in the present case for this relief, the petition would have been multifarious, we will not now determine. In no view of the case do we think there was any equity in the petition.

4. As to the defendants who demurred, the petition was properly dismissed, but it should not have been dismissed as to the defendants who did not unite in the demurrer. *Ballin v. Ferst*, 55 Ga. 546 (4); *Byron v. Gunn*, 111 Ga. 806, 35 S. E. 649 (2).

Judgment affirmed, with direction. All the Justices concur.

(128 Ga. 721)

#### WRIGHT v. STAFFORD & SONS.

(Supreme Court of Georgia. July 13, 1907.)

##### 1. WRIT OF ERROR—DISMISSAL—DEFECTS IN PROCEEDINGS.

A motion for a new trial was made, which by order of the court was continued from time to time until the 21st of May, 1906, at which time, in accordance with an order of the judge, the movant presented a brief of the evidence for approval. The presiding judge took the motion for final determination, and by consent of parties and an order passed it was set for June 2d. in a different county from that where the case was tried (as was recited in the bill of exceptions). On the hearing the judge approved the grounds of the motion and also the brief of evidence, and ordered it to be filed with the clerk of the superior court of the county where it was pending within 10 days. No objection or motion to dismiss appears to have been made in the superior court. He also overruled the motion. The brief was filed on June 9th. To the overruling of the motion the movant excepted. A motion to dismiss the writ of error was made on the ground that the brief of evidence was not approved until June 2d, and filed June 9th, and that there was no prior order granted giving authority for the hearing of the motion or the presenting or approving of the brief of evidence on the date mentioned. *Held*, that the motion to dismiss will be overruled.

##### 2. EXECUTION—CLAIMS BY THIRD PERSONS—EVIDENCE—ADMISSIBILITY.

The deeds offered in the present case did not on their face appear to be connected with the land in dispute, or to throw any light on the controversy. The motion for a new trial asserted that the claimant insisted and sought by evidence to show that there was a parol partition. But the statement as to the evidence offered was so vague and general that it did not show, if there was a parol division, with any distinctness, what it was, or that it was sufficiently perfected to pass any title. Whether it could be made sufficient to make the deeds admissible is not decided.

##### 3. SAME.

For a like reason, there was no error in excluding from evidence, when standing alone, a general statement by a witness that he was a witness to an agreement in which the defendant in *fi. fa.* and his father and other children of the latter made a partition or division "of all the lands, including the lands levied on."

##### 4. SAME.

It was erroneous to reject evidence tending to show that the husband of the claimant, under whom she claimed, made an exchange with the defendant in *fi. fa.* before the judgment against him was rendered, whereby the claimant's husband gave to the defendant an interest in 50 acres of land and a pair of mules and wagon, worth \$350, for the defendant's interest in the land in controversy, and that the defendant took possession of such property and afterwards sold it.

##### 5. WRIT OF ERROR—REVERSAL.

The judgment is reversed and the case returned for a new trial, in order that all legitimate evidence may be offered and admitted, if relevant. This court does not now express any opinion as to the effect which the evidence may have, or whether the alleged donor acquired a title superior to the lien of the execution, or, if he did, whether a parol gift to his second wife, and her children (if made) would convey such a title or interest as to be superior to the claim of one of his heirs, or of a judgment creditor of such heir.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action between Susie Wright and J. W. Stafford & Sons. From the judgment, Susie Wright brings error. Reversed.

Robert L. Berner, for plaintiff in error. C. J. Lester, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur.

(129 Ga. 49)

#### WESTERN & A. R. CO. v. TENNESSEE COAL, IRON & R. CO.

(Supreme Court of Georgia. Aug. 10, 1907.)

##### ERROR, WRIT OF—AFFIRMANCE—DIVIDED COURT.

This case being for decision by a full bench, and the six justices being evenly divided in opinion, the judgment is affirmed by operation of law.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Action between the Western & Atlantic Railroad Company and the Tennessee Coal, Iron & Railroad Company. From the judgment, the Western & Atlantic Railroad Company brings error. Affirmed.

John L. Tye, Neel & Peeples, and Tye & Bryan, for plaintiff in error. Thos. W. Miller & Sons, for defendant in error.

PER CURIAM. Judgment affirmed by operation of law.

(128 Ga. 754)

#### HART, Atty. Gen., v. ATLANTA TERMINAL CO. et al.

(Supreme Court of Georgia. July 19, 1907.)

##### 1. INJUNCTION—GROUND OF RELIEF.

Without reference to the legality or illegality of the claim-check system as originally practiced, it was alleged and evidence was introduced to show that it had been abandoned and there was no evidence of an intention to

reinstate it. Under these conditions, there could be no abuse of discretion in refusing an injunction in regard to it.

**2. CARRIERS — CARRIAGE OF PASSENGERS — BAGGAGE — SPECIAL PRIVILEGES AS TO HANDLING.**

In the case of *Kates v. Atlanta Baggage Co.*, 34 S. E. 372, 46 L. R. A. 431, 107 Ga. 637, after announcing that, "relatively to passengers and their baggage, the duty of a railway company in its capacity as a common carrier begins with affording to them, and to all of them alike, proper and suitable facilities for entering depots to purchase tickets and take passage, and for checking baggage, and ends with affording to them like facilities for leaving such depots and obtaining their baggage on presenting the checks therefor," the court decided that, "if a railway company in good faith complies with the law as above laid down, it does not violate any public duty or deprive any citizen of any lawful right by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, or by renting to such corporation or individual a portion of its baggage room and conceding to it or him the privileges necessarily incident to the occupancy and use thereof, provided that so doing does not interfere with the exercise by any other person of any right which he may lawfully demand of the company as a common carrier." This decision was concurred in by the entire bench of six justices. Upon review, it cannot be reversed except by the concurrence of the entire bench; and in this case the decision must stand, as a sufficient number of justices do not concur in order to overrule it.

**3. SAME.**

The questions of law in the present case (the claim-check practice not being now involved, as stated in a previous note) are substantially controlled by the decision in the case above referred to.

**4. INJUNCTION—GROUNDS OF RELIEF.**

On the questions of fact as to the actual practice followed in regard to baggage, and other issues of fact, the evidence was conflicting, and there was no abuse of discretion on the part of the presiding judge in denying an injunction.

**5. PARTIES—PARTIES PLAINTIFF—REAL PARTY IN INTEREST—AMENDMENT.**

The Governor of the state passed an order "directing that the Attorney General file appropriate proceedings in the proper courts in the name of the state, to correct the wrongs to the people complained of." In the action brought the petition stated that "this suit is instituted by virtue of an executive order made by Hon. Joseph M. Terrell, Governor of Georgia, on the \_\_\_\_\_ day of May, 1906, in pursuance of his authority as chief executive of the state of Georgia, and in pursuance of the authority vested in the Honorable John O. Hart as the Attorney General of the state of Georgia." Held, that the suit was substantially one by the state, and upon special demurrer raising the point that it was brought in the name of the Attorney General, instead of in the name of the state, it could be amended.

**6. MANDAMUS—EXCLUSION OF OTHER REMEDIES—INJUNCTION.**

In a case such as that made in the petition, brought for the benefit of the public, an application for injunction would be an appropriate remedy, if the facts justified it; and the exclusive remedy was not by writ of mandamus.

**7. WRIT OF ERROR—EVIDENCE.**

The rulings complained of as to the evidence were not such as to affect the decision above made.

Freeman, J., dissenting in part.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by John C. Hart, Attorney General, against the Atlanta Terminal Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. C. Hart, Atty. Gen., Arnold & Arnold, and Jno. L. Hopkins & Sons, for plaintiff in error. Dorsey, Brewster & Howell, Herbert Haas, Rosser & Brandon, and Arthur Heyman, for defendants in error.

FREEMAN, J. The rulings of the majority of the court are contained in the headnotes; and in the discussion which will follow anything that may be said which is in conflict with such rulings is to be understood as setting forth merely the individual views of the writer.

During the year 1906 the American Baggage & Transfer Company filed a bill against the Atlanta Baggage & Cab Company (hereinafter called the "Cab Company") and the Atlanta Terminal Company (hereinafter called the "Terminal Company"), wherein it was sought to enjoin the grant by the Terminal Company to the Cab Company of the use of a system of "claim checks," and for the purpose of having declared void a certain contract between the Terminal Company and the Cab Company, on the ground that such contract was in violation of Const. art. 4, § 2, par. 4. Upon a trial had in that case before the judge, a temporary injunction was granted, to which judgment there was exception to this court; and on May 24, 1906, the judgment of the court below was reversed, as will be seen from a report of that case in *Atlanta Terminal Co. v. American Baggage & Transfer Co.*, 125 Ga. 677, 54 S. E. 711. Afterwards, upon application of the Transfer Company, the Governor authorized this suit to be brought by the Attorney General. The petition avers that the Terminal Company is a railroad corporation of this state, that the Cab Company is a corporation, and that the Terminal Company is the owner of the Terminal Station in the city of Atlanta, which is used for the arrival and departure of trains of the Southern Railway, the Atlanta & West Point Railroad, and the Central of Georgia Railroad Companies, who are made parties to the suit. The Terminal Company and the railway companies filed separate answers. The judge refused the injunction prayed for, and the plaintiff prosecuted a writ of error to this court. The pleadings are voluminous, and much evidence was offered by both sides. The contentions of the parties in the pleadings and the evidence, so far as is necessary for an undertaking of the questions discussed, will be stated in the opinion.

The privileges granted the Cab Company by the Terminal Company, complained of by the plaintiff in error, so far as are pertinent to this discussion, are: (1) The exclusive control of checking baggage from and to all

points in the city of Atlanta from and into the baggage room of the Terminal Station. (2) The exclusive privilege of having an office in the depot building from which to conduct business. (3) The exclusive privilege of soliciting business on the depot property and in the depot building from passengers. (4) The exclusive privilege of boarding cars of the several railroad companies entering the passenger station, for the purpose of soliciting the delivery in the city of incoming baggage. (5) The exclusive privilege of receiving from the Terminal Company railroad checks and checking baggage at hotels and residences of passengers when tickets or evidences of the right to travel are exhibited to it. (6) The exclusive right to rent and occupy for the purpose of delivery and storage of baggage of incoming passengers for delivery in the city of Atlanta, and of outgoing passengers, prior to the checking of such baggage with railroad checks. Each of these privileges is granted exclusively to the Cab Company and denied to all others. Prior to the decision rendered by this court on May 24, 1906, in the case of *Atlanta Terminal Company v. American Baggage Company*, 125 Ga. 677, 54 S. E. 711, each of these privileges was granted and enjoyed by the Cab Company, except the last. After the rendition of that opinion, the Terminal Company cut off one corner of its baggage room by an iron railing, about three feet high, and furnished the same to the Cab Company in which to store outgoing baggage prior to the checking of the same by railroad checks. This space so cut off opened on the driveway from which trunks and other baggage are delivered into the baggage room, and also had openings into the remaining portion of the baggage room, which space the Cab Company was occupying at the time this suit was filed. The Terminal Company, after this arrangement was made, discontinued privileges (1) *supra*, and, refused to receive into that portion of the baggage room not rented to the Cab Company any trunk or other parcel whatever until the same was accompanied by a railroad ticket or other right to travel on one of the railroads using the station. In other words, the Terminal Company discontinued the claim-check system, which up to that time had been used exclusively by the Cab Company. The Terminal Company, also, after the rendition of said opinion, denied to the Cab Company privilege (5). With these changes, the business of receiving and discharging baggage when this suit was filed was the same as it was when the case in 125 Ga. 677, 54 S. E. 711, *supra*, was decided. It is insisted by the plaintiff in error that each of these exclusive privileges granted the Cab Company is illegal, and should be so declared.

1-4. The case of *Kates v. Atlanta Baggage & Cab Company*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431, decides adversely the contentions of the plaintiff in error as respects

the right to grant to the Cab Company the exclusive privilege of having an office in the depot building for the transaction of its business, of boarding the cars of the several railroad companies prior to entering the station for the purpose of soliciting the delivery in the city of incoming baggage, of soliciting business on the depot property and in the depot building, of checking to point of destination, with railroad checks, the baggage of passengers at hotels and residences. The plaintiff in error asks that the *Kates Case* be reviewed and overruled. The judgment in the case was concurred in by a full bench of six justices. In order to overrule it, the judgment of reversal must be concurred in by a full bench of six justices. Upon a review of the *Kates Case*, a sufficient number of justices do not concur in order to overrule and reverse it. Therefore that decision must stand and be followed as to all questions decided by it. In view whereof, it is not deemed advisable, in this connection, to enter upon a discussion of the principles underlying the decision. The subject is treated in *Beale & Wyman's Railroad Rate Regulation*, §§ 800-816, where the authorities pro and con are collated. An inspection of the opinion in the *Kates Case* will reveal that article 4, § 2, par. 4 (Civ. Code 1895, § 5800), was considered by the court, and the decision rendered with reference thereto. It is insisted by plaintiff in error that the right of the Terminal Company to rent to the Cab Company space in the baggage room, to be exclusively occupied by it for the storage of trunks prior to offering them to the baggage master to be checked with railroad checks for transportation, was not decided in the *Kates Case*. The defendants insist to the contrary. In order to pass upon this contention, it becomes necessary to critically examine the *Kates Case*, in order to determine if the contention of defendants in error is correct; for, if they be correct in this contention, the *Kates Case* is controlling, as has been shown above.

The facts upon which the opinion in the *Kates Case* is based are stated in the opinion. The first sentence shows this: "The facts necessary for a clear comprehension of the merits of the petition, under which the defendants were sought to be enjoined, may be briefly stated as follows." It will not be seriously contended that the legal principles announced arose out of or would be applicable to a different state of facts than those stated by the court upon which the opinion is based, even though an examination of the record should reveal a material difference. On page 642 of 107 Ga., and page 374 of 34 S. E., Judge Little states the questions for determination by the court this way: "The evidence was in direct conflict on many points. As to the truth of the allegations about which the evidence is conflicting, it is, so far as we are concerned, settled by the determination of the judge, and the right

of the petitioner to have the judgment refusing the injunction reversed must depend on the application of legal principles to such of the allegations as are not contested by the evidence, and these are, first, that the defendants permit the Cab Company to enter the passenger trains before reaching the city for the purpose of soliciting baggage, and refuse the same privileges to petitioner; second, that the servants of the Cab Company are allowed access to the passenger station for the purpose of soliciting patronage and for more conveniently attending to its business, and this privilege is refused to petitioner; third, that the privilege of using an office in the baggage room of the defendants for the transaction of its business is granted to the Cab Company, and refused to Kates; fourth, the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery of baggage at the passenger station." These questions were decided against the contentions of Kates. Kates also claimed in his petition (top of page 638 of 107 Ga., and page 373 of 34 S. E.) that the Cab Company was "given the exclusive privilege of entering the depot building for the purpose of handling trunks and baggage, and of issuing what is known as 'claim checks'; that is to say, that company is allowed to deliver, at his home or elsewhere, to a prospective passenger, its check for his trunk, and on delivery of a trunk so checked at the baggage room it is received by the baggage master and held until the check is presented," and on same page (middle) the Cab Company "is allowed storage in the baggage room for the baggage of its customers hours in advance of the departure of outgoing trains, and transacts its business in the baggage room." These allegations were denied by the answer (page 639, near bottom of 107 Ga., and page 373 of 34 S. E.). "Defendants answered, admitting that a contract existed with the Cab Company, but averring that no exclusive privilege of entering the depot for the purpose of hauling trunks, baggage, etc., has been given to the Cab Company; that the same rights which are accorded to the Cab Company as to the receipt and delivery of baggage are extended to all companies and persons engaged in the business, including the petitioner; that the petitioner, as well as the Cab Company, is permitted by the board of control to give claim checks to its patrons, which the baggage master recognizes." It is true that on page 641 the judge further states: "As a part of his evidence, the petitioner introduced a contract . . . by which it was provided that [the Cab Company] should have the exclusive control of checking baggage from all parts of the city of Atlanta into and from the baggage room of the depot." But, notwithstanding this, the judge treated the existence of the "claim-check" system to have been in issue between the parties, as will appear from this extract from the opinion on page

645, near middle, of 107 Ga., and page 375 of 34 S. E.: "Receiving and discharging baggage is one of the duties of a public passenger carrier, and the obligations before enumerated apply in full force in the receipt and discharge of baggage at the Union Passenger Station in the city of Atlanta, and if it should be found to be true that the defendant railroad companies, either in the receipt or delivery of baggage by their baggage master or other agents, discriminated against any passenger or the agent of any passenger in the time or manner in which baggage was received or discharged either through a system of claim checks or otherwise, such discrimination would be a palpable violation of their public duties, for which the law affords ample remedy by injunction and full redress in the nature of damages."

It is urged by the counsel for the Cab Company in this case that the court in this extract was speaking of baggage in its technical sense, having in mind a trunk, the custody and possession of which, by reason of its owner's relation to the railroad, could at once be legally enforced upon it; that is, when presented with a railroad ticket, to be checked to point of destination. The court, however, could not have had this view of the matter, for the simple reason that Kates was not complaining that there was a refusal to check with railroad checks trunks when presented with the evidence of the right of transportation. His complaint in this respect was that the baggage master received into the baggage room trunks having on them claim checks of the Cab Company, and refused him the same privilege. Nor could the court have had in view the complaint of Kates as to checking baggage by the Cab Company with railroad checks at hotels and residences, because the opinion deals with this subject and upholds this special privilege thus given to the Cab Company as being legal. It hardly seems possible to escape the conclusion that the court had in mind the system of claim checks as practiced at the station, and of which Kates was complaining. It was not the system of claim checks in and of itself which Kates objected to. He had the perfect right to have a system of his own, just as the Cab Company had; but the trouble was, as claimed by Kates, that the baggage master recognized the system of the Cab Company and received the trunks into the baggage room, but refused to recognize those upon trunks handled by Kates. The court says that "If it should be found to be true [that is, as the writer interprets the meaning of the court, if the jury on the final trial of the case should find it to be true that the baggage master received trunks into the baggage room on the claim checks of the Cab Company and refused a like privilege to trunks handled by Kates, the parties being at issue on this question] that the defendant railroad companies, either in the receipt or delivery of baggage

by their baggage master or other agents, discriminated against any passenger or the agent of any passenger in the time or manner in which baggage was received or discharged either through a system of claim checks or otherwise, such discrimination would be a palpable violation of their public duties," etc. It is clear that if the court did not decide the system of claim checks, practiced as claimed by Kates, to be a palpable violation of the public duties of the railroads, it certainly was not decided to be legal, and is still an open question, so far as the Kates Case is concerned. The only right of storage allowed the Cab Company in the baggage room was to place the trunks handled by it along with and among the other trunks in the baggage room; this right of storage being exercised under the claim-check privilege. It is certain, so far as storage privileges were concerned, that the Cab Company had no separate space set apart to it for that purpose. The conclusion follows that in point of fact the Cab Company had no right of storage in the baggage room except that accorded by the claim-check privileges, which, being a matter about which there was conflicting evidence, was not decided, and the opinion so expressly states. "The right of the petitioner to have the judgment refusing the injunction reversed must depend on the application of legal principles to such of the allegations as are not contested by the evidence." Page 642 of 107 Ga., and page 374 of 34 S. E. One of the contentions by Kates was that the Cab Company had the privilege of using an office in the baggage room for the transaction of its business, and this right was denied to him. There was no conflict in the evidence, nor denial in the pleadings, as to the truth of this contention by Kates. Whatever business may have been transacted in this office by the Cab Company it is certain that the storage of trunks was not a part of such business. The original record in the case indicates that the office was used in connection with incoming baggage. In paragraph 15 of its answer, the board of control says: "Therefore it is necessarily true that, in order to do this work effectively, some arrangement had to be made with some company granting to it the privilege of meeting incoming trains for the purpose of receipting for baggage to be delivered to the passenger's residence. In order to do this, the defendant had to furnish the company thus engaged with an office in which business could be conducted." Kates attacked the right of office privileges and the right of storage privileges separately; and it is a significant fact that the court treated these subjects under separate heads, sanctioning the office privilege as legal, and, if not condemning, certainly refusing to pass on the legality of the storage privilege, because its existence as an exclusive privilege was in issue. It would be fair to say that, in view of the foregoing, the

office privilege was an incident to the exclusive privileges sanctioned by the court, and its use was to enable the Cab Company to enjoy these privileges, and to that extent it was legal.

It is insisted, however, that the right of the Cab Company to have an office in the baggage room from which to conduct its business was distinctly decided; that there is no difference, in principle, in the right to an office in the baggage room and the right of storage space; that, the right of rental being conceded, the right of use for all purposes follows. In this connection, it would be well to determine what principle the Kates Case decides. It will not be controverted that the exclusive privileges held by the court to be legal, which were granted the Cab Company and denied to Kates, are all based upon the same legal principles. They are all stated together, and one line of argument applies to all. The court on page 643 of 107 Ga., and page 375 of 34 S. E., says: "The merits of his [Kates'] complaint, if any exist, must be found in the fact of the refusal of the defendant to grant to him the opportunities so to serve the public, and thereby better his business. Whether the refusal so to do is proper or unlawful does not depend upon favor or inclination of the railroad company, but upon the plaintiff's right." In order for Kates, therefore, to show that he was entitled to an office in the depot building, he had to show that he had a legal right under the facts to compel the railroads to grant it to him. The court further says that, "if it should depend upon favor, then the plaintiff in error has no cause of complaint, because favor is essentially free and voluntary, and may not be demanded, and it is in this view we come to measure by the legal standard what are the rights of the petitioner under the allegations he makes, as against the rights of the defendants to control property to which they have title, and consequently the right of use, and the plaintiff in error [Kates], to succeed, must establish the proposition that the defendants as common carriers are in law bound to afford to him the same conveniences and facilities for carrying on his business which they afford to others engaged in the same calling." The court then proceeds to argue that Kates, seeking to ply his private business upon the railroads' property, has no right which he can enforce. The decision is predicated upon the proposition that the railroad companies have the right to exclude from their premises persons going thereon for the purpose of transacting private business, and that, as to this class, the property of such companies is private property, and they therefore have the right to grant privileges to one and deny them to others; citing the case of *Fliker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328. From the foregoing it seems to be clear: (a) That, as a matter of fact,

the Cab Company had no separate space in the baggage room for storage purposes. It had an office in the baggage room, but baggage was not stored in the office. It had no storage privilege in the baggage room which was held to be legal by the court; the claim-check privilege being in dispute. (b) That the court decided, on legal principles (1) that, as to Kates seeking to ply his private business, he had no right to enjoin the railroad companies from granting the special privileges to the Cab Company until like privileges were granted to him; (2) that, except as to duties as passenger carriers which they owed the public, their property was private property. The court never decided, nor was the question in the case, that Kates could, in the suit, assert the rights of passengers, or the rights of prospective passengers. Under the decision of this court in the case of *Atlanta Terminal Company v. American Transfer Co.*, 125 Ga. 677, 54 S. E. 711, the rights of passengers or of prospective passengers cannot be enforced by a person or corporation seeking only to carry on private business. The conclusion follows that this court is not concluded by the *Kates Case* in so far as the point is made in the case at bar as to whether the Terminal Company can legally contract with the Cab Company to grant exclusively to the Cab Company space in its baggage room for the storage of outgoing baggage of its patrons prior to checking the same with railroad checks, and refuse to receive into the baggage room the trunks of all other persons until presented with railroad tickets, or evidence of the right to be transported over one of the lines of railroad using the station. If the language in the fourth headnote in the *Kates Case* be susceptible of a broader construction, it should be construed and limited by the legal principles underlying the decision, and by the questions really made and decided. The rights of that portion of the public having business with the railroads could not be enforced or their wrongs redressed by Kates, and such rights were not involved in that case, and hence could not have been decided.

The defendants in error deny that the claim-check system was in force when this suit was filed, and the evidence in support of this contention is not contradicted. There was no evidence of any intention to renew this system. Therefore the judge committed no error in refusing to enjoin this practice. While this is true, the system will be considered along with the storage privilege, as the same legal principles are applicable to both. Inquiry will therefore be had as to these matters: (a) Whether the system of "claim checks" as practiced before the rendition of the opinion in the *Atlanta Terminal Co. Case*, 125 Ga. 677, 54 S. E. 711, was or was not in violation of law; and (b) whether the exclusive occupancy of a portion of the baggage room in the Terminal Station by the Cab Company, after the rendition of that

opinion, as shown by the pleadings and evidence, is or is not in violation of law. For convenience, these two questions will be discussed together. The claim-check system is not of itself unlawful. Any person or corporation engaged in the business of hauling trunks or parcels to or from the passenger station can establish this system in conducting its business. The "claim check" is used simply as a convenient method of identifying the parcel. The operation of this system by the Cab Company is stated by the plaintiff and admitted by defendant to be as follows: The proposed passenger calls for the Cab Company to transfer his trunk from his home or hotel to the station. The Cab Company sends its wagon to the home or hotel, and there receives the trunk, placing one of its checks on trunk, bearing a given number, and giving to the proposed passenger a duplicate check carrying the same number. The trunk is then conveyed by the Cab Company's wagon to the baggage room of the Terminal Company. The baggage master receives the trunk into the baggage room, bearing the check of the Cab Company. The passenger follows the trunk at whatever time suits his convenience, purchases his railroad ticket, presents this to an employé of the Terminal Company at the baggage room, accompanied by the claim check issued by the Cab Company, and receives a railroad check for his trunk, nothing further being required of him in identifying his trunk or otherwise. The Terminal Company has granted the Cab Company the exclusive privilege of this use of claim checks. It refuses to receive into its baggage room at all any trunk offered by any other transfer company or person, whether accompanied by a claim check or not, unless it be accompanied by a railroad ticket or evidence of the right to be transported as a passenger over one of the lines of railroad using the Terminal Station. If the proposed passenger transports his trunk in person and it is presented to the baggage master, the privilege of depositing the trunk in the baggage room is denied him, unless he presents with the trunk a railroad ticket. If he should carry his trunk to the baggage room before he buys his ticket he would be compelled to leave his trunk unprotected in the driveway or make other disposition of it while he went to the ticket office, some distance away, in another part of the building, to purchase a ticket. The driveway for the delivery of trunks into the baggage room is on the north side of the building, and is the only way provided by which baggage is received or delivered. It is an open way and unprotected. If the trunk should be presented by any other transfer company, or person other than the owner, admission in the baggage room is refused, if the proposed passenger has not seen proper to buy his railroad ticket, and intrust it with such transfer company or person, or if such proposed passenger did not himself appear in person, identify his baggage, and



present his railroad ticket. If, when such trunk had arrived at the baggage room, the proposed passenger had not arrived, the trunk would have to be cared for by the person in charge of it, exposed to the weather, until the owner should appear with his transportation and identify the trunk. Neither the railroad companies nor their agent, the Terminal Company, have provided any place whatever for the deposit of baggage or for its temporary storage. A rule has been promulgated and enforced that no trunks or other parcels intended to be transported on the railroad as baggage should be received into the baggage room under any circumstances, except those bearing the Cab Company's checks, unless the same was accompanied by railroad tickets, and when thus presented would be checked as baggage. Such, in brief, was the method of doing business as respects the receipt of trunks at the baggage room at the time the decision in the Atlanta Terminal Company Case, *supra*, was rendered. Shortly after the decision in that case, and before this suit was filed, a rule was made that no trunk or other parcel whatever would under any circumstances be received into the baggage room unless accompanied by railroad tickets; the right of the Cab Company to deliver the trunks of its patrons being thereby revoked. In lieu of this privilege thus denied the Cab Company, the Terminal Company allowed the Cab Company to occupy a part of the baggage room itself, which space opened on the driveway and also opened into the balance of the baggage room not rented. Into this space the Cab Company delivered the trunks of its patrons, where they remained until the proposed passenger appeared and bought his railroad ticket. He then took his railroad ticket and his claim check, and presented it in the depot building to the agent of the Cab Company, this office being not in the baggage room, but on the passage leading from the ticket office to the train shed. When thus presented, such agent of the Cab Company would take the ticket and claim check, and go a short distance to the space in the baggage room occupied by the Cab Company, where the trunk was identified by the claim check and tendered to the baggage master, who received it and gave a railroad check. This check was handed the passenger by the agent of the Cab Company, who could then proceed on his journey without any further trouble or inconvenience. These privileges of having an office in the depot building and of renting space in the baggage room or elsewhere from the Terminal Company were exclusively enjoyed by the Cab Company. All other persons, whether tendering baggage in person, or through the medium of other transfer companies or draymen, desiring to have baggage checked, were compelled to tender railroad tickets simultaneously with the baggage before their trunks were received in the bag-

gage room, in the same way and manner as when the claim-check system was in force.

The plaintiff insisted that the claim-check system was discontinued because of the decision in the Atlanta Terminal Company Case, *supra*, and that the claim that exclusive space was rented to the Cab Company was only a subterfuge to avoid the ruling in that case, and thus continue the same discrimination against the public as practiced by the claim-check system; that the inconvenience to the general public in procuring railroad checks for baggage was greater since the change than before; that, when the change was made, the space which had been up to that time used for incoming baggage was used for outgoing baggage and vice versa, and the distance the passenger would have to walk to procure his baggage checked, was greater than it was before, while the patrons of the Cab Company had no further to walk than before, the Cab Company's office being on the way to the train shed. The defendant denied that any such motive prompted the change; and claimed that the Terminal Company, as agent of the railroads, owed no public duty to any person in respect to checking baggage until such person had obtained the right to travel by the purchase of a railroad ticket, and that, when such evidence of the relation of passenger and carrier had been established, everybody was treated alike; that the facilities for serving the public were ample; that space in the baggage room not necessary for this purpose was not impressed with any public use, and was private property, and that it had the right to rent it to the Cab Company if it chose to do so. For similar reasons, the Terminal Company insisted that the claim-check system was legal.

Mr. Justice Little in the Kates Case, 107 Ga. 645, 34 S. E. 375, says: "It is a sound legal principle that a railway company as a common carrier cannot grant to any person or persons, or to any part of the public, rights or privileges which it refuses to others, but must treat all alike. Receiving and discharging baggage is one of the duties of a public passenger carrier." It being the duty of a carrier as such to receive the baggage of those who desire to travel upon its lines, it is its duty, also, to provide suitable and convenient facilities for the reception thereof. Such facilities as it prepares must be furnished without discrimination to all alike who desire to avail themselves of the use of such facilities. This is a public duty. It is not granted as a favor, but may be demanded as a right. The right to have baggage transported by a common carrier is incidental to the right of the owner thereof to be transported. Incidental in the sense that no right to have baggage transported arises unless the owner thereof procures the right of transportation for himself. The price paid for a railroad ticket is the consideration for the right of transportation of both person and baggage, and is equally obligatory upon the carrier.



The price paid for the ticket pays for the transportation of the baggage in the same way that it pays for the transportation of the person. 3 A. & E. Enc. Law, 543; Hutch. Car. (ed. 1906) § 1241; 6 Cyc. 663. A railway company has the right to make and enforce reasonable rules for the conduct of its business. A rule requiring the purchase of a ticket before a parcel is checked for transportation as baggage is a reasonable rule, and a rule requiring that the ticket be exhibited to the proper agent before such checking is done is a reasonable one. It does not follow, however, that, until the relation of passenger and carrier is established by the purchase of a ticket, the railway company owes no public duty to the person desiring to become a passenger. The railway company owes to the person desiring to become a passenger the duty to afford him all necessary and convenient facilities for entering into contractual relations with it. It is the duty of such company, when such rules as above indicated are made, where the only way provided for entering trains by both passengers and baggage is through a depot provided for such purpose, to furnish suitable waiting rooms for the comfort and convenience of passengers after the purchase of tickets, and of prospective passengers before purchase of tickets, to provide suitable and convenient offices where tickets can be purchased, and to provide suitable baggage rooms for the reception of trunks and parcels to be checked for transportation. The person desiring to become a passenger has the right to demand the use of these facilities for the purpose of entering into contractual relations with the carrier for a reasonable time preceding the actual consummation of the contract of carriage. These, being public duties, must be performed by the carrier for every person desiring to use such facilities with fairness and impartiality, and without any discrimination whatever. As to these duties the property of the carrier is impressed with a public use, and no exclusive privileges can be granted by the carrier to any corporation or person in the enjoyment of them or any of them. It is private property only as between the carrier and those of the general public who have no occasion to use it for purposes of transportation. *Donovan v. Penn. Co.*, 199 U. S. 279, 28 Sup. Ct. 91, 50 L. Ed. 192. It is well settled that no hackman can be prevented from driving to the carrier's depot when his hack contains a prospective passenger, because in respect to prospective passengers as well as in respect to those who have perfected the contract of carriage, such property is impressed with a public use. "A passenger upon arriving at the station, in whatever vehicle, is entitled to have such facilities for entering the company's depot as may be necessary." *Donovan's Case*, 199 U. S. 296, 26 Sup. Ct. 95 [50 L. Ed. 192]. He has the right to enter the depot. He has the right to sit in the waiting room prior to the purchase of a tick-

et. He has the right, in common with the general public, to the use of any and all facilities provided as preliminary to entering into the actual contract of carriage. The rights he may demand for himself he may demand for such parcels as under the law he has the right to have transported by the carrier as baggage. If a prospective passenger carries his trunk on his shoulder, or in his own private dray, intending presently to enter into contractual relations with the carrier, and presents the same to the baggage master, it is the duty of the baggage master to receive it into the baggage room as a parcel to be subsequently checked as baggage proper. Thus presenting a trunk is notice to the carrier that such person intends in a reasonable time to perfect a contract with the carrier whereby the trunk will be checked as baggage for transportation; or, if the prospective passenger sends his trunk by his servant or by a transfer company, the same duty would arise upon the part of the carrier, and the presentation of such parcel would be notice to the carrier that the owner would appear in a reasonable time and demand that the parcel be checked for transportation. It would be but the first step in using the facilities of the carrier to enter into contractual relations with it for the transportation of himself and baggage. The carrier would have the right to prescribe and enforce such rules as would be reasonable, taking into consideration the custom prevailing among the traveling public, as to how long before the departure of trains such parcels could be thus delivered, in order that congestion in the baggage rooms would be prevented, to provide for the identification of such parcels when railroad checks should be subsequently demanded, and for storage charges similar to those prevailing when incoming baggage is not called for in a reasonable time. This being one of the public duties of the carrier arising from the use of property impressed with a public use, it is a privilege which any person desiring to contract with the carrier has the right to enjoy. It follows that the claim-check system, the use of which was granted exclusively to the Cab Company and denied to everybody else, is a palpable violation of a public duty; the vice in the system as practiced being the reception into the baggage room of the trunks of its patrons prior to the appearance of the owners with railroad tickets, and denying this right to all other persons. The foregoing applies with equal force to the space occupied by the Cab Company in the baggage room of the Terminal Company. Instead of receiving the trunks hauled by the Cab Company into the baggage room along with other trunks, one corner of the baggage room is set apart to the Cab Company's exclusive use, and the trunks hauled by it received into this space. The effect is the same. A passenger carrier cannot thus prefer the Cab Company in the discharge of a duty it owes to all alike.

In the Terminal Company Case, *supra*, the majority of the court, if they did not decide that the claim-check system as practiced was illegal, at least broadly intimated that it was so. If the claim-check system as practiced be illegal, it is difficult to perceive how the right of storage, as practiced, would be legal. In the case at bar the suit is brought on behalf of passengers and prospective passengers; on behalf of that portion of the public who do not depend on the favor of the transportation companies, but who may demand as a matter of right equal and impartial treatment. The facilities and conveniences enjoyed by that portion of the public patronizing the Cab Company in receiving, storing, and checking baggage, and denied to others, is an unjust discrimination and a violation of the public duties of the railroad companies, whether practiced directly by them or through their chosen agent, the Terminal Company, whether by means of a claim-check system or renting exclusive space in the baggage room. The means by which the discrimination is brought about is not material. It is the discrimination itself that is obnoxious. A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public. Civ. Code 1895, § 2298.

It is insisted in this case that the carrier has adopted a rule which the agent, the Terminal Company, is bound to obey, to the effect that no parcel shall be received into the baggage room unless the same be accompanied by a railroad ticket; that this rule is adopted for its own safety, as well as for the benefit of the public. It is conceded that a rule is reasonable which provides that no parcel shall be checked with a railroad check for transportation before the presentation of a railroad ticket, but it does not follow, because this regulation is reasonable and is for the protection of the carrier, that a regulation refusing admission into the baggage room of any parcel whatever until the transportation is provided would be a reasonable rule either for the protection of the carrier or for the public interest. From a consideration of the method of checking baggage for transportation at the Terminal Station by that portion of the public not patronizing the Cab Company, it is evident that such a rule is not in the interest of the public. Nor is such a rule necessary for the carrier's protection. The argument is stressed that the public would impose upon the railroad and have trunks and other parcels transported when the owner was not a passenger. This could not arise, because, after the package is received in the baggage room, it cannot be checked for transportation until the railroad ticket is presented. If not checked for transportation, then the Terminal Company can collect storage. No reason has been

suggested which sustains such a rule being reasonable. See 6 Cyc. 670; *Coffee v. L. & N. R. Co.*, 76 Miss. 569, 25 South. 157, 45 L. R. A. 112, 71 Am. St. Rep. 535.

5. The defendants make the point by demurrer that the suit is brought in the name of the Attorney General, and not in the name of the state; that the Attorney General has no authority to maintain the suit in his name. The suit is brought in the following language: "John C. Hart, as Attorney General of the state of Georgia, in its behalf and by virtue of the authority vested by law in said office, and by an executive order made May —, 1906, avers as follows." Paragraph 39 of the petition: "This suit is instituted by virtue of an executive order made by Honorable Joseph M. Terrell, Governor of Georgia, and on the — day of May, 1906, in pursuance of his authority as the chief executive of the state of Georgia, and in pursuance of the authority vested in Hon. John C. Hart, as the Attorney General of the state of Georgia." The executive order referred to is as follows: "After reading the foregoing petition, it is directed that the Attorney General file appropriate proceedings in the proper courts, in the name of the state, to correct the wrongs to the people complained of." It is urged that this is not the suit of the state, but the suit of the Attorney General; that the only suit that could be brought was in the name of the state by the Attorney General. *Atkinson v. Cawley*, 112 Ga. 485, 37 S. E. 715, is relied on as authority for this position. In that case the suit was brought by "W. Y. Atkinson, Governor of the state of Georgia, suing for the use of B. S. Calhoun." The court says that this was an effort to bring a suit on behalf of the state under authority of the Governor. If the petition had been in the name of the state of Georgia by and through W. Y. Atkinson, Governor, there would be no doubt that the state would be a party to the case. The Governor had no authority to sue in his own name as an individual, or in his official capacity as Governor for the use of a private citizen, for the simple reason that no cause of action existed in him as an individual or in his official capacity as Governor, and he has no authority to bring such a suit on behalf of an individual interested in the subject-matter of the suit. The court says: "The words, 'suing for the use of B. S. Calhoun,' which follow the words 'Governor,' etc., indicate that the suit is brought for the benefit of Calhoun. As the nominal plaintiff is not the state, but simply W. Y. Atkinson, who neither as an individual nor as a Governor has any authority to bring the action, B. S. Calhoun is to be treated as the real plaintiff in the case. In no view of the matter can the petition be construed as one brought by the state." We apprehend, however, that, if the suit had been brought by W. Y. Atkinson as Governor who sues for and on behalf of the state, the court would have held that the state was the real

party, and that, on demurrer, the petition could have been amended. So we think in this case. The Attorney General in his official capacity had the undoubted authority to bring the suit. The declaration shows that he claims no personal interest in it. If he had sued in the name of the state by and through John C. Hart, Attorney General, the state undoubtedly would have been a party. The suit of John C. Hart as Attorney General of the state and in its behalf, and by an authority of an executive order, is substantially a suit by the state. In the case of *Dent v. Merriam*, 113 Ga. 83, 38 S. E. 334, the court says: "The strict rules of pleading would have required that this suit be brought by Amy Merriam by her next friend, Tamah Dent, instead of by Tamah Dent as next friend of Amy Merriam. This court, however, has frequently held in exactly similar cases that such an irregularity is immaterial, and will not affect the decision of the case. 'The more regular form of pleading is for the minor to sue by the next friend, but, if the next friend sue as next friend to the minor, it is the same in substance.' *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243; *Van Pelt v. Railroad Co.*, 89 Ga. 706, 15 S. E. 622; *Ellington v. Beaver Dam Co.*, 93 Ga. 55, 19 S. E. 21." In the case of *Van Pelt v. Railroad Co.*, supra, the first headnote is as follows: "Though in suits conducted by a next friend the minor ought regularly to sue by him, yet, if the next friend sue in behalf of the minor, it is the same in substance. The defect is amendable by alleging that the minor sues by next friend." So we hold that the suit as brought is substantially the suit of the state, but that strictly good pleading would require that it should have been in the name of the state by and through John C. Hart as Attorney General. This defect is curable by amendment which the plaintiff can make in the court below.

6. The defendant insists by demurrer that, if any right of action exists under the pleadings and evidence in the case, mandamus and not injunction is the remedy. An injunction can only restrain. It cannot compel a party to perform an act. It may restrain until performance. Civ. Code 1895, § 4922. In the case of *Goodrich v. Georgia Railroad Co.*, 115 Ga. 340, 41 S. E. 659, Mr. Justice Cobb for the court reviews the authorities interpreting the above section of the Code. These principles are deduced therefrom: (a) If the main purpose of the petition is to compel the performance of an act, then, under our Code, injunction cannot be used as a remedy to accomplish this purpose. Under our Code injunction can be used only to restrain. (b) While the court cannot issue a purely mandatory order, the court can grant an injunction, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may be incidentally required to perform some act. The cases of *Georgia Pacific Ry. Co. v. Douglasville*, 75

Ga. 828, *Russell v. Mohr-Well Lumber Co.*, 102 Ga. 563, 29 S. E. 271, *Vaughn v. Yawn*, 103 Ga. 577, 29 S. E. 759, and *Paschal v. Tillman*, 105 Ga. 494, 30 S. E. 870, are cited and distinguished, holding that in each of these cases the order complained of, if carried into effect, would have required the party against whom it was issued to perform some affirmative act which was the main and controlling purpose of the order. In the case at bar, as made by the petition, brought by the state for the benefit of the public, injunction is an appropriate remedy, and the exclusive remedy was not by writ of mandamus. See, in this connection, *Trust Co. v. State*, 109 Ga. 747, 35 S. E. 323, 48 L. R. A. 520.

For reasons stated in the foregoing discussion, the writer is of the opinion that the judge below should have enjoined the defendants from carrying out the contract with the Cab Company, renting to it exclusively space in the baggage room, on the ground that it is an illegal discrimination against the public, and is violative of article 4, § 2, par. 4, of the Constitution. The opinion of the majority being as expressed in the headnotes, the judgment of the court below will be affirmed.

Five Justices concur.

FREEMAN, J., dissents.

FREEMAN, J., designated to preside in place of the CHIEF JUSTICE, whose absence is due to providential cause.

ATKINSON, J. (specially concurring). In my opinion the right of the defendant to rent space in its baggage room to another for the purpose of enabling the tenant to carry on therein the business of storing trunks and other parcels preparatory to checking them as baggage rests upon the same principle as the right of the defendant to grant to another the exclusive use of the "claim-check" system. Concerning that question, my views are fully expressed in the report of the case of *Atlanta Terminal Company v. American Baggage Co.*, 125 Ga. 677, 54 S. E. 71. In the present case there is a slight conflict of evidence as to whether there was not a discrimination in favor of the Atlanta Baggage & Cab Company in the matter of checking trunks as baggage after passenger relations had been established by purchasers of tickets. For example, the evidence offered generally by the defendant tended to show that there was no such discrimination, while the testimony of Mrs. Robertson indicates that, after the purchase of a ticket by one not a patron of said Atlanta Baggage & Cab Company, the purchaser of the ticket was not then afforded an equal opportunity with patrons of the Atlanta Baggage & Cab Company for identifying and checking trunks. It may be that the example cited was illustrative of a general custom of discrimination after the

passenger relation had been established. As to whether it was or not, and, if so, whether in fact the complaint was well founded, presented questions of fact for determination by the chancellor. Aside from these questions, I do not see from the evidence any other question of fact involved in the case. The other questions are purely of law, and are such as to enable me to agree with the majority in the conclusion that the court did not commit error by refusing to grant the injunction.

(126 Ga. 40)

**AMERICUS GROCERY CO. v. RONEY.**

(Supreme Court of Georgia. Aug. 9, 1907.)

**1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH.**

If a merchant employed a traveling salesman for a year at a fixed salary, and during the continuance of the term sought to change the contract by substituting a percentage on sales in lieu of a definite salary, and if, upon refusal of the employé to make the change, the employer declined to proceed with the contract or continue the employment, except upon condition that such change should be accepted, and thereby the salesman was prevented from further performance of the contract, this amounted to a breach of the contract on the part of the employer, which would authorize a recovery by the employé.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 7.]

**2. SAME—EVIDENCE.**

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by J. C. Roney against the Americus Grocery Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shipp & Sheppard, for plaintiff in error. Allen Fort & Sons, for defendant in error.

**LUMPKIN, J.** Roney sued the Americus Grocery Company, claiming that he had been employed for a year at a fixed salary, but had been discharged during the year without lawful cause. He recovered a verdict. The defendant moved for a new trial. It was refused, and the defendant excepted.

If the plaintiff's evidence was true, he was employed for a year at a fixed salary. Before the time had expired, his employer desired to change the contract, so that he should work for a commission, instead of at a certain salary. He was unwilling to do this; and the employer would not allow him to work further under the contract made, unless he would accept a commission in lieu of a salary. He offered to continue work under the original contract, but the employer would not permit this. There was some conflict in the evidence, but two telegrams sent by the defendant to the plaintiff while he was traveling for it quite strongly support his con-

tention. On December 30, 1900, he wrote to the defendant company a letter in which he said: "My contract expires with you on August 15, 1901. I will continue to work on salary until that time." On the next day the defendant telegraphed to him as follows: "None of our employees have any time contracts. The proposition made best can do. Answer whether satisfactory or not." To this he replied by telegram: "My letter of yesterday is my answer to your telegram." The defendant responded: "Our telegram final so far as we are concerned." If an employer has a contract with his employé for a definite time at a fixed salary, he has no legal right during the term to demand of the employé that the latter shall release him from the contract as made, and accept a commission upon goods sold in lieu of a salary agreed upon. If the employé complies with his contract, he has a right to insist that the employer shall do likewise. He is not compelled to accede to a proposed change in it. If the employer declines to proceed with the contract unless the change is made, in spite of the refusal of the employé to make it, this is a breach of a contract on the part of the employer. Such a case is made by the plaintiff's evidence; and, while there was some conflict, the issue was determined by the jury in his favor.

It was contended that, if the plaintiff had accepted employment on a commission, he would have made earnings, and that this would have diminished his damages, if it would not have prevented any from accruing, and that it is the duty of an employé, if he be discharged, to mitigate the damages by earning what he can during the term of the employment. Had he agreed to the change, he would have had no right of action at all, whether he was damaged or not. The law will not put him between two horns of a dilemma by saying to him: "If you agree to accept commissions in lieu of a salary, you have no right of action, because there will be a mutual alteration of the original contract. If you decline to agree to the proposed change, it can be urged against you that you might have earned as much as under your contract, or at least something. In the one event, you cannot recover at all. In the other your recovery must be diminished by what you might have made as a commission." This would be equivalent to saying to the plaintiff that he must give up his right of action entirely, in order to try to prevent damages accruing from the breach of the contract. The law does not impose such a condition upon a contracting party who insists upon his contract. He is not required to yield the whole right in order to diminish the damages in part.

The evidence authorized the charge to which exception was taken, and also the finding of the jury.

Judgment affirmed. All the Justices concur.

(129 Ga. 48)

**WITHAM v. STEWART, Tax Collector.**

(Supreme Court of Georgia. Aug. 10, 1907.)

**1. LICENSES—TAX ON BANK PRESIDENTS—LIABILITY.**

Section 2, par. 2, of the act of the General Assembly, approved December 16, 1902 (Act 1902, p. 20), provides that a "specific tax" of \$10 for each of the fiscal years 1903 and 1904 shall be levied upon the presidents of each of the express, telegraph, steamboat, railroad, street railroad, telephone, electric light, sleeping and palace-car companies, banks, building and loan associations, and gas companies doing business in this state." *Held*, that under the provisions of said act, where it appears that the same person is the president of two or more banks, a tax of \$10 may be collected from such person for each bank of which he is president. It appearing in the present case that the plaintiff in error was the president of several banks doing business in this state, he was liable to be taxed in the amount specified in the above act for each bank of which he was the president.

**2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.**

The tax in question is not repugnant to paragraph 1, § 2, art. 7, of the Constitution of this state; nor is such tax obnoxious to the fourteenth amendment to the federal Constitution, as denying to any person "the equal protection of the laws." *Singer Mfg. Co. v. Wright*, 25 S. E. 249, 97 Ga. 114, 35 L. R. A. 497.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8, 9; vol. 9, Constitutional Law, § 269.]

**3. LICENSES—COLLECTION OF TAX.**

It appearing that the president of the banks, from whom the taxes were sought to be collected, was a resident of Fulton county, it was proper for the tax collector of that county to collect the amount due by the said president as taxes under the provisions of the act above referred to; and the court did not err in refusing to enjoin the collection of the same.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. S. Witham against A. P. Stewart, tax collector. Judgment for plaintiff, and defendant brings error. Affirmed.

Ellis, Wimbish & Ellis, for plaintiff in error. Jno. C. Hart, Atty. Gen., and H. M. Patty, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(129 Ga. 31)

**SPENCE v. SOLOMONS CO. et al.**

(Supreme Court of Georgia. Aug. 8, 1907.)

**RECEIVERS—FUNDS IN RECEIVER'S HANDS—RIGHTS OF CREDITOR OF CLAIMANT—IMPOUNDING FUND.**

Where money is held by a receiver in a court of equity, which by decree is payable to the plaintiff, it is erroneous for the chancellor, upon application of a general creditor of such plaintiff who has no lien by judgment or otherwise, nor any interest in the fund, either legal or equitable, to order the same held by the receiver until such creditor can institute and prosecute a suit for the recovery of a judgment.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; L. J. Hopmayer, Judge pro hac.

Action by J. M. Spence against Perry's Pharmacy. Solomons Company and others intervened. From the judgment, J. M. Spence brings error. Reversed.

J. M. Spence instituted suit against Perry's Pharmacy, a corporation, for the purpose of foreclosing a mortgage in equity. A receiver was appointed. Solomons Company and numerous other persons intervened. Solomons Company intervened specially and sought affirmative relief against Spence, the plaintiff, and alleged the following: "(1) That to the October term, 1905, of this honorable court, there was filed a petition by J. M. Spence against Perry's Pharmacy, a corporation within the jurisdiction of said court, brought for the purpose of foreclosing in equity a certain mortgage executed by said Perry's Pharmacy to said J. M. Spence on or about the 17th day of October, 1904, to secure a note of like date for the sum of \$4,200, due six months after the date thereof. That under said petition this court appointed T. B. Perry receiver of the assets of the defendant mortgagor, who, under the order of this court, sold the assets of said defendant which were covered by said mortgage, realizing therefrom the sum of \$3,100, or other large sum. (2) That there is now in the hands of the receiver in said cause the said sum of money, less any disbursements for expenses which said receiver may have legally paid out under order of this court, which said sum is for disbursement as this court may order in the final decree to be entered herein. (3) That your petitioner is the holder of three certain promissory notes, aggregating the principal sum of \$1,658.95, besides interest and protest fees, which said notes are as follows: One for the sum of \$858.95, dated January 18, 1905, due on June 15, 1905, signed by Perry's Pharmacy and indorsed by B. Perry, T. B. Twitty, and J. M. Spence, and bearing interest from maturity at the rate of 8 per cent. per annum. Said note was protested for nonpayment at the cost of \$1.50, paid by your petitioner. A copy of said note is hereto attached as part hereof, marked 'Exhibit A,' to which reference is hereby made for the particulars thereof. Two of said notes are for the sum, respectively, of \$500 each, dated January 23, 1905, signed by M. V. Robbins and D. V. Thompson, who also sign by their firm names, Thompson & Robbins Drug Company, and bearing interest from January 17, 1905, at the rate of 8 per cent. per annum. Each of said notes was duly protested for nonpayment at a total cost of \$3 paid by your petitioner. Copies of said two notes are hereto attached as part hereof, marked 'Exhibit B,' to which reference is made for the particulars thereof. (4) Your petitioner further shows that by reason of the liability to it by J. M. Spence, in virtue of his indorsement notes and his failure to pay same, it has an interest in the fund now in the custody, through its officer and receiver, to the

extent of the amounts due upon said notes, to wit, the principal, interest, and protest fees. (5) Your petitioner further shows that under the laws of this state it is not permitted to garnish the receiver, and avers that, unless allowed to intervene in this cause on its own behalf for the purpose of the fund in court, should the said plaintiff recover in his action subjecting to the payment of its debt against the said J. M. Spence, to wit, the amount of the principal, interest, and protest fees of said three notes, by reason of his liability thereon as indorser, it apprehends that said amounts or some part thereof will be lost to it, for the reason that, so far as it is informed and believes, the said J. M. Spence has no tangible property out of which your petitioner could collect the amounts due to it by the said J. M. Spence, as aforesaid, by the ordinary process of suit, judgment, and execution. (6) That by virtue of his said indorsement on the notes above set forth the said J. M. Spence is indebted to your petitioner in the principal sum of \$1,658.95, the further sum of \$4.50, protest fees and interest on said principal sum from March 17, 1905, that being the average interest date, at the rate of 8 per cent. per annum." The intervention originally contained a prayer for judgment against Spence, but this prayer by amendment was stricken, and in lieu thereof the following was substituted: "Intervenors pray that in the event that it shall be decreed by the court that the mortgage sought to be foreclosed by J. M. Spence is a valid and binding instrument, and that the said J. M. Spence shall recover of the defendant, Perry's Pharmacy, thereon, that then and in this event that the receiver of this honorable court be decreed to hold up and retain in his custody out of any moneys in his hands to which the said mortgagee may be entitled, or the same may be otherwise impounded by this honorable court or a sufficiency of said funds to pay off in full the notes due to this intervenor as shown in their original intervention, as same may be ascertained and fixed in an action at law between this intervenor and the said J. M. Spence." Spence did not file an answer to the intervention, but demurred, among others, upon the ground that the intervention "does not show any right, either in law or in equity, why the relief prayed for should be granted." The court overruled the demurrer, and, after hearing evidence, passed the following order: "After hearing the evidence in said intervention and after argument of counsel, it being made to appear to the court from the sworn allegations contained in the petition and intervention of Solomons Company, filed in this court in the cause above stated, and from the evidence introduced, that the plaintiff and mortgagee, J. M. Spence, is indebted to Solomons Company in the sum of (principal) one thousand six hundred and fifty-eight dollars and ninety-five cents, besides protest fees and interest as indorser on three certain nego-

table promissory notes, and it appearing that said indorser is insolvent, and that, therefore, said Solomons Company will be unable to compel payment of said debt by said indorser, and it further appearing to the court that there is now in the hands of T. B. Perry, as receiver of this court in said cause, a sum of money decreed to be paid by said receiver to the said J. M. Spence, on the mortgage foreclosure as above stated, upon the prayers of the petition and intervention of said Solomons Company that a sufficient sum in the hands of said receiver be withheld by said court and impounded to await the judgment that may be hereafter rendered between the intervenors and said J. M. Spence in an action against said J. M. Spence by said intervenors, until the further order of the court; and it further appearing to the court, sitting as a court of equity, that said intervenors are without an adequate remedy in a court of law to reach said funds in the hands of the receiver of this court, by garnishment or otherwise, so as to subject same to any judgment that may hereafter obtain against the said J. M. Spence in said suit to be hereafter brought, it is ordered and decreed by the court that the receiver of this court in the above-stated case, T. B. Perry, shall retain from the said funds in his hands belonging to and decreed to be paid by him to said J. M. Spence the sum of nineteen hundred dollars, to await the further order of this court in the premises, provided that this judgment and decree shall have effect only if the said intervenors, Solomons Company, within thirty days from date, file with the clerk of the superior court of Mitchell county a bond with good and solvent security to be approved by the clerk in the sum of one thousand dollars, payable to J. M. Spence, and conditioned to pay said Spence any damages and costs he may sustain by reason of the foregoing money being held up, in the event of failure of said intervenor to recover against said J. M. Spence in the suit aforesaid to be hereinafter instituted and brought within 60 days from date." Spence excepted, assigning error on the judgment overruling the demurrer, and upon the impounding of the money.

M. E. Cox and A. G. Powell, for plaintiff in error. Jacob Gazan, Theo. Titus, D. F. Crosland, R. J. Bacon, Jr., and B. B. Lane, for defendants in error.

ATKINSON, J. Solomons Company found the money of Spence in the hands of a receiver in the court of equity, and sought to impound it. To accomplish that object, averring that garnishment was not the remedy, the aid of equity and the application of equitable remedies were sought. The relief prayed is not against the defendant whom Spence was suing, but against Spence. It is independent and in no way germane to the relief which Spence was seeking against Perry's Pharmacy. It was unnecessary to

call the proceeding an intervention. It is a proper case. Solomons Company could, of course, by equitable remedy, impound the money found in the hands of a receiver or in the hands of the defendant, or in the hands of any private individual. See, in this connection, *Ffield v. Jones*, 11 Ga. 418; *Baker v. Gladden*, 72 Ga. 409. But in the case at bar, and in any other case where resort is had to equitable remedies, it is incumbent upon the intervenor to allege such facts as under equitable principles would have authorized a court of equity to grant the relief. The relief sought is in its nature not less harsh than the writ of injunction or the appointment of a receiver. It is an attempt to limit the power of control by Spence of money which rightfully belonged to him and to which he was then entitled to possession. Does the plaintiff allege such facts as in equity would justify such a harsh remedy? In an ordinary garnishment case, it would be required to institute an attachment suit, or a common-law suit seeking a lien, and in either case they would be required to execute an approved statutory bond in double the amount of the debt claimed to be due before they could impound the fund. Solomons Company has not done even this. Yet it is asking the interposition of an equitable remedy. Equity sometimes requires more, but never less, than the law exacts for the grant of particular relief.

It sufficiently appears from the allegations of their intervention that at best the intervenor is no more than a general creditor of Spence without any lien, either by judgment or otherwise, and without interest, legal or equitable, in the fund sought to be impounded. Without lien or interest, either legal or equitable, we can see no theory, under the allegations of the intervention, by which, under equitable principles, it could impound the money. See, in this connection, *Peyton v. Lamar*, 42 Ga. 131, and citations; *Scott v. Jones*, 74 Ga. 762 (4); *Gulmartin v. Railway Co.*, 101 Ga. 569, 29 S. E. 189, and citations; *McKenzie v. Thomas*, 118 Ga. 728, 45 S. E. 610 (6), and citations; *Tichenor v. Williams Pavement Co.*, 116 Ga. 308, 45 S. E. 505.

Judgment reversed. All the Justices concur.

(128 Ga. 312)

#### TATUM v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia. Aug. 8, 1907.)

#### RAILROADS—ACTIONS AGAINST—VENUE.

Where it does not appear either from an admission in the pleadings or from the evidence submitted in behalf of the plaintiff on the trial of an action against a railroad company for the recovery of damages alleged to have been the result of a personal injury that the tort was committed in the county where the suit was brought, or that the suit was brought in the county where the principal office of the defendant was located, and that there was no agent of the railroad company in the county where the tort was committed, a judgment of nonsuit will

not be disturbed: *Atlantic Coast Line R. Co. v. Du Pont*, 50 S. E. 103, 122 Ga. 251.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 48-50.]

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Action by P. S. Tatum against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Williams, for plaintiff in error. Tom Eason, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(129 Ga. 44)

#### ATLANTIC & B. RY. CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. Aug. 10, 1907.)

#### INJUNCTION—RAILROAD SPUR TRACKS—CONTRACTS—CONSTRUCTION.

Under the facts and pleadings in the record, the court did not err in refusing the injunction.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by the Atlantic & Birmingham Railway Company against the Atlantic Coast Line Railroad Company. From an order refusing an injunction, plaintiff brings error. Affirmed.

The Atlantic & Birmingham Railway Company filed a petition for injunction against the Atlantic Coast Line Railroad Company, seeking to restrain the defendant from constructing and maintaining a spur track leading from the defendant's main line of track on A street in the city of Brunswick to the planing mill of Noble & Parker, which spur track would cross plaintiff's main line on A street. It appears from the petition that the defendant's track had been laid and was in operation along A street at the time the petitioner acquired the right to lay its track parallel to defendant's line on the east side of said street; and, in order to construct plaintiff's track along A street, it was necessary to remove defendant's line to the westward of its then existing location. At and prior to this time the defendant was maintaining a spur track extending from its main line eastward to the premises of the Standard Oil Company, and another spur track leading from its main line eastward to the mill of Noble & Parker. On October 21, 1905, plaintiff and defendant entered into a contract, the material portions of which are as follows: "The Birmingham Co. [plaintiff], desiring to extend its main line of track \* \* \* along the east side of A street, \* \* \* has made application unto the Atlantic Co. [defendant] to make such changes in the location of the tracks of the Atlantic Co. \* \* \* by moving the same westward, as will enable the

Birmingham Co. to lay its tracks along A street without encroaching upon private property, and the Birmingham Co. has requested the Atlantic Co. to waive its objections to the location of its [the Birmingham Company's] tracks, \* \* \* offering as a consideration unto the Atlantic Co., for the change of its tracks it will have to make between L and C streets on A street, that it [the Birmingham Company] will bear all expenses occasioned by such change of tracks of the Atlantic Co. \* \* \* and the Birmingham Co. further offering the Atlantic Co., as a consideration for the Atlantic Co. not pressing its objections to the extension, \* \* \* to save and hold harmless, as hereinafter provided, the Atlantic Co. from any injury which may arise unto the Union Passenger Station property of the Atlantic Co. Now, therefore, in consideration of the premises and of the covenants hereinafter contained on behalf of the Birmingham Co. running unto the Atlantic Co., the first and second parties have covenanted and agreed to and with each other as follows:" The first stipulation provides that the Birmingham Company shall "so drain F street in the vicinity of the Union Passenger Station property as that the storm and other water, which by the change of grade occasioned by the construction of the proposed tracks of the Birmingham Co., would otherwise flow upon said property, shall be carried off, \* \* \* so as not to drain into or accumulate upon the said Union Passenger Station property." The second stipulation provides that the Birmingham Company shall bear the expense of removing the tracks of the Atlantic Company to the west side of A street. The third and fourth provisions of the contract are as follows: "It is also understood and agreed that the second party shall construct, at the expense of the first party, a safe and proper rigid crossing over and across the side track of the second party leading from its proposed main line on A street to the property of the Standard Oil Co., so that the second party shall have hereafter, as now, permanent sidetrack connection into the property of the Standard Oil Co., for the benefit of said second party. It is further agreed that the map, or blueprint, hereto attached, identified by the signature of the presidents of the respective parties to this contract, delineates the correct profile, location, and character of work to be done, and shall, where not otherwise herein specifically provided, govern in the doing of the things by the parties hereto agreed to be done and performed." The blueprint above referred to does not show the location of the Noble & Parker planing mill, nor the spur track leading thereto. In its answer the defendant alleged that it had maintained a spur track connecting its main line with the Noble & Parker planing mill for four years prior to the execution of the above contract with the plaintiff, and that the plaintiff in the construction of its own line removed defendant's

said spur track without defendant's knowledge or consent, "and since then defendant has been unable to deliver to and receive freight from said planing mill, \* \* \* and said spur track cannot be replaced without laying same across plaintiff's track, as defendant has the right to do and was undertaking to do when the restraining order was granted in this cause." At the hearing the court passed an order denying the injunction prayed for, and dissolving the temporary restraining order previously granted. The plaintiff excepted.

Croratt & Whitfield and Rosser & Brandon, for plaintiff in error. Bennet & Conyers, for defendant in error.

BECK, J. (after stating the facts). The contention of the plaintiff is that the contract shows the unqualified intention of the parties to establish the new condition, and nothing else, upon a street, prescribed by the contract and by the blueprint attached to it, as a part of it, that they show that the Standard Oil crossing and side track were to be retained as a part of the new condition, and show and provide for no other crossing or side track. If another existed prior to the making of the contract and was intended to be retained under the new condition, then the contract would have so provided; there being no contention that such a provision for the Noble & Parker crossing and side track was omitted from the contract by fraud, accident, or mistake, or at all. And it is further contended that the intention of the parties to the contract, as appears by the recitals therein, was to provide for the relocation of the main line track of the defendant upon A street by removing it to a point westward of its then location, so as to permit the entry upon that street of another railroad, namely, that of the plaintiff, and the laying of its tracks and the operation of its trains along the eastern side of said street, and one thing more, to wit, the maintenance, under the changed conditions, of the connecting line then existing between the track of the defendant and the premises of the Standard Oil Company so far as the contract speaks the intention of the parties.

The weakness of the argument submitted to sustain the contentions of the plaintiff consists in the fact that the contract does not purport to deal generally with the subject of side or spur tracks leading into or connecting with the main line of the defendant company. It deals only with the side tracks or side track, the crossing of which over the line of plaintiff's road should be constructed at the expense of the latter. Had the contract provided that the defendants should have a spur track leading to its main line from the Standard Oil plant, generally and without reference to the question as to the party upon whom the cost would fall of constructing the crossing at the point where



such spur track intersected the plaintiff's line, then the contract would have dealt with a class in the sense that would have rendered applicable the rule invoked by the plaintiffs, that "the express mention of one act, contention, stipulation, class or number, person or place implies the exclusion of another or others not mentioned. The maxim restrains what is implied by what is expressed; what is general, by what is particular and specific." Except as to the crossing of plaintiff's road by the spur track, when the expense of constructing and maintaining a rigid crossing was, by the terms of the contract, imposed upon the plaintiff, the right of the defendant company to have and maintain other spur tracks then in existence across A street, as they existed at the time the contract was signed, is not controlled nor affected by it. The court could well have decided, under the pleadings and facts in this record, that the undertaking, as set forth in this contract, upon the part of the defendant, was gratuitous, in which case it should not, by the application of the highly technical rule of construction, have imported into the contract terms which are not expressly written there, and which are not necessarily implied from what is found in the face of that instrument. And apparently, from the pleadings and the evidence, the defendant here, as a matter of favor, gratuitously consented to a change in the location of its road so that plaintiff's track might be laid along the street in which defendant's track was already located. And, unless constrained thereto by the terms of the contract bestowing this apparent gratuity, we will not read into the contract terms by which there will be imposed upon the party bestowing the favor the hardship of losing the right to maintain spur tracks to its main line which has been in existence and use for years.

Judgment affirmed. All the Justices concur.

(128 Ga. 301)

G. S. BAXTER & CO. v. WETHERINGTON.

(Supreme Court of Georgia. Aug. 8, 1907.)

1. ADVERSE POSSESSION—EXTENT.

The actual adverse possession of a part of a tract of land by a person having a recorded deed will be construed to extend to all the land embraced within the boundaries of the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 547.]

2. SAME.

The proof in this case was sufficient to show the prescriber's possession was so open and notorious as to put the true owner on notice of his intention to assert ownership to the whole tract.

(Syllabus by the Court.)

Error from Superior Court, Echols County; R. G. Mitchell, Judge.

Action by Joseph Wetherington against G. S. Baxter & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

Toomer & Reynolds, for plaintiff in error. R. G. Tison, Wilcox & Patterson, and Crawford & Wilcox, for defendant in error.

EVANS, J. The action was trespass to recover damages for cutting timber on lot No. 462 in the thirteenth district of originally Appling, now Echols, county. The plaintiff relied upon a prescriptive title to prove his ownership of the land. The sole question presented by the record is whether, under the evidence, the plaintiff established a good prescriptive title. The abstract attached to the petition set out a grant from the state to H. Torrence, and mesne conveyances from the grantee to the plaintiff. The last conveyance was from G. M. English to the plaintiff, dated February 6, 1883, and recorded June 22, 1887. It was agreed that the land was originally granted to H. Torrence. The plaintiff tendered in evidence, and the court admitted as color of title only, the deeds referred to in the plaintiff's abstract, purporting to convey the premises in question from Torrence to the plaintiff. It was shown for the plaintiff that in 1883 G. M. English conveyed lot No. 462 for the consideration of \$30. At the same time he sold other land; the consideration being \$900. The latter transaction included two lots, Nos. 501 and 502, which adjoined lot No. 462. At the time of the sale English resided on lot No. 501, and cultivated a farm of 118 acres, about 3 or 4 acres of which were in the southwest corner of lot No. 462. This farm had been cultivated continuously for 15 years prior to 1883, and since that time has been in continuous cultivation by the plaintiff, who went into possession of the lot purchased from English. There were no houses on lot No. 462 at the time of the purchase from English, except some corncribs, which were either near or on the line of lot No. 462. All of the plaintiff's farm cultivated by him was situated on lots Nos. 501 and 502, except a small triangular portion situated in the southwest corner of lot No. 462. The plaintiff when he bought lot No. 462 believed he was getting a genuine title. He placed his deed on record, returned it for taxes, and has used from the entire lot 462 needful timber for plantation purposes. About 10 years before the institution of the suit, the plaintiff leased the turpentine privileges, and the lessees boxed and worked the timber on the entire tract for three successive years; no objection being raised by any one as to his right to have the timber worked for turpentine. Since 1883 the plaintiff has continuously cultivated the three or four acres of land which were situated in the southwest corner of lot 462. He purchased lot 462 on the same day he purchased lots 501 and 502, but took a separate deed to 462. There is a public schoolhouse on lot 462, about 100 or 200 yards from the lot line, which was built by the plaintiff with the help of his neighbors.

This school is under the control of a board of trustees.

The possession of an occupant of land under a deed extends to the boundaries defined in his deed, if the possession of a part of the land is of such a character as to put the world on notice that he is adversely claiming the part of which he is in actual possession. It is not the policy of the law to permit the true owner of the land to be dispossessed by equivocal possession. But, if the occupant's possession be of such a character as to announce to the world and to the true owner his assertion of ownership, and that possession is under a duly recorded deed, it will be construed to extend to all the contiguous property embraced therein, and after seven years will give a title by prescription. Civ. Code 1895, §§ 3686, 3687, 3689. The plaintiff's cultivation, for 18 years after his purchase, of a triangular portion of lot 462 in the southwest corner, when aided by his leasing the timber on the entire tract during the eighth, ninth, and tenth years after his purchase, and the boxing and working of the timber for turpentine, were such positive acts that no one could misunderstand his assertion of ownership of the entire lot No. 462. At all events, the character of the plaintiff's possession as developed by proof was sufficient to authorize the jury to find that it was so open, notorious, and adverse as to put the true owner on notice of the intention of the occupant to claim the entire lot. In *Ferguson v. Bagley*, 95 Ga. 516, 20 S. E. 241, it was said that "the rule of the Code, \* \* \* that actual possession of a part of a tract of land by one having paper title to the whole extends by construction over the whole tract, is satisfied where a bona fide purchaser for value, after taking a conveyance, incloses even as small a portion as 1 acre of a lot containing 400 acres, adds to it half an acre in the following year, and in that year cultivates the whole inclosure, then, in subsequent years, builds upon the tract and otherwise improves it, maintaining his possession openly and notoriously under a claim of right until the full term of seven years has expired from the date of completing his first inclosure." The character of the plaintiff's possession in the case now before this court differs essentially from that involved in the cases of *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712, and *Carrol v. Gillion*, 33 Ga. 539. In the *Royall* Case the possession was of an acre and a quarter of land on the adjoining lot, used sometimes as a cow pen and sometimes for cultivation. The prescriber also cut logs for a house from this land. The court held that this possession was so clandestine that the true owner was not put on notice that the possessor was intending an assertion of the title to the entire lot. In the *Carrol* Case the possession relied on for prescription consisted of a narrow strip of land 15 feet in width,

extending half across a lot which he had cultivated for a number of years as a part of a plantation lying mainly on an adjoining lot. There were no buildings on the land; neither was there any assertion of possession beyond the narrow strip which was cultivated along with his other lands. This kind of possession was of such an equivocal nature that the true owner might naturally infer that there was no intention to cross his line and cultivate his land. In the case in hand, not only was the actual possession of the triangular portion of three or four acres for 18 years, but soon after the plaintiff purchased he, through a lessee, boxed the timber over the whole lot for turpentine purposes. For more than seven years after this occurrence the plaintiff's possession was not disturbed. Surely the cutting and boxing of the trees for turpentine over the entire tract would be notice that the plaintiff's possession of the small area in actual cultivation was not under the belief that it was not included in lot No. 462, but, on the contrary, that such possession was an assertion of claim of ownership to the whole of lot 462. The jury found that the plaintiff had a good prescriptive title, based upon seven years' possession under color. The trial court refused to disturb the verdict, and we think the evidence is sufficient to sustain the jury's finding.

Judgment affirmed. All the Justices concur.

(128 Ga. 819)

#### BROCKHAN v. HIRSCH et al.

(Supreme Court of Georgia. Aug. 9, 1907.)

##### TRIAL—DIRECTING VERDICT.

There being no conflict in the evidence on the material and controlling issues in the case and that introduced, with all reasonable deductions or inferences therefrom, demanding a verdict for the defendant, the court did not err in directing the jury to so find. Civ. Code 1895, § 5331.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 382, 383.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by A. D. Brockhan against Henry Hirsch and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff, Brockhan, filed a bill in Fulton superior court against Hirsch and Nelms, sheriff, seeking to set aside the sale of certain lands made by said sheriff under executions in favor of said Hirsch; the lands being purchased by the last-named defendant. The material allegations of plaintiff's petition are as follows: Petitioner executed to M. & J. Hirsch a mortgage on certain described lands, consisting of a tract containing 91.6 acres in the Fourteenth district of Fulton county, and also an undivided half interest in a lot in the city of Atlanta, front-

ing 92 feet on Ivy street. Said mortgage was afterwards transferred to defendant Hirsch, and foreclosed by him on all of said lands September 25, 1899, for \$7,225.40, principal and interest. On November, 1899, a certain execution in favor of one Koch was levied on the said lands in the Fourteenth district of Fulton county, which had been previously mortgaged to Hirsch, and also on a lot fronting on Ivy street, not included in the Hirsch mortgage. The last-mentioned execution in favor of Koch was thereafter transferred to Hirsch, and certain tax executions, amounting to about \$1,780, against the said Ivy street lot, which had been levied upon by the said Koch, were also transferred to defendant Hirsch. In December, 1900, the Ivy street lot was sold by Hirsch under the Koch *fi. fa.*, and purchased by said Hirsch, for \$3,800, a part of which sum was applied to the payment of said tax executions against said land, and not credited on the said *fi. fa.*, which petitioner alleged was a wrongful application of that part of the funds arising from the sale of the lands. In March, 1901, the other lot fronting 92 feet on Ivy street was sold under the Koch *fi. fa.*, and bought by Hirsch for the sum of \$7,200. It is charged in the petition that, at the time the last-mentioned lot on Ivy street was being sold by the sheriff, "there was a large crowd of about 100 persons assembled in front of the courthouse and around 4 other auctioneers who were conducting auction sales there, and making a great noise and uproar," and "petitioner further shows that after said sheriff had read the advertisement for the sale of your petitioner's said property, and before bidding began the attorney for said Hirsch spoke up and said in a loud, commanding voice: 'Give notice that whoever buys this property must pay for it before 2 o'clock, or it will be resold.' \* \* \* And said sheriff gave said notice." And petitioner charges that this notice was given for the purpose of preventing bidding and to depress the sale, and that it did prevent bidding and depress the sale, and that "on account of said noise and uproar, and the unwarrantable interference of said Hirsch's attorney, the said Hirsch was enabled to buy petitioner's land \* \* \* for the low price of \$7,200, which was less than half its value." Substantially the same complaint is made in regard to noise and confusion which prevailed at the time the 91.6 acres in the Fourteenth district was exposed for sale; and petitioner contends that said noise and confusion depressed the bidding and caused the land to bring less than its true value. She further complains that the Koch *fi. fa.* was levied upon the 91.6 acres in the Fourteenth district, and also upon the two lots fronting on Ivy street, and that, although only one of the Ivy street lots was sold under said *fi. fa.*, the sheriff made an entry thereon, reciting that "the property described in the attached levy" was sold, and petitioner alleges that

this entry and record, the same being recorded in the book of deeds in the clerk's office, "was a great wrong to her, \* \* \* because it prevented bidders from attending the sales and prevented bidding" when the other lots on Ivy street and the land in the Fourteenth district were offered for sale. The defendants denied that any fraud had been practiced upon the petitioner in the manner of conducting said sales, and alleged that she was present during the sale of her property, and made no request of the sheriff to put a stop to the noise and disorder, or to suspend the sale until quiet was restored, that she consented to the application of part of the proceeds of the first sale to the payment of the tax *fi. fas.*, and was not damaged by the erroneous entry of the sheriff on the execution above referred to. At the conclusion of the testimony, the court directed a verdict in favor of the defendants, and the plaintiff excepted.

L. R. Ray, for plaintiff in error. W. S. Thomson and Candler, Thomson & Hirsch, for defendants in error.

BECK, J. (after stating the facts as above). On the controlling issues of the case, there was no material conflict in the evidence, and that submitted would have authorized no other verdict than the one which the trial judge directed in favor of the defendant.

Complaint is made of the appropriation of part of the proceeds of the first sale to the payment of tax *fi. fas.*, which had been issued against the plaintiff, and which had been transferred to Hirsch upon his payment of the amount due upon them. It may be true that, as a strict matter of law, the holder of the tax *fi. fas.* might not have a right to claim any part of the funds produced by this sale, and that the land would not have been freed from the lien of those tax *fi. fas.*, but, conceding this, the plaintiff in error can derive no advantage from it in this case, for it is affirmatively shown by uncontroverted testimony that this application of the proceeds of the sale referred to was made with the plaintiff's consent. Mr. Hopkins, who made the agreement with the defendant's counsel for this application of such parts of the proceeds as might be necessary to pay the tax *fi. fas.*, testified to the fact of the agreement, and that in this matter he was representing Miss Brockhan, and the truth of this testimony is nowhere denied. On the contrary, it was corroborated by a distinct admission in one paragraph of plaintiff's petition as originally filed. This paragraph was stricken by amendment, but was introduced in evidence by defendant, and is in the following language: "Your petitioner, through her attorney at law, in a spirit of liberality toward said Henry Hirsch, seeing he was determined to so apply said money, allowed \$1,780.55 of said purchase money to be applied to the payment of said tax executions."

Touching the second ground of alleged fraud relating to the erroneous entry by the sheriff, that the entire property described in the levy had been sold, when, in fact, only one piece had been sold, it might be said that there is nothing in the evidence to suggest that this was done with fraudulent intent, and the entire evidence upon this subject strongly negatives the existence of such an intent. And, besides this, there is no testimony coming from any witness to show that the slightest harm resulted to Miss Brockhan from the making of this entry, as it does not appear that any prospective purchaser or any one else saw or was influenced by this erroneous entry.

The third ground upon which the charge of fraud is predicated relates to the announcement, at the sale of the property fronting 92 feet on Ivy street, that a sale would be made at 2 o'clock if the bids were not paid. This ground is without merit, because there was nothing in the announcement or conduct of the sheriff which was illegal, as he had a right under the law to give notice of a resale in case of a failure of the bidders to pay the amount of the bid by a reasonable hour on the day of the sale. Civ. Code 1895, § 5466; *Suttles v. Sewell*, 109 Ga. 707, 35 S. E. 224. It is not insisted that the time fixed was in any way unreasonable; and we cannot see that the fact of this announcement having been made at the suggestion of counsel for Hirsch could have had the effect of making any act illegal if otherwise unexceptionable, unless it was made to appear that some harm resulted to the party whose property was being offered for sale, and no testimony was introduced to show that harm did result or could have resulted.

The next ground of fraud is the alleged inadequacy of the price for which the property therein referred to was sold, and the noise and confusion existing in front of the courthouse at the time of the sale. Here, again, there is a total lack of evidence which would have authorized the jury upon this issue to have made a finding contrary to that directed by the court. That there was considerable noise and confusion, and probably more than should have been tolerated by the sheriff, appears to be shown by the testimony in the record. But whether or not this had an injurious effect upon the sale is purely speculative. Besides, the complainant in this case was present at the sale, and made no objection to proceeding with the same at that time. Had she made a request of the sheriff to restore order and quiet, or had she made objection to the sale proceeding under the surroundings as they existed at that time, and then in case the sheriff had failed either to take steps to put a stop to the disorder and confusion prevailing, or to suspend the sale until the noise and confusion had ceased, she might have had good grounds for objecting to the consummation of the sale; and,

if her request and objection had been disregarded, there might have been valid grounds for setting aside the sale; at least a question would have been raised, under the pleadings setting up those facts, for determination by a jury, as to whether or not she had been harmed. But, in order to take advantage of those grounds, she should have acted promptly. Having failed to act in limine, and waited until this late day, she could not prevail in this action upon this ground without introducing evidence showing that she was harmed by the sale having taken place under the circumstances narrated in her petition.

No material error appearing to have been committed by the trial judge in the conduct of the case, the judgment directing a verdict is affirmed. All the Justices concur.

(128 Ga. 814)

### SOUTHERN RY. CO. v. BROUGHTON.

(Supreme Court of Georgia. Aug. 8, 1907.)

#### 1. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

Where in a suit based upon an alleged tort, resulting in personal injuries to the plaintiff, damages are claimed for lost time, expenses for medical and surgical treatment, permanent diminution in earning capacity caused by the physical injuries received, and mental and physical pain and suffering caused by such injuries, it is erroneous to charge the jury the provisions of Civ. Code 1895, § 3907, relative to suits for torts wherein the entire injury alleged is to the peace, happiness, or feelings of the plaintiff.

#### 2. TRIAL—INSTRUCTIONS.

When there is no evidence upon which a recovery for a particular element of alleged damages could lawfully be based, the judge should not submit to the jury the question of the plaintiff's right to recover for such element of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

(Syllabus by the Court.)

Error from Superior Court, Telfair County: J. H. Martin, Judge.

Action by M. P. Broughton against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. Eschol Graham and H. D. D. Twiggs, for defendant in error.

FISH, C. J. Missouri P. Broughton sued the Southern Railway Company for damages for alleged personal injuries claimed to have been sustained by falling, at night, in the dark, over the tongue of a truck on the platform of defendant's depot, where she had gone to purchase a ticket. She recovered a verdict for \$3,000, and the case is in this court for review, on exceptions to the overruling of defendant's motion for a new trial.

1. The damages claimed by plaintiff were for lost time, mental and physical pain, expenses for medical attention, and punitive damages. In instructing the jury the court

read from Civ. Code 1895, § 3907, as follows: "In some torts the entire injury is to the peace, happiness or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." Error was assigned in the motion for a new trial on this charge. Clearly the exception was well taken, as the exact point has been several times ruled by this court in accordance with this assignment of error. In *Atlantic & Birmingham Railway Company v. Bowen*, 125 Ga. 460, 54 S. E. 105, it was held: "In an action against a railroad company, where the plaintiff sues for the value of lost time, physical pain and suffering, physician's bill, permanent physical impairment, and the consequently diminished capacity to labor, alleged to be the result of personal injuries sustained in consequence of the negligence of the defendant company and its employes, it is error to give in charge to the jury the following provisions of Civ. Code 1895, § 3907: 'In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors.'" A similar ruling was made in *Central of Georgia Railway Co. v. Almand*, 116 Ga. 780, 43 S. E. 67, where this court said that the provisions of the Code section read by the court to the jury in the case now in hand have reference only to actions where the entire injury alleged is to the peace, happiness, and feelings of the plaintiff, as the law prescribes a more definite measure for determining the amount recoverable on account of lost time and expenses. A number of decisions of this court were there cited in support of the ruling that, in cases similar to the one at bar, evidence of the worldly circumstances of the parties was inadmissible, and it was therefore erroneous to instruct the jury that they should be considered by them. Moreover, as was said in *Bowen's Case*, *supra*, punitive damages were not recoverable in the case at hand, for the reason that there were no circumstances of aggravation either in the act or the intention. In the judgment overruling the motion for a new trial in the present case, the trial judge said: "In view of the fact that plaintiff's counsel expressly stated to the jury during the trial of the case and in their arguments that they did not ask for vindictive or punitive damages, and the court, after giving this abstract proposition of law, properly and specifically instructed the jury in what particulars they should find only the actual damages sustained, and confined the application of the rule to damages resulting from pain and suffering and the like, and that while it may have been erroneous to have made this charge, yet, in the light of the entire charge and statements of plaintiff's counsel to the

jury, I am of opinion that it could have done the defendant no harm." We have very carefully studied the entire charge of his honor as it appears in the record, and we cannot agree with him that he "properly and specifically instructed the jury in what particulars they should find only the actual damages sustained, and confine the application of the rule to damages resulting from pain and suffering and the like." We find nothing in the charge which can be construed into an instruction that the rule given by the court to the jury, to the effect that the measurement of damages was the enlightened conscience of impartial jurors, is limited to the fixing of the amount of damages for pain and suffering. The fact that plaintiff's counsel stated, in their arguments to the jury, that they did not ask for vindictive or punitive damages, instead of rendering the charge under discussion harmless, was an additional reason why the court should not have given it. The jury might well have reasoned that although the plaintiff was not asking for vindictive or punitive damages, yet as the judge, who knew this as well as they did, had given them in charge the rule applicable to a case in which the measure of damages is solely the enlightened consciences of impartial jurors, it must be applicable to the case which they were trying and to the damages which were claimed by the plaintiff therein. Surely this court cannot assume that the jury, in the absence of instructions to that effect, understood that the rule for measuring damages by their enlightened consciences applied solely to such damages as they might find for the pain and suffering caused the plaintiff by the alleged injuries. The charge might have been especially harmful in the present case, in view of the fact that the plaintiff sought to recover, as damages, medical and surgical expenses incurred by her in consequence of her alleged injuries, and yet, as we will show in the next division of the opinion, failed to prove, even approximately, the amount of such expenses. In the present case the erroneous charge was not cured and its probable, or at least possible, harmful effect obviated by other specific instructions, whereby the jury were given proper and accurate rules for the different kind of damages for which the action was brought, as was true in *Keating's Case*, 99 Ga. 308, 25 S. E. 669, and *Goodson's Case*, 118 Ga. 833, 45 S. E. 680.

2. Another exception was to the instructions of the court as to plaintiff's right to recover reasonable expenses for medical attention, if the jury should find in her favor; the assignment of error being that there was no evidence to authorize a charge on this subject. We think this assignment well taken. It was utterly impossible for the jury, from the testimony, to even form an approximately accurate estimate of the amount of expense which the plaintiff had incurred for medical and surgical attention and treat-

ment rendered necessary in consequence of the injuries which she had received in falling over the truck on the platform of defendant's depot. This was a matter which, from its nature, was capable of accurate proof, and yet the plaintiff only gave to the jury a rough estimate, or approximation, of the amount which she had expended for all the medical and surgical treatment which she had received after she was injured in the way alleged in her petition, admitting at the same time that a part of this amount was for treatment of ailments not caused by her fall over the truck, and not even attempting to separate the amount she paid for the treatment of such ailments from the amount which she paid for medical and surgical treatment caused by the injuries which she alleged were the result of defendant's negligence. According to her own testimony, she had been treated, at different times and places, by several physicians and surgeons. Upon the subject of the amount of expense which she thus incurred, she testified: "I have not kept an accurate account of my physicians' and surgeons' bills for my treatment. It has been between \$600 and \$700. I can swear positively \$600. \* \* \* I do not know that I could correctly state the amount I paid to each physician. I only based my estimate on a bank account that I used solely for medical attention. It is exhausted." She further testified, in reference to treatment at a sanitarium in Savannah, where Dr. White, assisted by other surgeons, performed surgical operations upon her, the principal one being for an injury to her shoulder, caused, as she claimed, by her fall over the truck, as follows: "They treated me for some other things as well. I was treated for some other minor troubles. The main trouble dated back to the birth of my baby. For two years it had not given me any trouble to amount to anything, but Dr. White said he thought best to attend to it. There was some operation besides that upon my arm. \* \* \* They did not make any itemized statement [of their bill for services]. I do not suppose that they would treat this other ailment for nothing. In stating what I paid for physicians' bills I meant for all purposes. In my family I have had very little treatment except for my treatment since that time. I do not know what I did with the bills; sometimes I taken a receipt and sometimes I did not. \* \* \* As to why I cannot remember how much I paid my physicians for treatment of my shoulder and how much for other treatment, if I had taken the time to figure the matter up, I might do it. I do not care to. I am tired of doctors' bills. I do not remember exactly now. I would not like for the railroad to pay for the treatment of my female troubles that they are not responsible for. As to whether I expect the jury to say what they are responsible for without the facts,

I will leave that to them to decide. If they think the railroad is not responsible for any part of my physicians' bills, they can so state." Dr. White, a surgeon of the city of Savannah, testified, in behalf of the plaintiff, that on January 18, 1902, he operated on her for four different ailments, which he separately named and described, one of them being an injury to her shoulder, and subsequently performed another operation on the shoulder; that three of the four ailments, or physical "troubles," for which he operated upon her the first time, were independent of the shoulder injury, and, in his opinion, existed before she received such injury. While he testified that "the troubles" other than the injury to the shoulder were minor ones, as compared to that injury, he did not undertake to inform the jury what his charges were for the treatment of the shoulder injury, as distinguished from his charges for the treatment of the plaintiff's other physical ailments. Indeed, neither he nor the plaintiff even stated what the whole amount of his bill was. No other evidence in the record tends to throw any light on the amount expended by the plaintiff for medical and surgical attention and treatment rendered necessary by the injuries alleged to have been received by the plaintiff in consequence of defendant's negligence. There was no evidence at all as to the reasonableness of the amounts which the plaintiff paid the different physicians who treated her. Indeed, this was not to be expected when she failed to state what these respective amounts were. Undoubtedly a plaintiff who is entitled to recover damages for a physical injury may recover, as a part thereof, reasonable physicians' bills incurred in consequence of the injury; but, in order to recover for such expenses, there must be proof of a definite nature as to the amount so expended, and also some evidence as to the reasonableness of such amount. As was said in *Mayor of Savannah v. Waldner*, 49 Ga. 316, 324: "A plaintiff cannot claim for what is capable of almost exact proof, without furnishing the jury some testimony to arrive at the measure or amount of the claim. Proof of what are the physician's bills, and other expenses growing out of damages received, is always required to entitle a recovery thereof." In *Allen v. Harris*, 113 Ga. 107, 38 S. E. 322 (4), it was held: "Proof of what was paid for professional services is not, without more, sufficient proof of their value." As, under the evidence, there could be no lawful recovery by the plaintiff for what the judge termed "medical bills and medical expenses," it was erroneous for him to instruct the jury that if they believed "from the evidence in this case that the defendant is liable to the plaintiff, and that the plaintiff was injured and it became necessary for her to incur medical bills and medical expenses, \* \* \* the defendant would be liable to

her for reasonable expenses in securing medical attention," etc. When there is no evidence upon which a recovery for a particular element of alleged damages could lawfully be based, the judge should not submit to the jury the question of the plaintiff's right to recover for such element of damages.

There were other assignments of error in the motion for a new trial with which we do not deem it necessary to deal specifically. Some of the matters complained of were such as will not likely arise upon another trial; and, while some of the instructions excepted to were not strictly accurate, none of them were so erroneous as to require the grant of a new trial, except those which we have discussed in this opinion.

Judgment reversed. All the Justices concur.

(129 Ga. 50)

**WATSON et al. v. EQUITABLE MORTGAGE CO. et al.**

(Supreme Court of Georgia. Aug. 10, 1907.)

**ERROR, WRIT OF—WHEN LIES—ADMINISTRATIVE ORDER—REFUSAL OF INJUNCTION.**

Where, upon an appropriate application, a receiver was appointed in an equity suit and directed to do certain things, and no exception was taken to the order of appointment, but afterwards the defendants amended their answer and prayed the court to enjoin the receiver from doing the things which he had been appointed to do, a bill of exceptions will not lie to the refusal of the court to interfere with the receiver while the main case is pending in the court.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by R. H. Watson and others against the Equitable Mortgage Company and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

J. W. Preston and M. G. Bayne, for plaintiffs in error. John L. Tye, Cabaniss & Willingham, Tye & Bryan, and Chas. A. Read, for defendants in error.

ATKINSON, J. Peter McMickle executed a deed conveying certain property to "Rufus H. Watson, Jr., for the use, benefit and advantage, in trust for Mary M. Watson, for life, \* \* \* for her sole and separate use and on her decease to her child or children as she may leave in life." In the deed there was a power given the trustee to sell the property for reinvestment upon the written consent of the said Mary M. Watson. The trustee made application to the judge of the superior court, in behalf of Mary M. Watson and her children, for leave to mortgage the property so conveyed. The judge granted an order authorizing the trustee to execute a mortgage in accordance with the application. A mortgage was executed by the trustee, purporting to create a lien upon the estates for life and remainder. There was a

default in the payment, and the mortgage was foreclosed and the property sold at sheriff's sale. The purchaser at sheriff's sale afterwards conveyed the property in fee to Mary M. Watson. After thus obtaining a deed to the entire property, Mary M. Watson executed a deed to secure a debt to the Equitable Mortgage Company, conveying said entire property as security for a specified debt. Default in payment followed, and the Equitable Mortgage Company instituted a suit for the purpose of recovering judgment and subjecting the property to its payment. While this suit was pending, Rufus H. Watson, Jr., as trustee, instituted suit against the Equitable Mortgage Company, attacking the mortgage executed by the trustee, and likewise the title alleged to have resulted from the sheriff's sale, and likewise the title held by the Equitable Mortgage Company as security for the debt. In this suit it was prayed that the Equitable Mortgage Company be enjoined, that the security deed be canceled, and that the title to the property be decreed to be in R. H. Watson, Jr., as trustee for Mary M. Watson for life, with remainder to her children. The Equitable Mortgage Company filed defenses to this suit; and, upon the final trial, the children of Mary M. Watson who were in life appeared in court by counsel, and presented an application to the judge to allow them to so amend their declaration as to proceed in their own names, instead of in the name of the trustee. The record here does not disclose that the judge passed any order allowing the amendment. The trial proceeded however, and resulted in a verdict for the defendant, upon which judgment was entered. There was no motion for a new trial or exception taken. After that trial the Equitable Mortgage Company proceeded with the prosecution of the suit against Mary M. Watson and recovered judgment. When the property was about to be sold, claims were interposed by R. H. Watson, Jr., as trustee, for Mary M. Watson and her children, and also by the children of Mary M. Watson, which caused a postponement of the sheriff's sale. The Equitable Mortgage Company instituted another suit against R. H. Watson, Jr., as trustee, and the children of Mary M. Watson, reciting the entire history of the litigation up to and including the rendition of the judgment subjecting the property to the payment of the debt and the filing of the claims at the time the property was about to be offered for sale by the sheriff. It was further alleged in that suit that the claimants were insolvent, that the taxes were accumulating, and that the property was insufficient to pay the debt; that for several reasons the claimants were estopped from asserting any claim under the trust deed, and especially that they have been concluded by the former judgment in the suit wherein they had caused themselves to be made par-

ties by amendment, and wherein they had asserted the same title and had endeavored to defeat the title of the Equitable Mortgage Company. Among others, there were prayers for injunction against the further assertion of title; likewise a prayer for the appointment of a receiver to take charge of the property, collect the rents, and sell the property for the payment of taxes and principal and interest due to the Equitable Mortgage Company. No exception was filed to such order. The receiver advertised the property for sale; and the defendants in the last-named suit then filed an amendment in the nature of a cross-bill to their previous answer, and again asserted their title under the trust deed, and prayed that the receiver be discharged, and that all orders and decrees heretofore made by the court under agreement or otherwise be set aside as void, and that the court enjoin the receiver from selling the property and from taking possession thereof until the rights of the parties could be settled under the cross-bill. There was an interlocutory hearing upon the application for injunction. The case was tried upon the allegations of the pleadings, without the introduction of evidence. After considering the case thus submitted, the judge refused to enjoin the receiver as prayed. The defendants in the main suit, who, by their answer in the nature of a cross-bill, had applied for an injunction against the receiver, excepted and assigned error upon the order of the court refusing to enjoin the receiver.

An examination of the bill of exceptions shows that the plaintiffs in error complain of only one ruling of the judge, to wit, his refusal to grant an injunction. An examination of the record discloses that the injunction sought was against a receiver of the court for the purpose of preventing him from doing certain things which he had been directed to do by previous orders of the court. While the remedy sought is called an injunction in the pleadings, it is not in fact such an injunction as is contemplated in Civ. Code 1895, § 5528, to the grant or refusal of which a writ of error would lie from the ruling of the court before the final trial of the case. The order applied for was a mere administrative order, directed by the judge to the receiver, to the grant or refusal of which exceptions pendente lite, and a further assignment of error in the bill of exceptions after the conclusion of the case would be proper and necessary, if the complaining party desired to review the ruling of the court. There were no exceptions pendente lite, and the case does not appear to have been finally disposed of. Under such conditions, this court cannot take jurisdiction of the matter. See, in this connection, *Lambert Holsting Engine Co. v. Dexter*, 127 Ga. 581, 56 S. E. 778, and citations.

Writ of error dismissed. All the Justices concur.

(129 Ga. 42)

**MELVIN v. MELVIN.**

(Supreme Court of Georgia. Aug. 9, 1907.)

**1. DIVORCE—TEMPORARY ALIMONY.**

The judge was authorized, under the pleadings and evidence, to award temporary alimony and counsel fees to the wife, and the allowance was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 632-634.]

**2. SAME—INJUNCTION.**

The writ of injunction to restrain a husband from incumbering or disposing of his property pending a divorce and alimony suit should not be granted, where the husband is neither attempting nor threatening to sell or encumber his property, and no other equitable ground for the issuance of the writ is shown to exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 600-603.]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by M. M. Melvin against E. M. Melvin. From a judgment awarding temporary alimony, defendant brings error. Affirmed in part and reversed in part.

W. C. Worrill and S. S. Bennet, for plaintiff in error. J. R. Pottle and C. L. Glessner, for defendant in error.

EVANS, J. The wife filed a petition against the husband, praying a divorce, an allowance of alimony and attorney's fees, and an injunction against the husband incumbering or selling his property pending the suit. On the interlocutory hearing the court awarded the wife counsel fees and temporary alimony, and enjoined the defendant from incumbering or selling his property until final decree. The defendant excepts on the grounds that the wife is not entitled to alimony under the case made, that the allowance was excessive, and that no cause for an injunction pendente lite was shown.

1. The ground for divorce was cruel treatment. The truth of the allegations was denied by the defendant. It appeared that both husband and wife had been previously married. By the husband's former marriage he had two minor sons, and by the wife's former marriage she had a minor daughter. The wife also had a separate estate, which previously to the marriage had yielded an annual income of about \$400. The court allowed as alimony a present sum of \$75, and a monthly allowance of \$15 until final decree, and counsel fees to the extent of \$50. There was proof that the husband was a good business man, worth about \$10,000, and received from the management of his property an annual net income of about \$1,000. Civ. Code 1895, § 2458, declares: "In arriving at the proper provision, the judge shall consider the peculiar necessities of the wife, growing out of the pending litigation; he may also consider any evidence of a separate estate owned by the wife; and if such estate is ample, as compared with



the husband's, temporary alimony may be refused." The court may also consider the fact that the wife has a minor daughter by a former marriage, dependent upon her for a support. The husband is under no legal duty to support his step-daughter; and the court, in estimating the wife's income from her separate estate should take this circumstance into consideration. The allowance was authorized by the evidence, and was not excessive.

2. The petition did not allege that the husband was disposing of his property, or incumbering it, or even threatening to do so. Nor did the petition allege any special reason why the husband should be enjoined from disposing of or incumbering his property. No proof was submitted that the husband was attempting or even contemplating the transfer of his property to defeat the wife's claim for alimony. A wife may, in a proper case, apply for an injunction to prevent the husband from alienating or incumbering his property to defeat her claim for alimony, but she cannot resort to this extraordinary remedy solely because she may be entitled to have her husband pay her alimony. Before the writ of injunction can properly issue, it must appear from the special circumstances of the case that the issuance of the writ is essential to the protection of her right to alimony. The court therefore erred in granting a temporary injunction.

Judgment affirmed in part, and reversed in part. All the Justices concur.

(128 Ga. 331)

### WALKER v. O'NEILL MFG. CO.

(Supreme Court of Georgia. Aug. 9, 1907.)

#### 1. JUDGMENT—LIEN.

Where a chose in action is owned by several individuals jointly, and suit instituted by one of them alone, making no reference in the pleadings to the joint ownership, or to the other individuals, and the plaintiff obtains judgment in his individual name, without reference to the others, the judgment does not create a lien against the defendant in favor of those who were not named therein.

(a) A sale of the execution issued upon such judgment by the plaintiff named therein to the defendant satisfies the claim of the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1529.]

#### 2. ATTORNEY AND CLIENT—ENFORCEMENT OF LIEN—PAYMENT OF FEES.

Where an attorney at law, asserting the statutory lien for attorney's fees, seeks to collect the same from the defendant in *fi. fa.* after settlement with the plaintiff, and, testifying in his own behalf, fails to state clearly and unequivocally the terms of the contract of employment, or the amount due him, either by express or implied contract, but testifies affirmatively that after the settlement between the parties the plaintiff sent him a check which recited that it was "in full for fees," and that he indorsed and collected the check without raising any question with the plaintiff that it was not in full satisfaction of the fees, such acceptance and use of the check, without explanation, authorized the court to hold as a matter of law that no attorney's fees were due.

#### 3. TRIAL—DIRECTING VERDICT.

The uncontradicted evidence in this case, when considered in that view most favorable to the contentions of the plaintiff, demanded a verdict for the defendant, and the court did not commit error by so directing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332, 333.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Henry Walker against the O'Neill Manufacturing Company. Judgment for defendant. Plaintiff brings error. Affirmed.

C. N. Featherston and Henry Walker, for plaintiff in error. Denny & Harris, for defendant in error.

ATKINSON, J. An attorney at law had in his hands for collection separate claims against a debtor in favor of four separate creditors. The debtor was insolvent, and at a sale of his assets by a receiver the attorney at law purchased for his own use an open account due to the debtor by another person. The attorney then notified his four clients of his purchase, and offered to let them have the account so purchased if each would pay sums proportionate to their respective claims sufficient in amount to reimburse him. They agreed, and paid him the money. After such payment, the attorney at law, for convenience, sued the account so purchased in the name of one of his clients only; the record not disclosing that any other person had any interest therein. Judgment was obtained. Thereupon garnishment proceedings were instituted against the employer of the defendant, and judgment was obtained against the garnishee. In the garnishment there was no suggestion of any other party plaintiff than the sole creditor, the Ahrens & Ott Manufacturing Company, in whose name suit had been originally instituted. After the rendition of the judgment in the garnishment proceeding, the attorney caused execution to issue thereon and retained it in his possession. Afterwards the attorney in his individual name sought to purchase the execution from the plaintiff. The purchase price was agreed upon, and the attorney entered upon the execution a blank assignment thereof to himself, and forwarded the same to the plaintiff for the purpose of having the assignment executed by the plaintiff, and, at the same time, authorized a draft to be drawn by the plaintiff on him for the purchase price. The assignment was executed according to directions, with the exception that the date was omitted. On account of that omission the attorney was unwilling to accept it. Upon this point we may quote from the testimony of the attorney as follows: "Seeing the date to be filled by them had not been filled in, after holding it for quite a while, the *fi. fa.* was returned to them to supply the date. It remained quite

a while in their hands, and was finally returned to me undated. \* \* \* For several days before, and at the time of that payment of July 17th, I had the *fi. fa.*; had it on the 8th or 10th of July. I had the *fi. fa.* levied, and this illegality was interposed to the levy." There was nothing said by the attorney at law indicating that the purchase contemplated a credit transaction. On the contrary, testimony was introduced to the effect that it was a cash transaction, which fact does not appear to be in any way contested by the attorney. Pending the negotiations above recited, the defendant in *fi. fa.* also entered into negotiations with the plaintiff in *fi. fa.* for the purchase of the execution, and succeeded, in consideration of the true amount of the principal and interest and cost due to the plaintiff, without respect to any of the three other alleged creditors, whose names were not disclosed by the judgment, in obtaining from the plaintiff a written assignment in these words: "Louisville, Ky., July 17, 1900. Received of O'Neill Mfg. Company of Rome, Ga., \$257.99 in full and complete settlement of all our interests in a certain judgment of the superior court of Floyd County, Georgia, which was rendered on the 12th day of April, 1899, in favor of the Ahrens & Ott Mfg. Company v. O'Neill Mfg. Company as garnishees." The consideration expressed in this assignment, \$257.99, is the same payment to which reference was made in the testimony of the attorney above quoted as having been made on "July 17th." It thus appears from the testimony of the attorney, who was the plaintiff in error in the present case, that at the time of the purchase of the execution by the defendant the execution was actually in his hands, delivered to him by the plaintiff. There was undisputed testimony to the effect that the attorney did not pay the purchase price which he agreed to pay for the execution, but, having possession of it under the circumstances already enumerated, he caused the same to be levied on the defendant's property. After the levy, the defendant filed an affidavit of illegality, upon the ground, among others, that the *fi. fa.* had been paid and fully satisfied by the defendant by reason of the payment of the sum of \$257.99 hereinbefore recited. The foregoing statement deals with that view of the case which is most favorable to the contentions of the plaintiff in error. The court directed a verdict in favor of the defendant in *fi. fa.*

1. To sustain the judgment refusing to grant a new trial, the evidence, when considered in its most favorable light for the plaintiff in error, must have been of such character as to demand a verdict against him. Considering the evidence in this light, we are unable to see that the plaintiff in error acquired any interest in the *fi. fa.* by purchase. His negotiations were not prosecuted to the completion of a purchase. The contemplated sale to him was a cash transac-

tion. He received and inspected, but did not accept, the article tendered, and did not pay the purchase price. Under such conditions the title did not pass. See, in this connection, *Starnes v. Roberts*, 58 S. E. 348. Other than these unconsummated and ineffectual negotiations, there was nothing to interfere with the right of the plaintiff, the Ahrens & Ott Manufacturing Company, to sell the *fi. fa.* to the defendants therein named. The plaintiffs did sell all of their interests and make a valid assignment therein in writing. When they sold their interests, they sold the entire execution, because there was no other party plaintiff, and consequently no one else could be consulted. Whatever may have been the interests of other persons in the subject-matter of the suit which resulted in the first judgment, those interests could not, under the condition of the record, be traced into the present judgment so as to acquire a lien upon the defendant's property. The plaintiff, the Ahrens & Ott Manufacturing Company, did not in either suit pretend to proceed for the use of any person except themselves. If other parties had an interest in the original execution, they would have been proper parties to the first suit, and could have obtained an interest in the judgment, but, as against the defendants, there is no theory by which they could remain out of the case until judgment and then claim by force of the judgment a lien upon the defendant's property. See, in this connection, *Whitman v. Bolling*, 47 Ga. 125; *Smith v. Pate*, 51 Ga. 246; *City Bank of Macon v. Crossland*, 65 Ga. 734 (4).

2, 3. But it is insisted that the plaintiffs, by a sale of the execution, could not defeat the lien of the attorney for his fees, and that he had a right to have the execution proceed for the purpose of enabling him to collect his fees. It is contended that his lien exists under the provisions of Civ. Code 1895, § 2314, par. 2, which provides that attorneys at law shall have a lien "upon suits, judgments, and decrees for money, superior to all liens but tax liens, and no person shall be at liberty to satisfy said suit, judgment or decree until the lien or claim of the attorney for his fees is fully satisfied; and attorneys at law shall have the same right and power over said suits, judgments, and decrees, to enforce their liens, as their clients had or may have for the amount due thereon to them." In order to support the claim of lien, the burden of proof was upon the attorney to show the existence of a valid judgment and execution. It is conceded by the defendants that, to the extent of the amount which they paid to Ahrens & Ott Manufacturing Company as purchase money for the execution, there was a valid judgment and execution. It is not necessary, therefore, to inquire whether upon that point the burden of proof was supported. The burden was also upon the party asserting the lien to show the amount of attorney's fees due at

the time of the trial, for which it was claimed that he had a lien. The attorney testified in his own behalf, and was in a position to testify clearly and unequivocally as to whether any particular amount had been agreed upon between himself and his client as a fee—if so, what amount, and, if none had been agreed upon, then to express his opinion as to the reasonable value of the services rendered by him to the plaintiff in recovering the judgment. As a matter of fact, he did not testify that the amount of his fee had or had not been fixed by agreement between himself and his client, and he did not express his opinion as to the value of his services to the plaintiff, separate and distinct from all of the services which he rendered to all of his clients, three of whom he contended had interests in the judgment, but none of whom were parties thereto. It has already been seen that the execution could not have been enforced against the defendant for the benefit of the clients of the attorney, other than the plaintiff in execution, for the recovery of the principal and interest alleged to be due them. If the execution could not be enforced for their benefit for the collection of the principal and interest alleged to be due them, for the same reason, it could not be enforced for the benefit of the attorney for such attorney's fees as they may have been liable to pay him. As to those claims he had no judgment, and it follows that he had no lien against the defendants.

With respect to the indebtedness of the plaintiffs in *fi. fa.* to the attorney for counsel fees, and the amount thereof, if any such debt existed, it is readily seen that the testimony of the attorney thus far considered is not clear and unequivocal. But there was further evidence upon the subject. The attorney testified that, after the payment of the \$257.99 had been made by the defendant to the plaintiff as purchase for the *fi. fa.*, "I received a little check for \$13, reciting that it was in full for fees. The check was mislaid. When found some time afterwards I indorsed it and collected it." No explanation is made by the attorney as to why he indorsed and collected the check, if he did not receive it in full payment of counsel fees due by the plaintiff. If he did receive it as such that was the end of his contention for counsel fees. If he did not receive it as such, the burden was upon him to explain. In the absence of explanation, it will be deemed that whatever may have been the amount agreed upon, or whatever the value of the services, the check satisfied his claim. See, in this connection, *Jenkins v. National Building Ass'n*, 111 Ga. 732, 36 S. E. 945; *Walker v. Wadley*, 124 Ga. 286, 52 S. E. 904. Under this view of the attorney's evidence, there was not, upon the subject of attorney's fees, any issue to be submitted to the jury. Upon the case as a

whole, there was no error in directing a verdict.

Judgment affirmed. All the Justices concur.

(2 Ga. App. 228)

**DORSEY v. STATE. (No. 458.)**

(Court of Appeals of Georgia. June 28, 1907.)

**1. HOMICIDE — INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.**

The law of involuntary manslaughter, as applicable to the evidence, was fully and properly presented to the jury by the charge of the court.

**2. SAME.**

A request to charge the jury that it is their duty, where threats, if proved, are susceptible of two constructions, to give the defendant the benefit of the innocent construction, was properly refused. The absence of the word "equally" renders the request one not proper to be granted.

**3. CRIMINAL LAW—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

To instruct the jury that threats (in any case) "are of very little importance as evidence in guiding the jury" would be a violation of Civ. Code 1895, § 4334. The jury, and not the judge, must weigh the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

**4. SAME—CONSTRUCTION AS A WHOLE.**

Extracts from a charge, upon which error is assigned, must be considered and construed in connection with the charge taken as a whole. It is impossible for a trial judge to repeat, in every connection, all of the principles involved in the case; nor is he required to indulge in such repetition. Where the statements upon different legal propositions are carefully distinguished and cautiously contrasted with each other, and so clearly that they can neither mislead nor confuse, the ordinary intelligence of the jury can safely be relied upon to render frequent repetition of the same principle of law unnecessary and useless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1990.]

**5, 6. SAME.**

The judgment of the trial court, refusing a new trial, is not, for any reason assigned, erroneous.

(Syllabus by the Court.)

Error from Superior Court, Hall County;

J. J. Kimsey, Judge.

J. T. Dorsey was convicted of voluntary manslaughter, and he brings error. Affirmed.

See 55 S. E. 479.

Thompson & Bell and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., and F. M. Johnson, for the State.

**RUSSELL, J.** Dorsey was indicted for murder, and convicted of voluntary manslaughter. His motion for a new trial was refused, and he excepts to that judgment.

The evidence showed that he and the deceased and several others had been drinking together at intervals during the afternoon and evening. As frequently occurs on such occasions, there were several trivial quarrels, in which the deceased participated. The defendant finally started to a house where he did not wish the other to accompany him, and requested the deceased not to do so. This

request, and some words over a drink of whisky, were followed by the deceased finally getting in front of the defendant, calling him vile names, and making a motion as if to strike him. There was no evidence that the deceased had any weapon, though the defendant claimed in his statement that he had either a knife or knucks. The defendant had in his hand a billiard cue, which had been cut off so as to be used as a walking stick, and with this he struck the deceased twice, once in the mouth and once on the side of the head, knocking him down each time. He then proceeded on his journey. The deceased went back to his home, procured medical attention, and died in two days. There was a former trial of this case, which is reported in 126 Ga. 633, 55 S. E. 479. In addition to the evidence there reported, there was testimony on the present trial that the deceased threatened to kill the defendant if the defendant did not kill him, and there was also evidence on the part of the state, not adduced on the former trial, that the weapon used was a deadly weapon. The case was remanded by the Supreme Court for a new trial upon the sole ground that the judge failed to instruct the jury as to the law of involuntary manslaughter; the Supreme Court holding that "if the jury should find that the weapon was one which would not ordinarily produce death, and was therefore not a deadly weapon, and the circumstances demonstrated to the satisfaction of the jury that there was no intention to kill, then, even though the blow was not justified, the accused would be guilty only of the offense of involuntary manslaughter, the grade of which he would be convicted to be determined by whether the blow was inflicted as a result of an unlawful act, or whether, under the circumstances, he was justified in striking a blow, but in administering it did not use due care and circumspection." This error of the trial court was corrected on the last trial, and both grades of involuntary manslaughter were given in charge to the jury; the jury, as on the previous trial, returning a verdict finding the defendant guilty of voluntary manslaughter. The case is now brought to this court for review upon several assignments of error in addition to the general grounds.

The first of these grounds is that the court erred in refusing a written request to charge that, while provocation by words, threats, menaces, or contemptuous gestures would not be sufficient to reduce the homicide below the grade of murder, when the killing is done, not on account of any fear in the mind of the slayer, but solely for the purpose of resenting the provocation, nevertheless threats, accompanied by menaces, may in some instances be sufficient to arouse the fears of a reasonable man that his life is in danger, or that a felony is about to be perpetrated upon him; and, if the defendant acted under the fears of a reasonable man

that the deceased intended by violence or surprise to commit a felony upon him, the defendant would be justified. This request was in the language of the decision of the Supreme Court in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, except, in the written request presented, the word "resisting" was used, instead of "resented." It devolved upon the defendant to present a correct request, and even though the error may be only typographical, yet, as it does not correctly state the law, it was not incumbent upon the court to present it to the jury. The plaintiff in error insists, however, that the principle embraced in the request should have been given in charge to the jury. We think the jury should have been and were instructed on the proposition for which the plaintiff in error contends.

The trial judge, upon this subject, instructed the jury as follows: "You know I charged you a while ago, gentlemen of the jury, that in order to reduce a homicide from murder to voluntary manslaughter—that, is, where a human being is killed under a great heat of passion—that no words, contemptuous gestures, or things of that sort, opprobrious epithets, should not be sufficient provocation to reduce the killing from murder to voluntary manslaughter. Under the head of reasonable fears in case of justifiable homicide—under this head of justifiable homicide—where the defendant is without fault in bringing on the difficulty, acting under reasonable fears, the law provides (it being purely a question of fact as to whether the attendant circumstances justified a reasonable fear upon the part of the accused that such injury was about to be committed upon his person) that that question is one exclusively for the jury. There are so many conditions under which grounds for reasonable fear could arise that the Legislature has not undertaken to say that any given state of facts or circumstances shall or shall not be sufficient to constitute grounds of reasonable fear, but has left the matter open for determination by the jury, in each instance, without further limitation than that the circumstances must be sufficient to excite the fears of a reasonable man that some one or more of the offenses named in the Penal Code were about to be committed, or that his life was in imminent danger; thus leaving it to the jury, after all, to pass upon the sufficiency of the circumstances for that purpose. And the jury would have the right to consider the conduct of the defendant and the conduct of the deceased—the words that were used, if there were any used. The jury would consider it all, what words were passed by one to the other; and it is for the jury to say whether or not the circumstances were sufficient to excite the fears of a reasonable man. If the circumstances are sufficient to excite the fears of a reasonable man, the killing will be attributed to them, in the absence of proof to the contrary, and also

that the accused acted under those fears and not in a spirit of revenge. The sufficiency of the fears is a question for the jury always. The defendant will be justifiable if there be a reasonable doubt as to whether he acted under such fears, or had reason to feel that it was necessary to kill in order to save his own life or to prevent a felony from being committed upon his person."

We think these instructions as fully put before the jury the principle that words, though not amounting to actual assault, may in some instances be sufficient to arouse the fears of a reasonable man, as did the request, and was more apt for the purpose than the charge requested, in that it called the attention of the jury to the circumstances creating the "some instances" referred to by the Supreme Court. A court of review frequently uses, and can properly use, language which would be highly improper or confusing to the jury, if given in charge by a trial judge. To have charged the jury that "in some instances" threats accompanied by menaces might be sufficient to arouse the fears of a reasonable man, without instructing the jury as to the nature of those instances, would have been erroneous, because the jury would have had no information as to how they were to determine from the evidence whether such an instance was presented in the case at bar. The trial judge gave them a correct rule when he said that the jury could consider the conduct of the parties, the words that were passed from one to the other, etc., consider it all, and say whether or not the circumstances were sufficient to excite the fears of a reasonable man; and the charge we have quoted above, calling special attention to his previous charge on section 65 of the Penal Code of 1895 (when instructing them as to the law of voluntary manslaughter), and applying by contrast the use of opprobrious words to the doctrine of reasonable fears (should the jury believe the defendant acted under such fears), rendered it impossible that the jury could either have been confused or misled, or the defendant's rights prejudiced.

2. The plaintiff in error assigns error upon the refusal of a request to charge as follows: "I charge you, further, that if there is any proof of threat by the defendant introduced before you, and such threats are susceptible to two constructions, it is the duty of the jury to give the defendant the benefit of the innocent construction, if they can, rather than the guilty construction." This not being a correct statement of the law, the court was not required to present it to the jury. The rule is that, if threats are equally susceptible of two constructions, it is the duty of the jury, if they can, to prefer the innocent construction.

3. To have given the charge, the refusal of which is excepted to in the third ground of the motion, would have been a manifest violation of the provisions of Civ. Code 1895,

§ 4334. The charge requested was in these words: "I charge you that mere idle threats, without any intention of carrying the same into execution, and without any effort to do so, are of very little importance as evidence in guiding the jury in the deliberation of the case."

4. Exception is taken to the following charge of the court: "I charge you, gentlemen of the jury, if two men suddenly fall out and fight, and there is a mutual intent to fight upon the part of the men, and there is great heat of passion, and they do fight, although there might not be but one blow stricken, and that blow is the fatal blow, if there is mutual intent to fight, and they do fight, and one is killed as the result of it—I charge you that such killing would be voluntary manslaughter, unless justified." The complaint made of the charge is that it took from the jury the consideration of the law of involuntary manslaughter, and also the consideration of the question as to whether such fight was with or without a weapon, or with or without intent to kill, or with a weapon likely to produce death when used in the manner in which it was used, or without regard to whether there was any intention to kill on the part of the defendant, and because it required the jury to find the defendant guilty of voluntary manslaughter. It is insisted, further, that the charge was error, because contrary to the decision of the Supreme Court in the following language: "If the jury should find that the weapon was one which would not ordinarily produce death, and therefore was not a deadly weapon, and the circumstances demonstrated to the satisfaction of the jury that there was no intention to kill, then, even though the blow was not justified, the accused would be guilty only of the offense of involuntary manslaughter, the grade of which he would be convicted to be determined by whether the blow was inflicted as a result of an unlawful act, or whether, under the circumstances, he was justified in striking the blow, but in administering it did not use due care and circumspection." It is further insisted that it was erroneous to instruct the jury that such killing would be voluntary manslaughter, unless justified.

The extracts from the charge to which exception is taken, if considered alone, or if it had been delivered as a part of the instruction with reference to involuntary manslaughter, or if there had been an absence of other and correct instructions upon the subject of involuntary manslaughter, would have been error. But it must be borne in mind that the language quoted in this exception is only a disconnected fragment from the charge of the court upon the subject of voluntary manslaughter, in which the court more than once called their attention to the fact that it was only to be considered as applicable to that particular grade of homicide. The judge first instructed the jury as to the law of

murder, then the application of the law of voluntary manslaughter was discussed, then involuntary manslaughter, and finally justifiable homicide; and, as the judge would pass from one to the other, he very carefully and cautiously called the attention of the jury thereto, and instructed them, so that they could not be confused or misled. Considered with what preceded and followed the extract upon which error is assigned, there is no ground for complaint; for it is impossible for the trial judge to repeat in every connection all of the principles and limitations involved in the entire case, nor is he required to do so. Some reliance must be had on the ordinary intelligence of the jury to render repetition unnecessary and useless.

In other portions of the charge, after clearly and specifically referring to the charge here complained of and distinguishing the application of the two principles, according as the jury might find the truth, the court fully instructed the jury that they were to consider the nature and character of the weapon and the intention with which it was used, charging them as follows: "I charge you that if you believe, from the evidence, that the weapon used, if one was used, if it was not a deadly weapon, or if it was a deadly weapon, it was not used in a deadly manner, then I charge you he would be justified. It would be for you to justify the use of it by words; that is to say, if the deceased used words, opprobrious words and epithets, to the defendant, it would be for the jury to say whether or not the defendant was justified in the use of the weapon. Now, if the jury should believe, as I have already charged you, that the defendant was justified in the use of the weapon, but that it was not used with due caution and circumspection, why then he would be guilty of involuntary manslaughter in the commission of a lawful act. But if you should believe, from the evidence, that the weapon was a deadly weapon, in the manner in which it was used, then I charge you that words would not justify the use of it, and it would be for the jury to say whether it was a deadly weapon, or not, in the manner in which it was used; and if the killing was done then in that way by the defendant, with no intent to kill, if he had no intent to kill, and there was no malice at the time of the killing, why then I charge you that it would be involuntary manslaughter in the commission of an unlawful act."

This charge not only gave all contended for by the plaintiff in error, but was really more favorable than the defendant had any right to expect; for it would have permitted the jury to acquit the defendant and justify him in the killing for the use of mere words. The error in the charge was prejudicial to the state, and not to the defendant. The phrase to which exception is taken, that "such killing would be voluntary manslaughter, unless justified," instead of exclud-

ing involuntary manslaughter from the consideration of the jury, as assigned, is fully explained and referred to in the very full charge upon the subject of involuntary manslaughter delivered by the court.

5. The complaint made in the fifth ground of the motion is that the court, in the charge upon which error is assigned, excluded from the jury the law of involuntary manslaughter in the commission of an unlawful act, under the evidence in the case. Boiled down, it is nothing but a complaint that the law of involuntary manslaughter was not charged in immediate connection with the charge assigned as error. As stated above, the judge instructed the jury on each grade of homicide clearly, fairly, fully, and in accordance with the law, and so carefully called the attention of the jury to the distinctions to be drawn that this assignment of error is in our judgment absolutely without merit. Summing up all the different points made by the plaintiff in error, an inspection of the charge as a whole discloses the fact that each and all of them are answered by the presentation to the jury of every principle insisted upon by him, except that the judge very properly did not charge upon the weight to be given to threats; and, in the absence of a proper request upon that subject, the omission to present it to the jury is not reversible error, under the facts of this case.

6. The plaintiff in error further insists that he is entitled to a new trial on account of the following language of the court, used in charging the jury: "As honest, upright men, you take this case. You have the interests of society on one hand, and you have the interest of defendant on the other; and as honest, good men, men who love liberty, men who love society, men who love law and order, decide this case according to the evidence and the law as given you in charge by the court." After a review of the very impartial charge in this case, with which the jury could not have failed to be impressed, we are constrained to consider criticism of this portion of the charge as hypercritical. It is not necessary for a judge to refer to the importance of the case in his charge to the jury; but the propriety of doing so is purely a matter of discretion, and he cannot be held to have erred unless in such remarks there is contained a misstatement of the law, or such an utterance as is calculated to prejudice the minds of the jury against the accused. The statement by the judge that the jury had the interests of society on one hand, and the interest of the defendant on the other, does not, without a forced construction, not to be drawn from the absolutely fair and impartial charge preceding it, necessarily imply that the interests of society were antagonistic to the interests of the defendant. It is not unlike the statement, very frequently made by trial judges, of the names of the parties to the case. It is not very dissimilar to the

opening remarks of the charge of the court in *Cobb v. State*, 27 Ga. 681, to which no exception was taken. In *Akridge v. Noble*, 114 Ga. 950, 41 S. E. 78, it was expressly held that it is not erroneous for the judge to call the attention of the jury to the fact that they have taken an oath to try the case according to the evidence and the law as given them in the charge by the court, and that they cannot set up any ideas of their own in reference to the law of the case, in opposition to the charge of the court. In *Beck v. State*, 76 Ga. 472, complaint was made that the court erred in charging the jury to take the case without any desire to convict an innocent man or to acquit a guilty one, but with the sole purpose of vindicating the law and finding the truth of the case; and the Supreme Court held that there was no error in this part of the charge—that "it is the duty of the jury to vindicate the law."

It will be noticed that the closing instruction of the court was that the jury should "decide the case according to the evidence, and the law as given you in charge by the court." The first and second assignments of error are that the verdict was contrary to the evidence, without evidence to support it, and against the weight of the evidence. In our view the plaintiff in error has no reason for complaint, upon these grounds, which we are authorized to consider. The evidence fully sustains the verdict, though the jury, under the charge of the court, would have been justified in finding a verdict for involuntary manslaughter of either grade, or in acquitting the accused. This court cannot consider the question of evidence, unless for want of evidence a verdict is contrary to law.

Judgment affirmed.

(2 Ga. App. 287)

STARNES et al. v. ATLANTA POLICE RELIEF ASS'N. (No. 277.)

(Court of Appeals of Georgia. June 26, 1907.)

1. BENEFICIAL ASSOCIATIONS—MEMBERSHIP—FORFEITURE—NONPAYMENT OF DUES.

Where the constitution of a relief association provides that "no member shall be entitled to benefits who has not paid dues and assessments in advance," and that "any member whose dues remain unpaid for two months shall be dropped from the roll and lose all claim to membership," neither of these results will ipso facto amount to a forfeiture of the benefits. There must be some judicatory or affirmative action by the association, declaring the member suspended or expelled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, § 15.]

2. SAME.

Where the secretary of the association has simply marked the defaulting member as "suspended," this does not amount to affirmative action of the association.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Beneficial Associations, § 15.]

3. SAME.

Where the association has entered upon its minutes an order declaring a member dropped as "being two months in arrears with his dues

to the association," such order will be ineffective and inoperative, unless at that time the dues of the member have remained unpaid for two months.

4. SAME.

Where the son for some months paid to the proper officer of the association his father's membership dues, which were accepted by such officer, the actual bona fide tender thereafter by the son of his father's dues as such member to said officer, who declined positively to receive them, prevented a forfeiture of the membership for nonpayment of dues; and where such tender has been made, and so declined, the tender need not be repeated to prevent a forfeiture.

5. SAME—BENEFICIARIES—"FAMILY"—DEFINED.

The word "family," used in the constitution of a benefit association to designate the class to which the beneficiaries must belong, includes any relative who lives with the member and who is dependent upon him, or with whom the member lives and by whom he is supported and cared for, at the time of his death. The majority of this court gives to the word "family" a broader definition than the one just indicated.

6. SAME—CONSTITUTION AND BY-LAWS—CONSTRUCTION.

Courts should construe the constitution and by-laws of a relief association liberally, to effect its benevolent purpose, and not so as to defeat such purpose.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. A. Starnes and others against the Atlanta Police Relief Association. Judgment for defendant, and plaintiffs bring error. Reversed.

J. W. Moore and Gordon & Branch, for plaintiffs in error. J. L. Mayson and W. P. Hill, for defendant in error.

HILL, C. J. This was a suit by the plaintiffs in error, as the only heirs and members of the family of W. A. Starnes, against the Atlanta Police Relief Association. At the conclusion of the evidence the court directed a verdict for the defendant, and to this judgment the plaintiffs except.

The following is a substantial statement of the evidence:

W. A. Starnes was a policeman of the city of Atlanta, and in 1898 became a member of the Atlanta Police Relief Association. On October 16, 1904, he died. It was admitted that from the date of his becoming a member until July 5, 1904, he continued to be a member in good standing in the association. It was also admitted that the plaintiffs were his only children at the date of his death, and that his wife had died in the month of June, 1904, and that the relief association had paid to him in the early part of October, 1904, the benefit to which he was entitled by reason of his wife's death. There was a conflict in the evidence as to the payment of the dues for the months of July and August, 1904. It was admitted by the secretary of the association, whose duty it was under the by-laws of the association to receive such dues, that he received the dues from the

plaintiff W. A. Starnes, Jr., for the month of July, 1904, but that he soon thereafter returned them to Starnes, who voluntarily took them back. The latter part of this statement was denied by Starnes. It was conceded that the son had been paying his father's dues for some months before his death, and the son testified that in August, when the monthly dues were to be paid, he tendered to the secretary the dues for that month; that, after taking the \$1 for that month, the secretary at that time gave back to him \$2, being the dues for July and August, telling him that they preferred to drop his father from membership, because of his immoral conduct; that the secretary handed the money to him before he made this statement, and he at once tendered it back, denying his right to receive it, or the secretary's right to return it, but that the secretary refused to take it back. The witnesses for the association testified that Dr. Starnes, the son, agreed to take back the dues, and asked that his father be dropped for nonpayment of dues, and not for immoral conduct. This was denied by Dr. Starnes. No dues were paid or tendered for September or October, 1904, because, as Dr. Starnes testified, the secretary had notified him that he would not receive any, if tendered. The minutes of the association showed that W. A. Starnes had been dropped from the roll of membership August 11, 1904, because "two months in arrears with his dues to the association." Article 4 of the association was introduced in evidence. The part thereof pertinent to the subject of dues is as follows:

"Section 1. Each member shall pay to the secretary \$1 dues each month in advance.

"Sec. 2. All dues and assessments shall be paid to the secretary by the 5th day of each month. No member shall be entitled to benefits who has not paid dues and assessments in advance.

"Sec. 3. Any member whose dues remain unpaid for two months shall be dropped from the roll and lose all claim to membership."

The evidence was undisputed that W. A. Starnes and wife, during his membership in the association, had lived with their daughter, Mrs. Crist, for six years prior to his death; that he went to Alabama to do some work, and after an absence of several months returned to Atlanta and went to live with his son, Dr. Starnes, where he was supported and cared for by said son about one month, when he died at his son's house. Article 5, section 1, of the constitution, was as follows: "On the death of any member the sum of \$1,000 shall be paid to his family, each member to be assessed \$2.50." It was admitted that the only members of the family of W. A. Starnes at the date of his death were the plaintiffs, his three children, all of whom were of age, married, and living separate from their father, and not dependent on him; but, as stated, at the date of his

death he was living with his son, W. A. Starnes, Jr., one of the plaintiffs, and at that time, as claimed, was dependent upon said son.

It was insisted by the defendant, in support of the motion to direct a verdict, that under this evidence no legal verdict for the plaintiffs could have been found: (1) Because W. A. Starnes was not a member of the association at the time of his death, as the evidence showed that he had been dropped by formal action of the association August 11, 1904, being two months in arrears with his dues to the association; (2) because at the time of his death he had not paid all dues and assessments in advance, and was therefore not entitled to benefits; (3) because, from the undisputed evidence, the plaintiffs did not constitute the "family" of the member, within the meaning of that term in the constitution.

Under Civ. Code 1895, § 5331, the court may direct a verdict where there is no conflict in the evidence, and that introduced, with all reasonable deductions and inferences therefrom, demands the verdict as directed. There was decided conflict in the evidence on the question of the payment of dues. To support the direction of a verdict we must assume that the testimony of Dr. Starnes was true, but was legally immaterial. It was admitted that Dr. Starnes paid the dues to the secretary June 5th, thus continuing the membership of his father until July 5th. On August 6th the secretary marked Starnes "suspended," and on August 11th thereafter the association dropped him from membership as "being two months in arrears with his dues to the association." But this action of the association was unauthorized by the constitution. The language is: "Any member whose dues remain unpaid for two months shall be dropped from the roll and lose all claim to membership." His dues were admittedly paid up to July 5, 1904. The association could not drop him from membership for nonpayment until the dues had remained unpaid for two months, which would not have been the case until September 5, 1904. A member cannot be dropped immediately upon failure to pay dues. A definite time of default is fixed. The dues must become due and "remain unpaid for two months" before such action can be taken. This is the plain, unequivocal construction to be placed on these words. If the construction was doubtful, we would give to it the construction which would prevent a forfeiture. In *Warwick v. Knights of Damon*, 107 Ga. 115, 32 S. E. 951, the Supreme Court expresses only the universal and controlling rule in holding that "forfeitures are not favored in the law, and, in order to work a forfeiture of the rights of membership in a mutual association, it must clearly appear that such was the meaning of the contract, and the facts upon which a forfeiture is claimed must be proved by the most satis-



factory evidence." The court, in applying this doctrine to an association closely analogous to the one now under consideration, declares: "When the rights of members or their beneficiaries are involved, by-laws declaring a forfeiture are to be construed strictly if their validity is called in question, and liberally if it is sought to bring such claimants within their provisions, so as to prevent a forfeiture in either case."

But, apart from the order of the association expelling Starnes, dated August 11, 1904, it is insisted that plaintiffs cannot recover under section 2 of article 4 of the constitution, which in express words provides that "no member shall be entitled to benefits who has not paid dues and assessments in advance." We think, under the facts of this case as shown by the plaintiffs, there was never a legal "suspension" of Starnes because he had not paid "dues and assessments in advance." The plaintiff's evidence showed a payment of the dues for July and August, although returned after payment in the manner described, and gave as a reason for not tendering the dues for September and October the positive declaration of the secretary that he would not accept them, if tendered. If this testimony was true, all dues had been paid in law at the date of Starnes' death, October 16, 1904, and he was at that time a member in good standing. "Even where the rules of the association indicate that such nonpayment of a monthly assessment by a member is a ground of suspension, a forfeiture of his benefits under the certificate will not result from such nonpayment, unless there has been some judicatory or affirmative action by the association declaring the member suspended." *Warwick v. Knights of Damon*, 107 Ga. 115, 32 S. E. 951. It cannot be reasonably claimed that the act of the secretary, August 6, 1904, in marking Starnes "suspended," is sufficient "judicatory or affirmative action by the association." No action declaring a suspension for nonpayment of dues or assessments was ever taken by the association. The only action of the association expelling the member because "his dues and assessments had remained unpaid for two months" was that of August 11, 1904, which the evidence shows was entirely ineffective, because in violation of the constitution and unwarranted by the facts. We conclude that the fact of membership at the time of death should have been left to be determined by the jury, and could not have been decided by the court as a matter of law.

2. The main question, however, upon which it is said the learned judge below based his judgment directing a verdict for the defendant, was the opinion entertained by him that the deceased, whatever might have been his status in reference to membership in the association, had no "family at the date of his death to take the benefit." The evidence showed that his wife had died a

few months before, and all of his three children, the plaintiffs in the suit, had married and had families of their own, and were living in separate households from their father, and were not dependent upon him for support. Article 5, section 1, of the constitution of the association provides: "On the death of any member the sum of \$1,000 shall be paid to his family, each member to be assessed \$2.50." What is the meaning of the word "family," as here used? The word is most elastic and flexible, either broad or narrow, according to the subject-matter to which it applies. In its limited sense the word "family" signifies the father, mother, and children. In its ordinary acceptation it means all the relatives who descended from a common progenitor. In its very restricted sense it means husband and wife; father, mother, and children; father and children; mother and children; or children forming the same household. Some general rules of construction have been laid down for our guidance when the word is used in contracts of insurance by mutual insurance companies, benefit societies, and like associations. "Where, under the contract, certain classes of persons only may take the fund, a broad and liberal meaning should be given to the words in which the classes are specified." *Niblack, Benefit Societies* (2d Ed.) § 175. "Where the word 'family' has been used to designate the class to which the beneficiaries must belong, the courts have not generally given it a strict construction, and relationship, either consanguinal or marital, has not always been insisted upon in order to bring one under this class." 3 Am. & Eng. Enc. Law (2d Ed.) 963; *Carmichael v. N. W. Mut. Ben. Ass'n*, 51 Mich. 494, 16 N. W. 871.

When we come to consider the cases where the courts have construed the meaning of the term "family," we find, notwithstanding these general rules, great divergence of construction. Some courts, adopting the liberal construction, have held that the word "family" includes relatives by blood or marriage, even when not living in the same household with the member or dependent on him at the time of his death. In *Tepper v. Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449, the court holds that stepchildren living apart from the member and independent of him at the time of his death, who had been brought up in his household, could lawfully be designated as members of his "family," even after they had married and left his household. The court in that case construes the word "family," as used in the constitution and by-laws of benefit societies, as including members of the household who, in the usual course of family development, have separated themselves from membership in the family. In *Faxon v. Grand Lodge*, 87 Ill. App. 262, it was held that the stepmother of a member, who was not living with nor dependent upon the member at the time of his death, was a member

of his family, under the meaning of that term as used in the constitution and by-laws of the lodge; she being the only surviving member of his family. For substantially similar rulings, see *Lane v. Lane*, 90 Tenn. 639, 42 S. W. 1058; *Norwegians' Old People's Home Society v. Wilson*, 176 Ill. 94, 52 N. E. 41; *Hosmer v. Welch*, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Hofman v. Grand Lodge*, 73 Mo. App. 47; *Ferbrache v. Grand Lodge*, 81 Mo. App. 268; *Klotz v. Klotz* (Ky.) 22 S. W. 551. Other courts, following the view of Lord Kenyon in *King v. Inhabitants of Darlington*, 4 Term Rep. 800, have given to the word "family" a restricted meaning. "In common parlance," said Lord Kenyon, "the family consists of those who live under the same roof with the pater familias; those who form (if I may use the expression) his fireside. But, when they branch out and become the heads of new establishments, they cease to be a part of the father's family." Similar constructions of the word "family," when used in the charter or by-laws of benefit societies, will be found in the following cases: *Elsey v. Odd Fellows' Association*, 142 Mass. 224, 7 N. E. 844; *Tyler v. Odd Fellows' Association*, 145 Mass. 134, 13 N. E. 360; *Roco v. Green*, 50 Tex. 483; *Brower v. Supreme Lodge*, 87 Mo. App. 614; *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

From a most careful study of conflicting authorities, I deduce the following as the sound rule of construction: Where the word "family" is used to designate the class who shall receive the benefit, any relation who is living with and dependent upon the member, or with whom the member is living and upon whom he is dependent, at the date of his death, is within the designated class and entitled to the benefit. This combines the family relation with the fact of dependence, both of which, I think, should exist in such cases. The construction of this word in the constitution of the association, insisted upon by the able attorney for the association, as meaning wife and dependent minor children, or wife, or dependent minor children, is entirely too narrow, and defeats the benevolent purpose of the association. There might be cases where the member's family consisted of adult children dependent upon him, or where the member himself was dependent upon adult children, who took care of him and paid his dues. Surely in such cases it would be unreasonable to hold that the benefit failed because there was no one to take it. In our opinion, the constitution and by-laws in these associations should be construed by the courts so as to effect their benevolent object, and not to defeat that object. There was some evidence in this case from which the jury could have inferred that the son had paid the dues of his father to the association for some months, and that at the date of his father's death he was living with

and was being supported by the son. We think he was entitled to have these questions of fact determined by the jury, and that a direction of a verdict against him was erroneous.

Judgment reversed.

RUSSELL and POWELL, JJ. (specially concurring). With the result reached, and with most of what is said by the Chief Judge in the opinion filed by him, we fully concur. However, we think that the word "family" should be given an even broader meaning than he has given it. Upon the theory, well recognized by the courts in dealing with insurance and similar beneficial contracts, that a death benefit bought and paid for by a person in life should not fall upon his death for lack of a beneficiary competent to take, no hesitancy has been shown, in the construction of such contracts, in giving great elasticity to the meaning of words, where necessary to do so in order to find a beneficiary. Such a rule of construction is desirable from the standpoints both of the insurer and of the insured. One of the chief objections hitherto made against fraternal insurance is that it does not offer freedom in the designation of beneficiaries, and that the member is liable to pay for insurance which can never be collected, by reason of some strict and technical construction of the limitations imposed as to who shall be a beneficiary. The result of a course of judicial construction which liberally construes such contracts, so as to make it more certain that the benefits bought will reach some person or persons whom the member would really wish such benefits to reach, is, therefore, to give popularity to this form of insurance. In such contracts the word "family" has been most liberally extended, wherever necessary to effectuate the beneficial purpose. It is a word which must vary in meaning according to the conditions surrounding the member at the date of his death. From a review of the decisions we deduce the following order of precedence which should ordinarily be observed in determining who are entitled to take under the words "family of the member," or similar designations: (1) Wife and unmarried children, minor or adult; or, if no unmarried children, (2) wife alone; or, if no wife, (3) unmarried children alone; or, if no wife and no unmarried children, (4) persons related by consanguinity or affinity, living with the member in the same household; or, if none of these, (5) any person related by consanguinity or affinity upon whom the member is dependent; or (6) any person related by consanguinity or affinity, dependent on and supported by the member; or, if none of these, (7) married children, irrespective of dependency; or, if none of these, (8) father, mother, brothers and sisters, irrespective of active household connection and irrespective of the question of dependence; and in some instances an even further ex-

tension may be made, if necessary, in order to find a beneficiary. The existence of the benefit connotes a contemplated beneficiary, and the law will find one, if possible.

(3 Ga. App. 209)

**DURANT LUMBER CO. v. SINCLAIR LUMBER CO. (No. 363.)**

(Court of Appeals of Georgia. June 26, 1907.)

**1. COURTS—SUPREME COURT—TRANSFER OF CAUSES TO COURT OF APPEALS—JURISDICTION.**

Although the Court of Appeals came into existence on October 12, 1906, the Supreme Court retained jurisdiction of writs of error from city courts until January 1, 1907; and it still has jurisdiction in such cases, to the extent that it may cause them to be filed and transferred to this court.

**2. ASSIGNMENTS—ACTIONS BY ASSIGNEE—PARTIES—PLAINTIFFS—PERSONS ENTITLED TO SUE—SET-OFF AND COUNTERCLAIM.**

One who, having bought the business of another, fills an order sold by the latter to a third person, cannot maintain in his own name a suit against such third person upon the contract of sale.

(a) In such a case he may sue in the name of his predecessor in business, with himself as usee.

(b) In that event, the defendant may set off counter demands existing in his favor against the nominal plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 206; vol. 40, Principal and Agent, §§ 513, 520.]

**3. SALES—EVIDENCE—SUFFICIENCY.**

The evidence was insufficient to show a contract between the plaintiff and the defendant.

**4. SET-OFF AND COUNTERCLAIM—PARTIES TO AND MUTUALITY OF CROSS-DEMANDS.**

While an undisclosed principal may sue upon a contract made with his agent, yet the opposite party to the contract will be entitled to set off any claim he may have against the agent.

(Syllabus by the Court.)

Error from City Court of Valdosta; O. M. Smith, Judge.

Action by the Sinclair Lumber Company against the Durant Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jas. M. Johnson and A. J. Little, for plaintiff in error. G. A. Whitaker, for defendant in error.

**POWELL, J.** The Durant Lumber Company bought a car load of lumber from one Wells, who was operating a mill business. The Sinclair & Simms Lumber Company cut the lumber, and shipped it. The Sinclair & Simms Lumber Company, which, for convenience, we will herein call the "Sinclair Company," brought suit in its own name against the Durant Lumber Company, which herein we will likewise call the "Durant Company." For original answer the defendant filed a general denial of the paragraph of the petition alleging indebtedness upon the account. To meet a contention of the plaintiff that Wells was acting as agent of the Sinclair

Company in making the contract, the defendant filed an amendment to the answer, in which he set up that, if Wells was agent of the plaintiff, the defendant had no knowledge of the fact, that Wells was indebted to the defendant, and that, as to the remainder of the money beyond Wells' indebtedness to the defendant, it had been paid into court under a garnishment proceeding instituted against Wells by one of his creditors. It appears from the evidence that shortly after Wells made the contract of sale he sold out his business to the Sinclair Company. The contention of the plaintiff is that, before the lumber was cut, Wells notified the Durant Company of this fact, and that Wells, as the agent of the plaintiff, made a new contract, whereby the plaintiff was to cut it instead of him. The defendant denied that it had any intimation that Wells had sold out, or that the Sinclair Company was to cut the lumber, until after it had been shipped. Upon this point the plaintiff's case rests solely upon the following testimony of Wells: "I did tell him [Durant] of the sale a day or two after it was made, and before this lumber was cut that is sued for. I told Mr. Durant that I had sold out, and that the Sinclair & Simms Lumber Company would have to fill the balance of their orders if they were filled; that I had nothing more to do with them. That was before this lumber was cut. Don't remember what Mr. Durant said about that; only he said he wanted his orders filled. I was managing the business of the Sinclair & Simms Lumber Co. Q. You say that just a few days after you sold out to the Sinclair & Simms Lumber Company you put Mr. Durant on notice? A. Yes, sir; I came up here in a day or so after I had sold out, and told him that I had sold out. I told him in that conversation that I would be with the Sinclair & Simms Lumber Company. Q. Was there anything said between you and Mr. Durant about the Sinclair & Simms Lumber Company continuing to cut for him? A. Well, he said he wanted his old orders filled, that he had placed his orders, and he wanted them filled. I told him that I did not have anything to do with them, that was with the Sinclair & Simms Lumber Company. Q. What did he say in that connection? A. He said that he wanted them filled." There was evidence of an indebtedness existing from Wells to the Durant Company at the time that the order was taken and at the time it was filled. On this point the court charged the jury: "The defendant in this case could not take this car of lumber (even if Wells was the agent, and he dealt with him in ignorance of his being the agent and the other parties the principals), and place any part of it to the payment of the account due by W. E. Wells to him which existed prior to this time, or any other account, except payment of money on this particular car; and they don't claim in this case to have paid

any money on this particular car, except as paid in court, and there is no evidence to justify a verdict in favor of the defendant on the question of payment, and it resolves itself down to this one question in the case, and there is but one question you are to decide, and that is whether or not the shipment of this car of lumber by plaintiffs in this case to defendants was authorized by defendants." The verdict was in the plaintiff's favor. To the overruling of the motion for a new trial the defendants filed a bill of exceptions, which was signed December 13, 1906, and filed in the office of the clerk of the Supreme Court on December 22, 1906. After January 1, 1907, the case, having originated in a city court, was transferred by the Supreme Court to this court. The defendant in error has filed a motion to dismiss the writ of error, on the grounds that on December 13, 1906, the Court of Appeals had exclusive jurisdiction of cases arising in city courts, and the writ of error signed that day was made returnable to the Supreme Court; also that on that date the Supreme Court had no jurisdiction to entertain writs of error from city courts; that the Supreme Court, being without jurisdiction, had no power to transfer the case.

1. We will first dispose of the motion to dismiss the writ of error. It is ill founded. By the constitutional amendment of 1906 (Acts 1906, p. 24) the Supreme Court retained jurisdiction of writs of error from city courts until January 1, 1907. Express power was also conferred on that court to transfer such cases of the class mentioned as were pending therein on January 1, 1907, to the Court of Appeals. Even now, by virtue of another provision of the same constitutional amendment, the Supreme Court may entertain jurisdiction of writs of error in cases not reviewable by that court, to the extent of transferring them to the Court of Appeals, "and the Court of Appeals shall try the cases so transferred." A writ of error which is made returnable to the Supreme Court, when it should be made returnable to the Court of Appeals, is not void. The framers of the constitutional amendment wisely made provision for such cases; for, although frequently there is doubt as to which court has the jurisdiction, the writ of error may in all cases be filed in the Supreme Court, and, if that court finds that the case is within the jurisdiction of the Court of Appeals, it will be transferred. This motion to dismiss arises from a misconception of our ruling in *Gainesville Midland Ry. v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007. While, as held in that case, the Court of Appeals came into existence October 12, 1906, yet this in no wise interferes with the powers reserved to the Supreme Court, under the constitutional amendment creating this court.

2. The judgment must be reversed. Certainly the Sinclair Company could not sue in its own name upon the original contract

between Wells and the Durant Company; for he was not the agent of the Sinclair Company when that contract was made. It might have maintained a suit in the name of Wells for its use, but the defendant would have been entitled to the protection of all the defenses it might have had against Wells. *Atlantic Coast Line R. Co. v. Hart Lumber Co.*, 58 S. E. 316.

3. Nor was there sufficient evidence of a subsequent new contract, whereby the defendant bought from the Sinclair Company, through Wells as its agent. The evidence upon which the plaintiff must rely to establish that contention is set out above. It shows that Wells notified the defendant that he had sold his sawmill to the plaintiff, and that, if the lumber was cut, the plaintiff would have to cut it. Nowhere does Wells say that the Durant Company agreed to surrender its contract with him and to make a new purchase from the Sinclair Company; but he says that Mr. Durant replied that "he wanted his old order filled, that he had placed his orders, and wanted them filled." The words quoted are apt for the expressing of the idea that Durant insisted on Wells' complying with his contract, even though it were necessary for him to get some one else to cut the lumber, and inept to express the idea that a direct purchase by the Durant Company from the Sinclair Company was contemplated.

4. But, even conceding that the plaintiff's evidence was such as to show that Wells contracted with the defendant as the agent of Sinclair Company, yet, since the defendant denied any knowledge of the agency until after the shipment was made, the court's instructions quoted above were erroneous. While an undisclosed principal may sue upon a contract made with his agent, yet the opposite party to the contract will be entitled to set off any claim he may have against the agent, and not merely such claims as arise out of the particular contract in question. *Ruan v. Gunn*, 77 Ga. 53; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152.

Judgment reversed.

(2 Ga. App. 283)

**GOLDSMITH v. STATE.** (No. 257.)

(Court of Appeals of Georgia. July 10, 1907.)

**CRIMINAL LAW—ACCUSATION—AMENDMENT.**

A solicitor of a city court may amend an accusation in that court at any time before the defendant therein has pleaded to the merits, provided the affidavit of the prosecutor will legally support the accusation as amended, unless such amendment is forbidden by the act creating such city court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 433½.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

John Goldsmith was convicted of crime, and brings error. Affirmed.

Isaac S. Peebles, Jr., and Wallace B. Pierce, for plaintiff in error. Jas. C. C. Black, Jr., Sol., and John M. Graham, for the State.

**RUSSELL, J.** The only assignment of error to be passed upon in this case is the complaint that the court erred in allowing the accusation against the plaintiff in error to be amended, and in refusing to quash it. The amendment was permitted before the defendant pleaded, and it consisted in changing the ownership of a pistol alleged to have been stolen and of the house in which it was said to have been contained. The question is thus squarely presented whether the solicitor of the city court of Richmond county has the right to amend an accusation originating in that court and based upon an affidavit of a prosecutor; and, if so, under what circumstances can such amendment be allowed. The thirty-second section of the act creating the city court of Richmond county provides: "Defendants in criminal cases, where the prosecution originates in said city court, or where such defendants are bound over to said city court by any justice of the peace or notary public, shall be tried on written accusations, setting forth plainly the offense charged, founded on affidavit containing the name of the accuser, and signed by the solicitor of said court. The proceedings, after accusation, shall conform to the rules governing in the superior court, except there shall be no jury trial, unless demanded, as hereinbefore provided, by the accused. In all cases tried upon accusations, the offense shall be therein charged with the same particularity, both as to the matter of form and substance, as is required by the laws and rules of criminal pleading to be observed in bills of indictment in the superior courts." Acts 1880-1881, p. 580. The plaintiff in error insists upon the latter portion of the section that the proceedings after accusation shall conform to the rules governing the superior courts, and the offense shall be charged with the same particularity as is required to be observed in bills of indictment in the superior court.

We confess that the determination of the question is not without some difficulty, in view of the language of the act which we have quoted, if considered alone and without reference to the difference between the word "accusation" (as used with special reference to a city court, and not considered in a generic sense) and an indictment. There is, however, a marked difference between accusation and an indictment, which would furnish reasons for allowing an accusation to be amended, while an indictment cannot be except by the grand jury itself before the defendant pleads. The indictment is found upon the oaths of a grand jury, whereas an accusation in a city or a county court is based upon the affidavit of the prosecutor; and, if the affidavit of the prosecutor is not amend-

ed, the analogy between the two is complete, although an indictment cannot be amended. An accusation is the equivalent of the common-law "information"; and we apprehend, therefore, that, when the act says that the proceedings after the accusation shall conform to the rules governing in the superior court, the Legislature intended to refer to the accusation as it stands when the defendant is finally put upon trial, and not to preclude the right of amending the accusation, either to make it conform to the affidavit on which it is based or to amplify the charge contained in the affidavit, so as to comply with the requirement of the act as to the particularity with which the charge should be set forth. We are satisfied that this is the proper construction to be given the section of the act creating the city court of Richmond county, above quoted. It clearly appears from the following decisions: In *Gordon v. State*, 102 Ga. 679, 29 S. E. 446, Mr. Justice Cobb said: "The term [accusation], as used in our law in reference to trials in courts having jurisdiction of misdemeanor cases, is but the equivalent of an information at common law." And Justice Fish, speaking for the court, in *Wright v. Davis*, 120 Ga. 676, 48 S. E. 173, says: "Under the common law, from which most of our ideas of 'due process of law' are derived, an information lies for all misdemeanors, and an information by the attorney or solicitor general \* \* \* is the mere allegation of the prosecuting officer by whom it is preferred." If it be true that an accusation takes the place of a common-law information, an accusation in a city court, in the absence of a statutory provision to the contrary, is subject to amendment. In *Rex v. Wilkes*, 4 Burrows, 2527, Lord Mansfield says: "There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defense, the defendant has leave to change his plea." There can be no question that the solicitor could have withdrawn the accusation and have preferred a new one. The motion to quash was based upon the fact that he had merely amended the original accusation. If the accusation was not amendable the motion to quash the accusation should have been sustained; and, as this would have been a final disposition of the cause, the overruling of the motion properly presents the allowance of the amendment to this court for review.

The question has not been directly raised in any case which has come under our observation, but, from what has been said above, we are convinced that the allowance of

the amendment in this case was not error, because it was made before the defendant pleaded to the merits. The amendment did not conflict with the affidavit, and the act creating the court did not forbid it. In the case of *Barlow v. State*, 77 Ga. 448, the court did not settle the question now before us, but rather decided what we have already held, that the solicitor could have withdrawn the accusation and have presented another, and held that the defendant would not be heard to complain, because, instead thereof, the accusation was amended, because he himself consented to be tried on the accusation as amended, rather than require another accusation. In the case of *Conly v. State*, 83 Ga. 498, 10 S. E. 123, the defendant was tried in the city court of Atlanta upon an accusation which failed to allege venue; and an amendment was allowed alleging venue after the evidence had closed. The judgment finding him guilty was reversed because the court did not sustain a motion in arrest of judgment, and the court held that it was too late to amend after the party has been put upon his trial. This was the real question in the case that was to be decided; and the court held that the accusation takes the place of an indictment. But, while this was the only issue in that case, the court, in deciding the case, we think decided this. What might have been considered obiter in that case is based upon the principles announced in the authorities to which we have referred, and is sound law. "The solicitor of the city court, before trial of a criminal case, and before the selection of a jury, can at any time amend the accusation as he may deem proper." This rule does not admit in its fullness the statement made by Justice Blandford, that "the accusation takes the place of an indictment." The rule is based upon a recognition that here is a substantial difference between the two, and that if the affidavit upon which the accusation sought to be amended is based is for any reason insufficient, or incompatible with the accusation as amended, the amendment cannot be allowed, but the state will be forced to procure a new affidavit and a new accusation thereon. In this case, as the defendant was charged in the affidavit with "misdemeanor—larceny from the house," without more, the affidavit was as applicable to the accusation as amended as to the original.

Judgment affirmed.

(2 Ga. App. 322)

**PASCHAL & SON v. MOLINE JEWELRY CO.** (No. 456.)

(Court of Appeals of Georgia. July 10, 1907.)

**APPEAL—JUDGMENT AGAINST FIRM—BOND—DISMISSAL.**

A judgment was rendered in a county court against the individual members of a partnership. An appeal was entered in the name of the partnership by its attorney at law, and the

sole surety was one of the partners against whom judgment had been rendered. *Held*, that the appeal was a nullity, was not amendable, and was properly dismissed on motion. *Gordon v. Robertson*, 26 Ga. 410, and cases cited in the footnotes; *Fisher v. Pearson*, 57 S. E. 1018, 1 Ga. App. 517, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2024, 2026.]

(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Action by the Moline Jewelry Company against Paschal & Son. Judgment for plaintiff in the county court. Defendants' appeal was dismissed, and they bring error. Affirmed.

W. T. Davidson, for plaintiffs in error.  
Turner & Adams, for defendant in error.

**POWELL, J.** Judgment affirmed.

(2 Ga. App. 263)

**GROOVER, CONOLY & DAVIS v. MELTON.** (No. 439.)

(Court of Appeals of Georgia. July 4, 1907.)

**ATTACHMENT—LEVY ON REALTY.**

This case is controlled by the decisions of the Supreme Court in the cases of *Harris v. Kittle*, 45 S. E. 729, 119 Ga. 30 (2), *McCrary v. Hall*, 30 S. E. 881, 104 Ga. 606, *Smith v. Brown*, 23 S. E. 849, 96 Ga. 274, *New England Mtge. Co. v. Watson*, 27 S. E. 160, 99 Ga. 733, and *Baker v. Aultman*, 83 S. E. 423, 107 Ga. 339, 73 Am. St. Rep. 132, holding that some overt act of constructive seizure by the levying officer is essential to the validity of the levy of an attachment upon real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 482.]

(Syllabus by the Court.)

Error from City Court of Quitman; R. L. Shipp, Judge.

Action between Groover, Conoly & Davis against F. F. Melton. From the judgment, Groover, Conoly & Davis bring error. Affirmed.

Sam S. Bennet and Stanley S. Bennet, for plaintiffs in error. J. A. Wilkes, for defendant in error.

**POWELL, J.** Judgment affirmed.

(2 Ga. App. 268)

**GURR v. CARTER.** (No. 430.)

(Court of Appeals of Georgia. July 4, 1907.)

**CONTINUANCE—AMENDMENT OF PLEADING.**

The court erred in not granting the defendant's motion for a continuance, upon the plaintiff's having tendered a material amendment to his petition, whereby the defendant was surprised and rendered less prepared for trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 109.]

(Syllabus by the Court.)

Error from City Court of Dawson; Frank Park, Judge.

Action by W. P. Carter against T. E. Gurr.

Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Gurr, for plaintiff in error. A. M. Raines and M. J. Yeomans, for defendant in error.

POWELL, J. Judgment reversed.

(2 Ga. App. 360)

KISER CO. v. McLEAN, EVERETT & CO.  
(No. 403.)

(Court of Appeals of Georgia. July 18, 1907.)

PLEADING—SUSTAINING DEMURRER—EFFECT.

"A judgment overruling a demurrer to an answer, unless excepted to and reversed, concludes the plaintiff as to the legal sufficiency of the answer; and, if the same goes to the whole of the plaintiff's demand and is duly supported by evidence, a complete defense is established." Louisville Coffin Co. v. Rhudy, 35 S. E. 632, 111 Ga. 827.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 568.]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by the M. C. Kiser Company against McLean, Everett & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Johnston & Cone and Mayson & Hill, for plaintiff in error. R. Lee Moore, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 345)

CITY OF STATESBORO v. SIMMONS.  
(No. 291.)

(Court of Appeals of Georgia. July 18, 1907.)

ERROR, WRIT OF—EVIDENCE—REVIEW.

No material error of law was committed. The evidence warranted the verdict, and it was approved by the trial court.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by R. Simmons against the city of Statesboro. Judgment for plaintiff, and defendant brings error. Affirmed.

Remer Proctor and Johnston & Cone, for plaintiff in error. Deal & Lanier, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 369)

BENSEL CONST. CO. v. HOMER. (No. 406.)  
(Court of Appeals of Georgia. July 18, 1907.)

1. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—LIABILITY.

A city may by reasonable ordinance limit the amount of space in the street which may be occupied by material assembled for the erection of a building on an abutting lot. A violation of such an ordinance is, as against a member of the public using the street for ordinary travel

and injured by reason of such violation, per se wrongful and negligent; and the court may so instruct the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1688-1689.]

2. SAME—NEGLIGENCE OF PEDESTRIAN.

Pedestrians have the right to use the entire highway, and are not confined to the sidewalks alone. If a pedestrian leaves the sidewalk and enters upon the portion of the highway devoted primarily to vehicles, the surroundings may require of him the exercise of a greater amount of care and caution for his own protection than if he had remained upon the sidewalk; but the question of his negligence under the circumstances is one for the jury.

3. SAME—EVIDENCE.

There being evidence justifying a finding that the defendant was negligent, that the plaintiff was injured as the proximate result thereof, and that the plaintiff was not guilty of such contributory negligence as to defeat a recovery, the verdict in the latter's favor is sustained.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Kate Homer against the William Bensel Construction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Jas. L. Key, for defendant in error.

POWELL, J. Mrs. Homer recovered a verdict against the William Bensel Construction Company for personal injuries; and the latter, its motion for a new trial having been overruled, brings error.

The defendant was engaged in erecting a building on the north side of Trinity avenue, in the city of Atlanta, and, under building permits and a city ordinance allowing the laying of building material on the street and sidewalk to the extent of one-half the width thereof, had piled lumber and other building material in the street. Mrs. Homer lived on the north side of Trinity avenue, just above the place where the building was being erected, and, returning home after nightfall, she stumbled over a piece of scantling projecting from underneath a pile of lumber, fell, and sustained injuries. According to her testimony, which is to be taken as true (although contradicted), since the jury decided in her favor, the pile of lumber covered more than one-half of the width of the street, and the sidewalk was totally obstructed. The piece of scantling over which she stumbled projected about five feet further out into the street than did the outer margin of the pile of lumber. A city ordinance required the placing of lighted lanterns so as to mark the corners of such obstructions; and, while three lanterns were placed on the lumber, they were not so placed as to indicate that there was any obstruction beyond the margin of the lumber, and, owing to the darkness, the plaintiff did not see the scantling. She knew that the building was going

on, and that lumber was piled in the street, but did not know of this scantling, as it had been placed there since she had last passed the place where it was. Coming up Trinity avenue towards her home, when she reached the obstruction on the sidewalk, she attempted to go around it in the street, though she could have avoided it by using the sidewalk on the south side of the avenue. The ordinance of the city provides (omitting immaterial parts): "Any person or persons actually building, or about to build or repair any building, may collect and lay all such materials as may be necessary for such building or repairs in the street, lane, or alley next adjoining to or in front of such building or repairs, and such person or persons so building or repairing shall have the privilege of using one half of the sidewalk and one half of the width of the street adjoining or in front of said building or repairs; during all such time as such materials shall so lie in any street, lane, or alley, the owner or proprietor of such materials shall cause a lamp or lantern, with good and sufficient light therein, to be securely hung up, placed or fixed on a post, or otherwise, at each of the two corners of such enclosure projecting into the said street, lane, or alley, and in such manner as clearly and plainly to show the place and extent occupied by such material."

It is urged by the plaintiff in error that the verdict is contrary to the evidence, because the plaintiff by ordinary care could have avoided the injury, and because the negligence, if any, of the defendant, was not the proximate cause of the injuries. Exception is also taken to the following instructions of the court to the jury: "This defendant had the right, under the permit issued to it by the city, to use one-half of the width of the street in laying its material, piling, and keeping it during the progress of the building, but it did not have the right to go any further than half the width of the street; and, if it used any more than half the width of the street for the purpose, such use, beyond a half of it, was in violation of the city ordinance, and unlawful, and it would be as against any person who sustained injury on account of such violation. If such person did sustain injury, negligence as against that person. But if they did not exceed half the width of the street, gentlemen, if they were within their legal rights as defined under this ordinance, then, so far as their acts being a question of negligence as a matter of law, there would be no negligence, if they did not violate the ordinance." Also: "This clause of the ordinance means just what it says, expressed in plain English words, and I cannot make it any clearer by enlarging upon it. If there was a failure on the part of the defendant to comply with that clause of the section with reference to the lights, that would be a violation of the

ordinance, and, as against any person injured on account of it, would be negligence as a matter of law, and you would so consider it. If there was no violation of its terms, to which I called your attention, then as a matter of law, gentlemen, there would be no negligence with reference to the lights, but would become a question for you, under the instructions which I shall now give you on the general subject of negligence." Also: "So far as going along the street is concerned, as a matter of law a pedestrian—that is, one walking—has the legal right to walk on any part of the street, as well as the sidewalk. Now, whether a pedestrian, or person walking, is in violation of ordinary care in going upon any part of the street at any time, or at a given time and place, under a given state of circumstances and facts, is a question for the jury to determine. Whether ordinary care required one not to have done it, or whether one could have done it in the exercise of ordinary care, it becomes a question of fact for the jury to say what ordinary care required under the circumstances." Other exceptions were taken; but, as they do not involve any new or interesting questions, we shall not elaborate them, but merely state that they present no error.

1. An unlawful obstruction to the free and safe passage along a public street is a nuisance; and ordinarily a person specially injured thereby has a cause of action. *Brooks v. Atlanta*, 1 Ga. App. 878, 57 S. E. 1081, and citations. The city may by a reasonable ordinance limit the amount of space in the street which may be occupied by material assembled for the erection of a building on an abutting lot. No complaint is made that the ordinance in question is unreasonable or invalid. As against a member of the public injured as the proximate result thereof, a violation of such an ordinance is per se wrongful and negligent; and the court may so instruct the jury. This is no invasion of the province of the jury to determine questions of negligence from the facts proved; for, if the ordinance and the violation be shown, the negligence follows as a matter of law. *Central Ry. Co. v. Bond*, 111 Ga. 14 (7), 17, 36 S. E. 299, and citations. Likewise, where the city ordinance requires the placing of lanterns to indicate the presence and the boundaries of obstructions permitted in the streets, noncompliance with the requirement is negligent. *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269.

2. We think the instruction of the court upon the subject of the right of a pedestrian to use the street, instead of confining himself to the highway, correctly states the law. The entire highway is for the use of pedestrians; and, if a person on foot leaves the sidewalk and goes upon the portion of the street devoted primarily to the use of vehicles, he is not necessarily negligent. The circumstances



may require of him a greater amount of care and caution for his own protection than if he remained upon the sidewalk; but this is all an open question for the jury. *Atlanta & W. P. R. Co. v. Atlanta, B. & A. Ry. Co.*, 125 Ga. 529, 54 S. E. 736; *Brunswick R. Co. v. Gibson*, 97 Ga. 498, 25 S. E. 484.

3. We cannot hold that the plaintiff was guilty of such contributory negligence as to defeat her recovery. We presume that this question was fairly submitted to the jury, as there is no complaint to the contrary. We cannot say as a matter of law that common prudence demands that a pedestrian who, walking along the sidewalk on one side of the street, meets with an obstruction, shall, in order to reach a point further along on the same side of the street, cross to the opposite sidewalk, proceed till the obstruction be passed, and then recross, rather than to attempt to go around the obstruction by using that portion of the street which under the law should not be obstructed and which the location of the danger signals does not indicate to be obstructed. Nor can we say that the violation of the ordinance in question was not the proximate cause of the injury. It is true that if the lumber had been piled within the lawful limits, and the projecting scantling had also been situated within those bounds, and the plaintiff had attempted to pass as close to the lumber as she did, in all probability she would have been injured just as she was. If this had been the case, and lanterns properly placed had indicated the presence of the scantling or other obstruction within the boundaries so marked out, and the plaintiff had transgressed within these bounds, she could not have recovered. She then would have been injured, but the defendant would have been free from wrong, and therefore not responsible; but such is not the case. The defendant wrongfully placed an obstruction where it did not have the right to place it. The plaintiff, using the highway in the exercise of ordinary care, and without notice of the presence of the obstruction, fell over it and was injured. These are the facts found to be true by the jury; and the recovery is therefore sustained.

Judgment affirmed.

(2 Ga. App. 374)

**McCOOK v. DUBLIN & S. W. R. CO.**  
(No. 440.)

(Court of Appeals of Georgia. July 18, 1907.)

**1. CARRIERS—EXPULSION OF PASSENGER.**

"It is the duty of passengers to supply themselves with tickets before getting on the trains."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1005.]

**2. SAME—EVIDENCE.**

Where a passenger, without fault of the railroad company, but solely because of his own lack of reasonable diligence, fails to buy a ticket, he is not entitled to transportation without paying the train rate; and, if he re-

fuses to pay such rate, the company can lawfully eject him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1433.]

**3. TRIAL—NONSUIT.**

The plaintiff's own testimony clearly shows that he had no cause of action, and that his case was utterly without merit. The nonsuit was properly granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 360.]

(Syllabus by the Court.)

Error from City Court of Dublin; W. M. Clements, Judge.

Action by Archy McCook against the Dublin & South Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

K. J. Hawkins, for plaintiff in error.  
Daley & Bussey and P. L. Wade, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 386)

**SCHLEY v. STATE.** (No. 512.)

(Court of Appeals of Georgia. July 25, 1907.)

**CRIMINAL LAW—APPEAL—REVIEW.**

This case is controlled by the decision in this court in *Plummer v. State*, 1 Ga. App. 507, 57 S. E. 969.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Wiley Schley was convicted of crime, and brings error. Affirmed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol., and Zach Childers, Sol., for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 385)

**FRANKLIN v. STATE.** (No. 508.)

(Court of Appeals of Georgia. July 25, 1907.)

**FALSE PRETENSES—CHEATING—EVIDENCE.**

The facts alleged in the accusation and proved did not constitute the offense of cheating and swindling; and the verdict should have been set aside and a new trial granted on the general grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 62.]

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

J. H. H. Franklin was convicted of cheating and swindling and brings error. Reversed.

J. W. Wise, for plaintiff in error. T. V. Lester, Sol., for the State.

HILL, C. J. The defendant was convicted for a violation of Pen. Code 1895, § 670, the general section on the subject of cheating and swindling. The specific acts alleged

as constituting the offense are set out in the accusation as follows: Said defendant "did on the 14th day of November, 1905, in county of Fayette, by using deceitful means or artful practices other than those mentioned in volume 3, Code of Georgia of 1895, cheat and defraud Charlie Bussey to the extent of ten dollars, \* \* \* said deceitful means and artful practice consisting in the said Franklin representing to said Charles Bussey that he had sworn out an accusation against said Bussey in the city court of Fayetteville for disturbing divine worship, said representation being false and fraudulent," etc. The evidence showed that the defendant was the pastor of a church in the country; that the prosecutor, Bussey, had by disorderly conduct disturbed the congregation assembled in the church while engaged in divine worship. The defendant proposed to prosecute him for this offense; and, while he did not actually swear out the accusation, he intended to do so, and did not carry out such intention because of the payment of \$10. We think, under these facts, the conviction was without evidence, and was contrary to law. The prosecutor was not defrauded or cheated by representations made by the defendant. Neither was such representation deceitful or artful. The defendant did accuse the prosecutor of disturbing his congregation lawfully assembled for divine worship, and agreed not to press the prosecution or accusation if he was paid \$10. The \$10 was paid, and, according to promise, no prosecution was instituted. While the conduct of the defendant or pastor does not show a very high standard of morality, yet it falls short of a penal offense.

Judgment reversed.

(2 Ga. App. 253)

**SWAIN et al. v. NASWORTHY.** (No. 373.)  
(Court of Appeals of Georgia. July 4, 1907.)

1. LANDLORD AND TENANT—DISTRESS WARRANT—DISMISSAL.

Upon the trial of a case arising from the filing of a counter affidavit and replevy bond to the foreclosure of a distress warrant, the defendant cannot properly move to dismiss the levy on the ground that it is excessive.

2. SAME—COUNTER AFFIDAVIT—EFFECT OF FILING.

The effect of filing the counter affidavit and bond is to render the process mesne; and the proceeding becomes a suit to recover rent, the distress warrant operating as a declaration and the counter affidavit as a plea. *Chisholm v. Lewis*, 66 Ga. 729; *Elam v. Hamilton*, 69 Ga. 736; *Selfert v. Holt*, 9 S. E. 843, 82 Ga. 757.

3. SAME—EXCESSIVE LEVY.

The tenant's remedy against an excessive levy, if he has any remedy, is an action in damages for the abuse of the process. *Sturgis v. Frost*, 56 Ga. 189.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1155.]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by J. M. Nasworthy against T. E. Swain and others. Judgment for plaintiff. Defendants bring error. Affirmed.

E. H. Williams, for plaintiffs in error. Hal Lawson, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 386)

**TURNER v. STATE.** (No. 513.)

(Court of Appeals of Georgia. July 25, 1907.)

VAGRANCY—EVIDENCE.

The defendant was convicted on an accusation charging her with vagrancy under the act of 1905, and alleging that she was a minor over 16 and under 21 years of age. The undisputed evidence showed that her father was able to support her. *Heid*, that the verdict of guilty was not warranted by the evidence. *Acts 1905, p. 110, par. 8; Collins v. State*, 53 S. E. 809, 125 Ga. 15.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Vagrancy, § 1.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Bertha Turner was convicted of vagrancy, and brings error. Reversed.

Blalock & Cobb, for plaintiff in error. Zach Childers, Sol., for the State.

HILL, C. J. Judgment reversed.

(2 Ga. App. 376)

**FAIR v. METROPOLITAN LIFE INS. CO.**

(No. 309.)

(Court of Appeals of Georgia. July 25, 1907.)

ERROR, WRIT OF—GRANT OF NEW TRIAL.

Unless the judgment rendered is absolutely demanded by the evidence, the first grant of a new trial on certiorari will not be interfered with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 205.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by W. T. Fair against the Metropolitan Life Insurance Company. Verdict for plaintiff. From an order granting a new trial, defendant brings error. Affirmed.

L. D. Moore, for plaintiff in error. Harde-man & Jones and E. P. Johnston, for defendant in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 264)

**STRACHAN & CO. v. WOLF.** (No. 417.)

(Court of Appeals of Georgia. July 4, 1907.)

1. ERROR, WRIT OF—REVIEW—REINSTATEMENT AFTER DISMISSAL.

The exercise of discretion by the trial judge in reinstating a case dismissed for want of prosecution will not, unless flagrantly abused, be disturbed. *Davis v. Alexander*, 27 Ga. 479; *Wallace v. Cason*, 42 Ga. 433.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3838.]

**2. JUDGMENT—CONTROL—ANNULMENT.**

As to those judgments which, outside of the merits of the controversy, pertain to the rules of practice, and are rendered upon formal matters of procedure, the trial judge is allowed a wider control, as to modification or annulment, than as to judgments upon substantial matters affecting the merits of any portion of the case. *E. T., V. & G. Ry. Co. v. Green*, 22 S. E. 36, 95 Ga. 37.

**3. ERROR, WRIT OF—REVIEW—DISMISSAL—REINSTATEMENT.**

While the truth of a motion to reinstate a case, or similar motion, should be made to appear, yet, where the presiding judge entertains the motion, this fact, on exceptions to the judgment, affords a sufficient implicit verification; aliter, where the motion is denied.

**4. DISMISSAL—MOTION TO REINSTATE.**

A motion of the character indicated is to be regarded as filed when actually presented to the court for action, though the written entry of filing by the clerk is not made until a later date.

(Syllabus by the Court.)

Error from City Court of Brunswick; A. D. Gale, Judge.

Action by Edward Wolf, for use, etc., against F. D. M. Strachan & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Conyers, for plaintiff in error. Hardeman & Jones and Max Isaac, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 269)

**PORTER v. TERRELL. (No. 444.)**

(Court of Appeals of Georgia. July 4, 1907.)

**1. ERROR, WRIT OF—BILL OF EXCEPTIONS—EXHIBITS—REVIEW.**

Exhibits attached to a bill of exceptions, following the certificate of the judge thereto, and which are not identified by the trial judge, cannot be considered by this court. Assignments of error, the determination of which is dependent upon such exhibits, therefore cannot be passed upon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2714-2718, 2905-2909.]

**2. HUSBAND AND WIFE—AGENCY OF HUSBAND—EVIDENCE.**

Proof of the relationship of husband and wife, and that work was done and material furnished to improve real estate belonging to the wife without more, is not sufficient evidence to establish the fact that she is an undisclosed principal and the husband merely her agent, so as to render her liable for contracts made by him with third parties.

(Syllabus by the Court.)

Error from City Court of Douglas; C. T. Roan, Judge.

Action by O. B. Porter against A. C. Terrell. Judgment for defendant, and plaintiff brings error. Affirmed.

Rogers & Heath and J. W. Quincey, for plaintiff in error. F. Willis Dart, for defendant in error.

RUSSELL, J. The plaintiff sought a general judgment against the defendant and a

special judgment against certain real estate belonging to her, against which he alleged he was entitled to enforce his lien as a contractor and materialman. The petition alleged a balance to be due for material furnished and work done by him under a contract with the defendant as to certain water connections, sewerage connections, and plumbing in a certain house and on real estate alleged to have been owned by defendant, in the city of Douglas. The petition averred that the material was furnished and work performed under a contract made with the defendant, Mrs. Alice C. Terrell herself, and that she paid him on said contract the sum of \$68.63, leaving the balance sued for, which she refused to pay. It was further alleged that plaintiff was entitled to a lien "upon said real estate and the house and improvements put therein for the balance of said sum of \$44.94," and that he had recorded his claim of lien as required by law and brought his action within the time prescribed. His prayers were for a general judgment against the defendant and a special judgment against the real estate described. The defendant filed an answer, in which she denied generally the allegations as thus pleaded, and specially denied that she was indebted to the plaintiff in any manner or form, and further alleged that the plaintiff was not entitled to and had no valid lien on the premises described in his petition, and was not entitled to a judgment against her, either general or special.

The testimony for the plaintiff showed that W. W. Terrell, the husband of the defendant, alone had employed him and contracted with him to do the work, and furnish the material set out in the bill of particulars attached to his petition, that the plaintiff had done the work and furnished materials, and that it was all worth \$113.57, and that this had been paid by the said W. W. Terrell, except \$44.94, which he refused to pay, claiming that what he had paid was as much as the material and work were worth. After the plaintiff had completed his work and furnished the material therefor, and when he went to record his lien for the balance claimed by him, he discovered that the real estate in question did not belong to W. W. Terrell, but was the property of his wife, Mrs. Alice C. Terrell, and the plaintiff thereupon made out and recorded his lien against the wife. There was not the slightest suggestion even that the plaintiff had any contract, agreement, or understanding, directly or indirectly, with Mrs. Terrell in regard to the material or work in question; and the only reference made to her at all was the fact that she was present a part of the time while the work was being done and made some suggestions as to putting in an extra wash basin, coupled, however, with the injunction to see her husband about the matter first, which the plaintiff did.

Such contract as the plaintiff had was solely with W. W. Terrell, the account was charged to him, and he made all of the payments thereon, as heretofore stated.

The plaintiff also offered in evidence a certified copy of the lien recorded at his instance, which was in the following language: "Georgia, Coffee County. The undersigned, C. B. Porter, a mechanic, claims a lien upon certain waterworks and sewerage erected and put in one dwelling house and premises owned and occupied by Mrs. Alice C. Terrell, situated on the corner of Sycamore and Madison streets, in the city of Douglas. Said lien is claimed for material and plumbing work done by the undersigned in said structure and on the premises. The amount for which the undersigned claims this lien is forty-four dollars and 94 cents. And, now within three months since the same was done, the undersigned records this lien therefor in the office of the clerk of the superior court of the county where said property is situated as aforesaid, pursuant to the provisions of section 2804 (2) of the Civil Code. This December 14, 1906. C. B. Porter." "Recorded December 14, 1906. Sessions Fales, Clerk Superior Court." "Clerk's office, Coffee Superior Court. I, J. R. Overman, clerk of the superior court of Coffee county, do hereby certify that the above and foregoing, is a true copy of the original lien now of record in my office, on Mortgage Record, No. 14, page 501. This March 18, 1907. J. R. Overman, Clerk superior court, Coffee county Georgia." This certified copy was objected to upon the ground that the proper foundation had not been laid, and generally upon the ground that the evidence in the case showed a contract with W. W. Terrell, instead of with the defendant, and did not show any right of the plaintiff to connect the defendant with the contract. The court sustained the objections, and ruled that the copy lien could not be admitted as evidence. The plaintiff then closed, and, upon motion of the defendant's counsel, the court awarded a nonsuit, passing the following judgment: "Upon motion of defendant, a nonsuit is hereby granted in this case, upon the ground that the plaintiff fails to show such facts as entitle him to recover in said case." The plaintiff in error excepts to the ruling of the court excluding the certified copy of lien and to the judgment of nonsuit. The evidence may have been sufficient to establish the loss of the original claim of lien, but it is immaterial whether this is so or not. If this paper was properly identified before us, we could not reverse the judgment of the trial judge, although he may have excluded the paper for the wrong reason. It would have been properly excluded because it failed to set forth a claim of lien on anything except the waterworks and sewerage put in the dwelling house and premises.

not claim a lien on the real estate as set forth by the Code. But, even if the plaintiff's court erred in excluding this pa-

per, under the well-settled rulings of the Supreme Court, we cannot ourselves consider the paper, by reason of the fact that it is neither included in the bill of exceptions nor identified by the trial judge, and does not precede his certificate. For want of this identification, we cannot lawfully know the contents of the paper excluded by the trial court, so as to be able to determine whether the ruling was in fact erroneous. Whether this paper be defective or not, without it a special judgment could not be rendered, and no special lien could be created.

We come next to consider whether there was error in awarding the nonsuit, for the reason that the plaintiff was entitled to a general judgment. We do not think the court erred in adjudging a nonsuit. The evidence did not establish the fact that the defendant was an undisclosed principal, and that the husband was her agent. There is in the evidence no suggestion that the plaintiff had any contract, agreement, or understanding with Mrs. Terrell in regard to the material or work in question. The only reference made to her in the evidence is the statement that she was present part of the time while the work was being done, and made a suggestion as to putting in a certain wash basin, coupled, however, with the injunction to see her husband about the matter first, which the plaintiff did. There was no stipulated price to be paid for the work to be done, and no evidence that the defendant authorized it to be done. Nor does any reason appear from the evidence why the plaintiff would not have done the work for the husband. Such contract as plaintiff had was with W. W. Terrell only. The account was charged to him, and he made all the payments thereon. There was no escape from a nonsuit, because the plaintiff alleged contractual relations with the defendant, and there was no testimony tending to support this allegation. "A materialman's lien does not arise against the real estate of the true owner unless the material is furnished directly to the true owner, or to one who occupied the legal relation of a contractor, or one who had some contractual relation with the true owner in connection with the improvements to be made." *Pittsburgh Glass Co. v. Peters Land Co.*, 123 Ga. 726, 51 S. E. 725; *Jennings v. Huggins*, 125 Ga. 340, 54 S. E. 169. The title of the true owner cannot be incumbered by a lien without some act on his part signifying his assent. Repairs or additions might be made at the direction of a disseisor, trespasser, or tenant, and "might even be improvements and add to the value of the property, and yet might not be of a character which the owner desired placed on his land. If the real estate could be subjected to a lien under such circumstances, he might be called upon to pay for that which the next week he would cause to be torn down and removed. It frequently happens that the lot and a new house sell

for less than the cost of building, and it is unfortunately true that one is often improved out of his estate. But, before this can be done, he must at least consent to the making of the disastrous improvement." *Reppard v. Morrison*, 120 Ga. 30, 47 S. E. 555.

We have only referred to these decisions upon the subject of liens because the plaintiff in error strenuously insists that plaintiff was entitled to a general judgment, and the same doctrine of agency or authority to act would be applicable to bind the defendant for the contract of her husband and subject her to a general judgment as would be necessary were the assignment as to the special judgment properly before us. The only real question, therefore, is whether, the relation of husband and wife being shown, a finding is required that the latter shall in any and all events be bound therefor, where the husband for any reason sees fit, of his own accord and upon his own responsibility, to make expenditures upon premises which happen to be owned by the wife, but which were not the basis of the credit extended, or whether the creditor in such cases shall be required to prove other facts or circumstances in addition to the relationship, showing it to be right and proper that the wife shall be bound for the contract. If the husband is acting as agent for his wife and she is simply the undisclosed principal, of course, her liability cannot be questioned any more than if he had, with her assistance, concealed or misled the contractor as to the true ownership of the property, to improve which work or material was furnished. The authorities cited by the plaintiff in error upon the subject of an undisclosed principal are not applicable to the facts of this case. Where the wife is the principal and the husband agent, there are generally at least some circumstances pointing to that conclusion. None such appear in this case. In the absence of evidence of any peculiar circumstances, no conclusive presumption arises, from proof of the relation of husband and wife, that a husband may not present his wife with a new bath tub, or that he may not have put it in the house for his own use and benefit, although the wife may own the real estate. Under the decisions in the cases of *Colquitt v. Solomon*, 61 Ga. 494, *Masland v. Kemp*, 70 Ga. 786, and other cases cited, there can be no question that, even if the copy lien tendered should have been allowed as evidence, it cannot be considered by this court. It is attached to the bill of exceptions on a separate sheet and following the judge's certificate. It is not identified by the judge's signature as being the "Exhibit A" referred to in the bill of exceptions. Certainly, therefore, there could not have been a special judgment against the defendant; and as, in our opinion, the plaintiff's evidence fails to show that the wife was the undisclosed principal of her husband, and the evidence show-

ed, without contradiction, that the employment was procured by the husband, the work done according to his suggestion and wishes, and all the payments made by him, there could have been no general judgment against the defendant. There was no error in the judgment awarding a nonsuit.

Judgment affirmed.

(2 Ga. App. 301)

#### HENDRIX v. ELLIOTT. (No. 429.)

(Court of Appeals of Georgia. July 10, 1907.)

##### 1. JUSTICES OF THE PEACE—PLEADING—AMENDMENT.

An account attached to a summons in a justice's court, and set forth in the following language, to wit: "A. to B. dr., to commissions on sales on real estate to Dr. Grove, as per agreement, \$75.00"—sufficiently indicates and specifies "some particular fact or transaction as a cause of action" to authorize an amendment amplifying the details and circumstances of the particular transaction.

##### 2. SAME.

A rule of liberal construction is to be applied to section 4116 of the Civil Code of 1895, because the same degree of strictness and precision is not required in justices' courts as in courts of higher jurisdiction. If a defendant in the justice's court is informed of the nature of the plaintiff's demand against him, the purpose of the law is fulfilled.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. H. Elliott against J. H. Hendrix. Judgment for plaintiff was affirmed on appeal, and defendant brings error. Affirmed.

W. H. Terrell, for plaintiff in error. Aldine Chambers and Wm. M. Smith, for defendant in error.

**RUSSELL, J.** This suit started in the justice's court. It was appealed to the superior court. The summons called the defendant to answer to an action of debt due on account. Attached to the summons was the following copy of the account: "J. H. Hendrix, to J. H. Elliott, dr., to commissions on sales of real estate to Dr. Grove, as per agreement, \$75.00." After the appeal to the superior court, the defendant moved to dismiss the case, "on the ground that no cause of action was set forth in the case of the alleged account attached to the summons." The court overruled this motion, and allowed the plaintiff to amend by setting forth with greater particularity the sales referred to and how the indebtedness for commissions was created. The defendant excepted *pendente lite* to the overruling of his motion to dismiss, and to the allowance of the amendment. There is no assignment of error in the bill of exceptions as to the rulings to which exceptions were taken *pendente lite*; and, while error may be assigned as to the subject-matter of exceptions *pendente lite* by distinct assignment of error in the brief or written argument in this court, it is doubtful

In this case whether there is anything even thus presented to our consideration in the brief of counsel for plaintiff in error. As, however, several authorities are referred to, and the point is made that there was nothing to amend by so far as the amendment allowed was concerned, we will consider the brief as containing an assignment of error as to the orders complained of in the exceptions pendente lite.

We think the trial judge did right in requiring the plaintiff to amend, and in refusing to dismiss the case. Really no amendment was necessary. As held by this court in *Georgia So. Ry. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236, niceties in pleading are not required in justices' courts. The requirement of Civ. Code 1895, § 4116, was certainly sufficiently complied with by the allowance of the amendment, and the statement, "to commissions on sales of real estate to Dr. Grove, as per agreement, \$75.00," set forth a cause of action. The use of the word "commissions" indicated clearly that the plaintiff claimed either a percentage or a fixed amount for services as an agent, representing either the seller or the buyer in the purchase of property. The word "sales" put the defendant on notice that there was more than one of the transactions involved. It was clearly stated that the sales for which plaintiff claimed compensation were of real estate. The transactions were then particularly identified by stating that one Dr. Grove was the purchaser of the pieces of real estate in the sale of which plaintiff was concerned and for which he claimed compensation, and the matter was still further identified by the statement that there had been an agreement in reference to the commissions, which, in the absence of anything to the contrary, could only be inferred to be between plaintiff and defendant. "A petition showing a plaintiff and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by." Civ. Code 1895, § 5098. The plaintiff in error cites us to the cases of *Thomas v. Forsyth Chair Co.*, 119 Ga. 693, 46 S. E. 869, *Powell v. Alford*, 113 Ga. 979, 39 S. E. 449, and *M. & B. R. Co. v. Walton*, 121 Ga. 275, 48 S. E. 940, to establish the proposition that the cause of action is not set forth with sufficient certainty. None of these cases would be applicable to the cause of action attached to the summons in this case. As we have shown, the statement as to the account indicates and sufficiently specifies a particular transaction as required by the Code. The defendant is given notice of what he is required to meet. In the first case cited by counsel for plaintiff in error the judgment was reversed, not only because no bill of particulars was attached to the summons, but because there was nothing to furnish reasonable notice to the defendant as to the character of the plaintiff's demand. By an

examination of the original record in *Thomas v. Forsyth Chair Co.*, in the clerk's office of the Supreme Court, we find that the account attached in that case to the summons contained no reference whatever to what it was for—no bill of particulars. It was as follows: "Thomas & Blake in account with Forsyth Chair Company. Chairs and rockers, 1901. April 30, \$22.00. Sept. 12, \$8.50. \$30.50." Following that account are two statements, both dated September 12th—one for "one dozen 156, duplicate, \$8.50"; the other "two dozen 60, \$17.00, half dozen 156, \$23.00, less rebate \$1.00, leaving \$22.00." It is clear from these accounts that no one could tell what plaintiff purchased from defendant. In *Powell v. Alford*, Alford was sued as a guarantor, and judgment was rendered against him as a principal. The case was taken by certiorari to the superior court, where the certiorari was sustained and the judgment against Alford set aside on the express ground that, having been sued as a guarantor, a judgment against him as principal could not be sustained; the court holding as follows: "The suit was against J. F. Wood and G. W. Alford as guarantor. No amendment was made either to the summons or the account sued on, both of which stated Alford to be guarantor. I cannot surmise a possible amendment or send the case back on such a surmise. The plaintiff, having so sued Alford, must so recover against him, if at all. He could not, in such a suit, recover against him as sole principal debtor." The case was then carried to the Supreme Court by writ of error and the judgment of the trial court affirmed; the court holding: "The plaintiff in an action in a justice's court must set forth with some degree of certainty his cause of action, and, having done so, must recover, if at all, upon the cause as laid, and cannot recover upon a different and distinct ground of liability." The holding thus embraced two ideas only: One, that the cause of action in that case was set forth with certainty; and the other, that, being thus set forth, the plaintiff must recover on his cause of action as laid, and can, in no event, recover on a totally different cause of action. While in the third case cited by counsel for plaintiff in error it was held that, on motion to dismiss, the action was proper where no cause of action was set forth (even after an appeal had been entered to the superior court) and that that motion should have been sustained in the case then being considered, still the decision in that case is authority for what we now hold. The court in deciding that there was nothing in the statement of account in that case to put the defendant upon notice of the character of plaintiff's claim, inferentially decided, in the spirit of the Code, that where, as in this case, there is ample statement to put the defendant on notice and enable him to prepare his defense, the suit should not be dismissed.

The plaintiff in error also relies upon the decision of Atlanta Ry. Co. v. Shippen, 126 Ga. 784, 55 S. E. 1031. The decision in that case is simply that the suit should have been dismissed because it was doubtful what was the character of the claim sought to be recovered. As said by the Supreme Court: "It might be construed to be a claim for an overcharge. It might be construed to be a claim for a penalty. \* \* \* The penalty for the use of \* \* \* such equivocal language is a dismissal, if the most unfavorable construction would oust the court of jurisdiction. \* \* \* There was no amendment in this case, and the penalty for equivocal language should have been imposed and the case dismissed." The only points in the decision are that, under the facts stated, the suit could be construed as one for penalty without an amendment, and should, therefore, have been dismissed, and that by amendment it could have been saved, the court referring to *Atla. R. Co. v. Ga. Ry. Co.*, 125 Ga. 798, 54 S. E. 753, in which the plaintiff saved his case by amendment. The defendant in error seems to have had the latter case in mind in preparation of the amendment allowed in this case. If there were ambiguity in the cause of action as originally set forth, it was relieved by the amendment. There was no error in allowing the amendment, or in overruling the motion to dismiss. The exception taken to the order overruling the motion for new trial is without merit. The plaintiff fully established his case, if the jury preferred to believe him and his witnesses in preference to the testimony of the defendant, which was uncorroborated; and, the trial judge having approved the finding of the jury, we have neither the power nor the disposition to disturb their verdict as to the facts, nor to interfere with the proper judgment of the court in the premises.

Judgment affirmed.

(2 Ga. App. 332)

**KAMINSKY v. HERRIGAN, Sheriff. (No. 198.)**

(Court of Appeals of Georgia. July 18, 1907.)

**1. EXECUTION—AFFIDAVIT OF ILLEGALITY—REPLEVY BOND.**

The obligation of a replevy bond, filed with an affidavit of illegality, is to redeliver the goods at the time and place of sale.

**2. BANKRUPTCY—LIEN OF JUDGMENT—EXECUTION—REPLEVY BOND.**

The lien of a judgment obtained more than four months prior to the filing of the petition in bankruptcy is superior to the adjudication in bankruptcy; and the adjudication of the principal in a replevy bond to be a bankrupt does not relieve the surety from the obligation of his bond, especially where such surety takes no step to bring such lien to the attention of the bankruptcy court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 306.]

**3. SAME—AFFIDAVIT OF ILLEGALITY—REPLEVY BOND.**

Where property is levied upon, and it is replevied, the principal or surety must show why the identical property levied upon is not deliv-

ered; and, where such writ is brought upon such bond, the burden of proof is upon the defendant surety, and not upon the plaintiff, to show sufficient reason why such property is not produced.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by J. J. Horrigan, sheriff, for use, etc., against L. Kaminsky. Judgment for plaintiff. Defendant brings error. Affirmed.

Osborne & Lawrence and E. H. Abrahams, for plaintiff in error. Geo. W. Owens, for defendant in error.

**RUSSELL, J.** On November 5, 1903, Horrigan, sheriff of the city court of Savannah, levied an execution in favor of Max Ripps for the sum of \$192.26 and costs upon the stock of goods of one I. Berendt; the return of the levy being as follows: "On and by virtue of the within execution, I have this day levied upon the following property belonging to one I. Berendt: The stock of goods now in the storehouse kept by said Berendt on the southwest corner of York and East Broad streets, Savannah, Georgia." Berendt contested the levy by affidavit of illegality, and gave a forthcoming bond for the property, with Kaminsky, plaintiff in error, as surety on the bond; the words of description of the property replevied, employed in the bond, being the same as those used in the levy. The affidavit of illegality was filed on December 15, 1903, and the bond was executed on the same day. The condition of the bond was such that should Berendt deliver said property so levied on at the time and place of sale, in the event said illegality should be dismissed by the court or be withdrawn, or should L. Kaminsky do so for him, then said bond to be void; else of full force and effect. The illegality was dismissed by the court on the 11th day of July, 1904. On May 23, 1904, Berendt applied for homestead, filing schedule showing the stock of goods as owned by him as part of his assets, approximating \$1,500 in value. On July 23, 1904, the stock of goods in the storehouse kept by I. Berendt on the southwest corner of York and East Broad streets, Savannah, Ga., as the property of said I. Berendt, was surrendered into the custody of the bankrupt court of the United States for the Eastern Division of the Southern District of Georgia, and on July 23, 1904, Berendt was adjudicated an involuntary bankrupt. Under the order of the referee in bankruptcy, the property as above described was sold by the trustee in bankruptcy at public outcry, and brought the sum of \$560. After the adjudication in bankruptcy had been made, the affidavit of illegality was dismissed in the state court; and, when the sheriff went to make demand for the goods, he found the same in charge of the deputy marshal of the United States, acting as custodian of the bankruptcy court. The surety pointed out

the goods to the sheriff, but delivery was refused by the marshal.

The defendant in error filed his suit to the May term, 1905, of the city court of Savannah, alleging as follows: That I. Berendt and L. Kaminsky were residents of the city of Savannah; that at the November term, 1903, of the city court of Savannah, Max Ripps obtained judgment against the said I. Berendt for \$192.26 principal, and interest from November 26, 1902, and costs of court; and that on said date an execution was issued from said court on said judgment and levied on that day on the stock of goods then in the storehouse of I. Berendt, on the southwest corner of York and East Broad streets, in the city of Savannah; that on the 15th day of December, 1903, said Berendt filed his affidavit of illegality to said execution, and gave bond in terms of the law, with said L. Kaminsky as surety on the same, conditioned that should said Berendt deliver said property so levied on at the time and place of sale, in the event said illegality should be dismissed by the court, or withdrawn, or should the said L. Kaminsky so do for him, then said bond to be void, else of full force and effect; that subsequently said illegality was dismissed by the court on the 11th day of July, 1904, and that, subsequent to the filing of the said illegality, said Berendt filed his petition for a homestead in the court of ordinary of Chatham county, and subsequent to filing said petition for homestead filed a petition in bankruptcy in the United States court, for the Southern District and Eastern Division of Georgia, in which he also claimed a homestead, and that on the 23d day of July, 1904, this last petition was referred to the referee in bankruptcy, and on the 28th day of July, 1904, Berendt was adjudicated a bankrupt, and that on the 17th day of August, 1904, a trustee was appointed for said bankrupt's estate, who duly qualified and filed his petition for authority to sell all of the property belonging to said bankrupt's estate, and that an order was duly passed giving said authority on the 10th day of October, and the trustee filed his report of the sale on the 20th day of December, 1904, showing that all of the property of the said Berendt had been sold for the sum of \$560, which sale was duly confirmed; and that on the 29th day of November, 1904, said trustee filed his report of the property set apart to said Berendt as a homestead, and an order was passed approving said report, whereby all of the property of Berendt was set aside to him as a homestead. Petitioner further showed that from the date of said levy, namely, November 5, 1903, to the 23d day of July, 1904, when the marshal of the United States court took possession of the stock of goods of Berendt, the said Berendt had remained in possession of the stock of goods levied on previously by the sheriff, and continued to

sell the same in due course of business, and continued to do business in his store on the southwest corner of York and East Broad streets, in the city of Savannah, and that, by virtue of the above facts, it was impossible to advertise said property of Berendt for sale or to require him or his surety aforesaid to produce the same at the time and place of sale, whereby the principal and surety became indebted to the petitioner for the use of Max Ripps in the amount of his bond.

In reply to plaintiff's petition the defendant denied the allegation in all other paragraphs, except that he resided in Chatham county; and set up that, though he admitted the execution of the bond described in the petition, he was not liable thereon, because on the 28th day of July, 1904, Berendt was adjudicated a bankrupt, and on the 29th day of November, 1904, he received his discharge in bankruptcy, whereby Max Ripps became barred from further proceeding against the defendant, and for the further reason that all of the property for the forthcoming of which said bond had been given was taken charge of by the bankruptcy court and administered by it, and that, by reason of said administration, he was unable to produce or deliver said goods upon the demand of the plaintiff in this case.

Before the trial of the case, plaintiff amended his petition as follows: "Your petitioner further shows that from the date of said levy, to wit, November 5, 1903, to the 23d day of July, 1904, when the marshal of the United States court took possession of the then stock of goods of the said Berendt, he, the said Berendt, remained in possession of the stock of goods levied on by the sheriff of the court, and continued to sell the same in due course of business, and continued to do business in his store on the southwest corner of York and East Broad streets, in the city of Savannah." To this amendment the defendant demurred, but it was allowed by the court; and to the averment of said amendment the defendant filed no plea.

This case was evidently tried in the court below on the single issue as to whether the stock of goods taken charge of by the United States marshal in aid of the proceedings in bankruptcy was the same stock of goods levied on by the sheriff. The contention of the plaintiff was that, before the marshal took charge of the property, the stock of goods had been changed or disposed of by sale from time to time until more than enough of the stock had been dissipated to pay the plaintiff's debt. The defendant's surety contended that the stock of goods was the same, and that as a surety he was relieved from liability on the forthcoming bond by reason of the fact that the property was placed beyond the power of his principal and himself on account of its seizure by the bankrupt court. We would find no fault with the judgment of the lower court if this were a real issue



which should have been determined; for it appears that the stock was for nearly eight months in the custody of the defendant Berendt, and that his doors remained open for business, and we think the jury could have reasonably inferred that in that length of time as small an amount as \$192 worth of goods in stock must have been sold or disposed of. We think it, however, fruitless to discuss the various assignments of error arising from a trial predicated upon the theory to which we have alluded. The errors committed, if any, were immaterial. The real issue in the case was whether the surety was liable on his bond for the nonproduction of the property according to the terms of his obligation. Under the agreed statement of facts, he was liable, because the proceedings in bankruptcy were not instituted for more than four months after the levy of the sheriff. The lien was not divested by the proceedings in bankruptcy. Bankr. Act July 1, 1898, c. 541, §§ 67, 67½, 80 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3450]; Dozier v. McWhorter, 113 Ga. 584, 39 S. E. 106. Neither the trustee in bankruptcy nor the United States marshal was entitled to the possession of the goods; and when Berendt, the principal, surrendered them to the bankrupt court, it was the duty of the surety to bring to the attention of that court the fact that the stock of goods was subject to the lien of the *fi. fa.* which had been levied upon them, and to have procured their release for his own protection. Having tacitly consented to the surrender of this stock of goods, it does not lie in his mouth to claim an advantage from that which he could himself have prevented. In so far as the homestead is concerned, it appears to have been taken in the residue of the stock of goods after the adjudication in bankruptcy, and to have been dependent entirely upon it. As the stock of goods under levy should not have been turned over to the bankrupt court, and as this disposition could have been prevented by the surety, he can derive no benefit from that. As said by the Supreme Court in *Fleming v. Odum*, 59 Ga. 363: "The personal property was in the hands of the sheriff on final process, and the assignee in bankruptcy could not dispossess him legally of it." And in this case the property levied upon was in the hands of the principal (only by reason of the bond upon which the defendant Kaminsky was surety), and the trustee in bankruptcy could not have dispossessed him if the surety had interposed proper and timely objections. The defendant failed to carry the burden resting upon him. The admission in his answer that he executed the bond, and that the goods were not produced in accordance with its terms, put upon the defendant the burden of showing that all of the goods levied upon had been set apart, and that none of them were sold.

In this view of the case, we think that the verdict for the plaintiff was demanded by

the evidence; and, as none of the exceptions taken addressed themselves to this, the true view of the case, they need not be noticed.

Judgment affirmed.

(2 Ga. App. 387)

#### MIMBS v. STATE. (No. 519.)

(Court of Appeals of Georgia. July 25, 1907.)

##### 1. DISORDERLY HOUSE—EVIDENCE.

There was no error in refusing a new trial on the ground that there was not sufficient evidence to support the conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 26–29.]

##### 2. CRIMINAL LAW—OPINION EVIDENCE.

The testimony of a witness, in referring to an act which took place in his presence, "It seems to me that he closed the door behind him, but I cannot say positive that he did close the door, I was so far away"—is not subject to objection on the ground that it is opinionative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1035–1039.]

(Syllabus by the Court.)

Error from City Court of Mt. Vernon; J. B. Gelger, Judge.

Martha Mimbs was convicted of keeping a disorderly house, and brings error. Affirmed.

Wm. B. Kent and A. C. Saffold, for plaintiff in error. W. M. Lewis, Sol., for the State.

POWELL, J. 1. The defendant was convicted of maintaining and keeping a lewd house. The evidence shows that the defendant, her daughter, and her niece lived together; that men were seen frequenting the place by night and by day; that the defendant had a general reputation of being a lewd woman, and the house of being a place of prostitution. This was sufficient. *McCain v. State*, 57 Ga. 391; *Hogan v. State*, 76 Ga. 82.

2. A witness may testify to facts with a degree of certainty less than that of absolute positiveness. Many men guard their statements as to facts concerning which they are most certain with expressions indicative of doubt. With some people, notably the Scotch, this cautiousness is almost a national trait. But that the witness is not willing to state positively the existence of a fact of which from the nature of things he has some knowledge does not render his testimony inadmissible. The statement of the witness in this case, "It seemed to me that he closed the door behind him," taken in connection with the context, manifestly showed that the witness was not attempting to give his opinion, but to state the impression of his mind as to a fact concerning which his recollection or ability to see perfectly would not permit him to state with more positiveness. In *Franklin v. Macon*, 12 Ga. 257, the court says: "It is not sufficient to exclude the testimony of a witness, who swears that 'the impression resting on his mind was so and

so,' as every witness must swear according to the impressions on his mind, which are the materials of his knowledge, and this is only a more cautious mode of expressing himself." Ordinarily the words "It was my understanding," when used by a witness, means his knowledge and recollection of the fact, though, of course, there are times when these would be apt words to express merely the opinion of the witness. In the former event the evidence is admissible, in the latter not so. *Moody v. Davis*, 10 Ga. 403; *Fleider v. Collier*, 13 Ga. 496; *Neal v. Field*, 68 Ga. 534; *Martin v. State*, 38 Ga. 297; *Printup v. Mitchell*, 17 Ga. 558 (3), 63 Am. Dec. 258. The words "I believe" ordinarily indicate that what follows them is merely the opinion of the witness; but this is not always so. They may be merely words of caution, in which event the evidence is admissible notwithstanding the statement may be prefaced by these words. *Thompson v. Davitte*, 59 Ga. 483 (13); *Imboden v. Etowah Co.*, 70 Ga. 87 (12d). In *Central R. v. Coggins*, 73 Ga. 689, it is held that, taken in connection with the other facts to which he deposed, it was not error to permit the plaintiff to testify that, "as the engineer slacked up for the switchman to get on the train, he seemed to shut off his engine, and the car ran up on the engine, and he opened his engine right suddenly, I suppose." As to the use of the word "suppose" as qualifying the statement of the witness, but not rendering it inadmissible, see *Atlanta Ry. Co. v. Beauchamp*, 93 Ga. 3. 19 S. E. 24. In *Thomas v. State*, 67 Ga. 464 (4), the Supreme Court says: "The appearance of a thing is a fact." To state that a thing "seems" so to a witness is merely to state its appearance as viewed by the witness. See, in this connection, *Roberts v. State*, 123 Ga. 146,<sup>1</sup> and citations. The words used by Justice Lumpkin in the case of *Franklin v. Macon*, 12 Ga. 261, are still true and apply to existing conditions. We therefore quote them with approval: "I have long been satisfied that we are too hidebound and restricted in our practice with regard to the admissibility of evidence. The books of Reports will show that there is no state in the Union, and no country in the world, where there are as many captious objections made to the testimony. It is high time that the practice should be discouraged. \* \* \* Nothing tends more to embarrass a trial, civil or criminal, than the frequent and frivolous objections that are so commonly and so capriciously made to the introduction of the proof." Judgment affirmed.

(2 Ga. App. 352)

**ATLANTA & W. P. R. CO. v. HUDSON.**  
(No. 333.)

(Court of Appeals of Georgia. July 18, 1907.)

**1. EVIDENCE—PHYSICAL EXPERIMENTS.**

In a suit against a railroad company for killing stock, where the vital point illustrating

the question of negligence is the distance that the stock could have been seen on the track by the engineer, it is competent for the plaintiff to prove the results of experiments made subsequently to the accident, where it appears that the experiments were made at the place of the accident, and upon facts and under conditions substantially similar to those surrounding the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 439.]

**2. SAME.**

Physical experiments based on substantially similar facts frequently elucidate the truth in controversy. The closer the similarity in the facts proved and the facts upon which the experiment is based, the greater the probative value of such evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 439.]

**3. TRIAL — INSTRUCTIONS — CREDIBILITY OF WITNESSES.**

The charge of the court complained of on the subject of the impeachment of witnesses was a substantial compliance with the sections of the Code.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 492.]

**4. RAILROADS—KILLING STOCK—DILIGENCE REQUIRED.**

The rule of diligence required of railroads in running cars to prevent killing stock is not modified or altered by the legislation known as the "stock law"; and it is not a matter of law contributory negligence to allow stock to run at large in communities where such stock or fence law prevails.

**5. SAME—EVIDENCE.**

No error of law was committed, and the verdict was warranted by the evidence.

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Action by A. O. Hudson against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Arthur Heyman, Dorsey, Brewster & Howell, and Arthur H. Thompson, for plaintiff in error. J. R. Terrell and F. P. Longley, for defendant in error.

**HILL, C. J.** The plaintiff sued the Atlanta & West Point Railroad Company for killing two cows and injuring a third. The jury found a verdict for the plaintiff, and the motion of the defendant for a new trial was overruled. The evidence showed that the cows were killed at or near a private crossing near the town of La Grange. The contention of the defendant was that the engineer could not see the cows in time to stop or control the train, because of the embankment of a cut through which the track ran just before reaching the crossing; that the cows came from around the edge of the cut, and the engineer did not see and could not have seen them until the train was right at them; that he did everything in his power to prevent the accident after seeing the cows. The plaintiff contended that a cow at or near the crossing in question could be seen by the engineer for several hundred yards before reaching the

<sup>1</sup> 51 S. E. 374.

crossing, and in ample time to stop or get the train under control.

1. The storm center of the evidence was the contested point as to how far a cow could have been seen on the track by the engineer in approaching the crossing at or near which the accident occurred. To illustrate this question, the court permitted the plaintiff to prove the result of certain experiments he and others had made. These experiments consisted in placing a steer at and near the crossing where the cows were killed, and then in determining by sight and measurements how far the steer could be seen up the track in the direction from which the train was approaching, and also by determining in the same manner the distance from the track near the crossing that the steer could be seen by a person standing where the train left the cut before reaching the crossing. The results of these experiments were objected to as evidence by the defendant, on the ground that they were not based upon the actual facts of the case, and were therefore irrelevant. The experiments were made according to the facts as proved by the plaintiff. Experiments made in and out of court sometimes makes a practical demonstration of the question in issue, and are often the best evidence in elucidating the truth. It is necessarily largely within the discretion of the trial court to determine whether the testimony shows that the experiments were made under such conditions as to fairly illustrate the point in issue. Yet, when it is shown that the conditions were essentially the same, the testimony should be admitted, and its weight determined by the jury. If the experiments be predicated upon different facts than those in the particular case, evidence of the results would tend to confuse rather than enlighten the jury, and should be excluded. We think the true rule is that there should be substantial and reasonable similarity in the facts proved in the case and the facts upon which the experiment is based. The facts need not be exactly or in every particular similar. If they are sufficiently similar to accomplish the purpose of assisting the jury to intelligently consider the issue of fact presented in regard to the special point in controversy, the evidence is admissible. Of course, the closer the similarity in the facts of the case and the facts of the experiment, the greater the probative value of the evidence. *Morton v. State* (Tex. Cr.) 71 S. W. 281; *Commonwealth v. Piper*, 120 Mass. 185; 5 Enc. Ev. 475, 485. The case of *Byers v. Nashville R. Co.*, 94 Tenn. 345, 29 S. W. 128, is analogous to the present one. It appeared that plaintiff's husband had been killed by defendant's train while crossing a bridge. On the question as to whether the engineer could have stopped the train after coming in view of the deceased, the plaintiff was allowed to introduce evidence of experiments showing the distance at which a man could be seen standing where deceased was killed.

We think, under the facts in the record, the requirements of the law were sufficiently shown to make the evidence of the experiments and the results therefrom admissible.

2. Error is assigned on the following charge as to impeachment of witnesses: "A witness may be impeached by proof of contradictory statements as to matters that are material to the issues on trial. The general rule is that, when a witness has been successfully impeached, he should not be believed. If such witness be corroborated—that is, if there be other evidence in the case sustaining what the witness said—such witness may be believed. In all attempts at impeachment it is for you, the jury, to say whether or not such attempt has been successful." The objection to this instruction is that it took away from the jury the right to believe the witness, although impeached by proof of contradictory statements; it being for the jury to determine the credit to be given his testimony when impeached by proof of contradictory statements. This criticism of the charge is not well taken. The court did leave the whole matter of the witness' credit, although impeached, to be determined by the jury.

3. Error is assigned on the failure of the court to charge the jury upon the issue of contributory negligence. It is claimed that what is known as the "stock law" existed in the community where the cows were killed, and that the fact that the owner of the cows allowed them to roam at large where such law prevailed furnished evidence of contributory negligence. The existence of the stock law may be a pertinent fact to be considered by the jury, along with other facts and circumstances, in determining the question of the exercise of ordinary and reasonable care and diligence in guarding against killing stock by the running of trains. The existence of the stock law is not necessarily evidence of contributory negligence, nor is the rule of diligence imposed by law upon railroads to prevent the killing of stock altered or modified by such local legislation. "With or without the stock law, the degree of diligence required of railroad companies is one and the same. It is ordinary and reasonable care." Besides, there was no request for the court to charge on this subject; and even if such instruction had been proper, there was no error in failing to give it where no request to do so was made.

Judgment affirmed.

(2 Ga. App. 322)

EPPERSON v. KITCHENS. (No. 452.)

(Court of Appeals of Georgia. July 10, 1907.)

1. JUSTICES OF THE PEACE—CERTIORARI—DEFECTIVE AFFIDAVIT.

After the petition for certiorari has been sanctioned and the answer of the magistrate filed, and such answer supports the allegations of the petition, the certiorari will not be dismissed because of a defect in the affidavit of the plaintiff in certiorari verifying the petition.

## 2. ERROR, WRIT OF—CERTIORARI—REVIEW OF EVIDENCE.

Where the superior court, on certiorari, set aside a verdict rendered in a justice's court, and ordered a new trial because "the ends of justice require it," the voice of the evidence demanding such verdict, to be heard in this court, would have to be very clear and very loud.

(Syllabus by the Court.)

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action between W. T. Epperson and J. W. Kitchens. From an order refusing to dismiss a petition for certiorari, Epperson brings error. Affirmed.

A. C. Brown, for plaintiff in error. Martin & Stevenson and A. J. Griffin, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 322)

SYKES et al. v. BROWN. (No. 451.)

(Court of Appeals of Georgia. July 10, 1907.)

## 1. ERROR, WRIT OF—REVIEW—DENIAL OF NEW TRIAL—EVIDENCE.

Grounds of a motion for a new trial in which error is assigned upon the admission of evidence will not be considered by this court, when the evidence objected to is not set forth, literally or in substance, nor attached to the motion as an exhibit. Hicks v. Webb, 56 S. E. 307, 127 Ga. 171 (5); Lewis v. Hutchinson, 56 S. E. 998, 127 Ga. 790 (3), and cases cited; Waldrop v. Wolff, 40 S. E. 830, 114 Ga. 610 (2).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2890.]

## 2. SAME.

The verdict is well warranted by the evidence; and no reversible error appears.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Action by Mattie Brown, administratrix, against J. M. Sykes and others. Judgment for plaintiff, and defendants bring error. Affirmed.

T. E. Patterson, for plaintiffs in error. Lloyd Cleveland, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 376)

VIRGINIA-CAROLINA CHEMICAL CO. v. ROBERTS. (No. 138.)

(Court of Appeals of Georgia. July 25, 1907.)

## 1. ERROR, WRIT OF—DISMISSAL.

The assignment of error in the bill of exceptions is sufficiently specific. The motion to dismiss the writ of error is therefore overruled.

## 2. JUDGMENT—MATTERS CONCLUDED—IDENTITY OF ISSUES.

One who has unsuccessfully claimed title to property levied upon by an execution in favor of a third party is not thereby estopped from foreclosing a mortgage in his favor upon the property previously claimed by him and asserting the lien of such mortgage. Consequent-

ly there was no error in sustaining the certiorari in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1234.]

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by A. D. Roberts against the Virginia-Carolina Chemical Company. Judgment for defendant. From an order sustaining a certiorari, it brings error. Affirmed.

L. W. Neison, for plaintiff in error. J. W. Walters, Jr., and Clayton Jones, for defendant in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 375)

SOUTHERN RY. CO. v. STONE. (No. 443.)

(Court of Appeals of Georgia. July 18, 1907.)

## 1. JUSTICES OF THE PEACE—CERTIORARI—ANSWER.

The allegations of the petition for certiorari must be verified by the answer of the magistrate whose decision is sought to be reviewed, or the truth of the allegations must be admitted by the defendant in certiorari.

## 2. SAME—DISMISSAL.

Where no answer to a certiorari was filed giving information to the reviewing court as to what was done by the lower court, and the answer was not waived, and the truth of the allegations contained in the petition was not admitted, there was nothing before the court on which a final judgment could have been rendered. In such condition of the record, the only proper judgment would have been the dismissal of the certiorari; and a final judgment by the superior court against the plaintiff in certiorari for the amount alleged to have been recovered in the justice's court was erroneous, and must be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 823.]

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Action by W. L. Stone against the Southern Railway Company. Judgment for plaintiff before a justice. From a judgment against defendant on certiorari, he brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. H. L. Williams, for defendant in error.

HILL, C. J. Judgment reversed.

(2 Ga. App. 349)

HILL & MOULTRIE v. WHEELER. (No. 330.)

(Court of Appeals of Georgia. July 18, 1907.)

## BROKERS—ACTION FOR COMMISSIONS—QUESTIONS FOR JURY.

On the trial of an action by real estate agents for the recovery of a commission on the sale of property, it was error to award a nonsuit, where it appeared from the evidence that the defendant had placed the property in their hands to sell upon specified terms, and that pending negotiations between the agents and their customer, they were prevented from sell-

ing, or at least from concluding their negotiations for a sale, by the action of their principal in taking the matter into his own hands and, without notice to them, selling the property at a lower price to the customer, procured by their efforts. In such a case the good faith of the parties and the question as to whether the stipulated price was waived, as well as whether a purchaser would have given the stipulated price, are all questions of fact for the jury.

(Syllabus by the Court.)

Error from City Court of Floyd; Harper Hamilton, Judge.

Action by Hill & Moultrie against J. T. Wheeler. Judgment for defendant, and plaintiffs bring error. Reversed.

Lipscomb & Willingham, for plaintiffs in error. Seaborn & Barry, Wright, for defendant in error.

**RUSSELL, J.** We think the court erred in awarding a nonsuit in this case, for we think that there was an issue of fact involved in the evidence upon which only the jury could legally pass. The question was certainly raised by the testimony adduced in behalf of the plaintiff, as to whether the defendant acted in good faith in selling the property himself at a lower price than he had at first stipulated, after using the services of the real estate agents to find a purchaser for it and to interest him in its advantages. Under the testimony for the plaintiffs, the jury could have found (in the absence of any further evidence) that there was a waiver of one of the terms of the sale on the part of the defendant—that is, as to the price at which defendant was willing to sell—and that the defendant himself prevented the sale being made by the real estate agents to prevent them from receiving commissions. It appears from the testimony of the plaintiffs that the defendant and Capt. Garlington, to whom he sold, met several times in the plaintiffs' office, and made two or three trips, after the first one, to view the premises, and that in all of the negotiations up to the very time of the sale the plaintiffs were engaged in assisting the defendant to sell the property, not necessarily, so far as appears from the evidence, at the price first set by the defendant, but at some price to be agreed upon by seller and buyer. To use the language of one of the plaintiffs in the evidence, "We were constantly negotiating, in trying to get them together and get them to agree." It further appears that the defendant never notified the plaintiffs that he had taken the property out of their hands; that he did not withdraw it, but after several different meetings and various propositions and counter propositions, and while negotiation was still pending between the plaintiffs and their customer, the defendant himself sold the property.

We do not mean to say that the plaintiffs were obliged to recover, that the evidence demanded a verdict in their favor, and, indeed, the jury might find, on evidence adduced by

both parties, that they were not entitled to recover; but we are clear that the evidence, construed in the light of decisions in our state, would have authorized a finding for the plaintiffs. Where the evidence, in any view of the case, would authorize a finding for the plaintiffs, the case should not be taken away from the jury by a judgment of nonsuit. While a real estate agent, to recover commissions from his principal, must show that he was employed to sell land in which the principal had an interest, and that he procured a customer ready and able to buy upon the terms proposed by the seller, still there may be an implied modification of the terms of sale, arising from the conduct of the seller, which would be equivalent to an express modification. The price at which property is to be sold is only one of the terms of the sale, and may be modified by the principal, as any other term. And, if the owner of the real estate who has placed it for sale in the hands of a real estate agent interferes with the sale by his agent, by modifying the terms of sale as regards the price, he would be just as much liable for his commissions as if he had interfered in any other way. Under the principle laid down in *Doonan v. Ives*, 73 Ga. 302, if the brokers set to work to sell the property and procured Capt. Garlington as a customer, or one likely to buy from them, and, pending their negotiation with him, the owner interfered, knowing or having information that they were negotiating with the customer, and sold the property to the customer thus procured by them, even with some modifications of the price at which he had authorized them to sell, he could not defeat their commissions, "because it would be the fraudulent taking advantage of their labor without paying for it." If the negotiation in which the plaintiffs were engaged had terminated, and they had abandoned all further efforts to sell, or if the defendant, after reasonable notice to them (if no time limit had been agreed upon), had withdrawn his property from their hands, and thereafter himself sold to Garlington, or any other purchaser, without the plaintiffs' aid, they could not recover. Because one puts property in the hands of a broker to sell, it does not follow that he himself cannot sell. If he does not use their labor to help him, he owes them nothing. If he does use it and puts in to take the trade—its consummation—out of their hands so as to escape paying them, then *ex æquo et bono*, he does owe them, and must pay just what they could have made by the contract if he had not prevented it. This is sound sense and good law. In this case it is undisputed that the plaintiffs brought the defendant and Capt. Garlington, who purchased his place, together; that previous to this Mr. Moultrie, one of the plaintiffs, had interested Garlington in the property, and had, at his own expense, carried him several miles to see it and taken the trouble to show it to

him. On several different occasions, after the defendant and Garlington began to discuss the matter, they used the plaintiffs' office and maps in discussing the proposed trade, and Mr. Moultrie did all he could to effect an agreement. Each time Garlington would say that he would give \$9,000. According to the evidence, he never did say that he would not give \$10,000, the price agreed upon between the seller and his agents; nor did the seller in these conferences say that he would not take less than \$10,000. As Moultrie was present, engaged in assisting the defendant to sell, we think it more fair to presume that the stipulation as to price was waived by the seller than that he should receive the services of the agent for nothing, in view of the fact that he did not withdraw the property from the hands of the agents or lead them to suppose that he would undersell them. The question of good faith was one that should have been submitted to the jury. It should have been left to the jury to say whether by selling to Garlington at \$9,000, instead of for \$10,000 to a purchaser procured by the plaintiffs, the defendant did not ratify all of the efforts of the plaintiffs to sell, and did not himself waive one of the terms of the sale, to wit, the original price fixed by him in his agreement with the real estate agent. In *Odell v. Dozier*, 104 Ga. 203, 30 S. E. 813, it was held that the liability of the principal to the agent was not affected by the inability of the purchaser, procured by such agent, to comply with the original terms of sale. In this case the purchaser, instead of being unable, was unwilling to comply with the terms so far as the price was concerned; and, according to the testimony of the plaintiffs, the defendant, without notifying his agents or giving them any further opportunity to perfect the sale at the higher price, sold at a lower price to their customer, and thus perhaps prevented them from making the sale at the higher price. If this is true, the plaintiffs are entitled to recover. If it is not true, the defendant can show it and relieve himself from a recovery. In any view of it, it is a question for the jury, and not for the court, to determine.

Judgment reversed.

(2 Ga. App. 291)

**ALLEN & CO. v. HASTINGS INDUSTRIAL CO.** (No. 351.)

(Court of Appeals of Georgia. July 10, 1907.)

**1. CORPORATIONS — SUBSCRIPTIONS — BINDING CONTRACT.**

A stock subscription is a transaction between the subscriber and the corporation, and the obligation of one can only be sustained by the corresponding obligation of the other. If both are not bound, neither is bound. Therefore a subscription which is not binding upon the corporation until a stipulated amount has been secured and accepted by the corporation is also not binding upon the subscriber; and until these conditions have been fully accomplished, and the subscription has ripened into a binding con-

tract, any party may withdraw therefrom without the consent of the others. The subscriber may withdraw his subscription, and the corporation may refuse to accept.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 328.]

**2. SAME—TENTATIVE SUBSCRIPTION.**

As to a tentative contract between the subscribers to the formation of a proposed corporation and a third person, conditioned that it shall not become binding until a certain sum is subscribed, one who has signed as a subscriber may withdraw his subscription, without the consent of such third person, at any time before the sum named has been subscribed.

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by the Hastings Industrial Company against Allen & Co. Judgment for plaintiff. Defendant brings error. Reversed.

E. S. Longley, for plaintiff in error. Russell & Hawes, for defendant in error.

HILL, C. J. The Hastings Industrial Company, a corporation under the laws of the state of Illinois, brought suit in the city court of Bainbridge against Allen & Co., a partnership doing business in the city of Bainbridge. The suit was based on a contract of subscription for stock, for a canning factory to be erected at Bainbridge by the Hastings Industrial Company. The material portions of the contract are as follows: "We, the subscribers hereto, desiring a canning factory of the following description located at and near the town of Bainbridge, county of Decatur, state of Georgia, hereby enter into this agreement with the Hastings Industrial Company of Chicago, Illinois, party of the first part, the subscribers hereto being second parties, for the construction and equipment of a canning factory, to be built and equipped according to the descriptions endorsed hereon, on the following terms and conditions, for \$8,900. This contract is not binding unless the amount of \$8,900 or more should be subscribed, and it is understood that no subscriber is liable for a greater interest in said factory when same is completed than is represented in his or her amount of subscription. Each subscriber agrees to pay the amount subscribed by him or her to the first party when the factory is completed, and no more. Subscriptions to this contract may be secured for any amount; and for this purpose one or more duplicates of this form of this agreement may be circulated by second party, and at any time after the subscriptions on all forms to be circulated shall equal or exceed the purchase price, it may be closed by the first party's special agent signing the same, and such forms shall be taken together and constitute the sole contract between the parties. First party shall have the right to first collect from said subscription if it sees fit the entire amount due under this contract, but all money, notes, or subscriptions, remaining after the first party has

been fully paid, is the property of the second parties, and may be used by them as surplus. Second parties agree to appoint an executive committee of three when this contract is closed, with full power and authority in a majority to represent them in all of their business herein, and from time to time to inspect the work and material of the first party while it is building said factory and placing said material. Said second parties shall within ten days from the date of this contract select and furnish at the expense of second parties suitable and reasonably level land, with water ready on same, with which to connect pump for the use of said factory, and designate to first party in writing the land so selected, and it is further understood that in case second parties should fail to furnish said land and water within ten days after the execution of this contract, said party of the first part, at its option, may select and furnish land and water in behalf and at the expense of the subscribers. Said factory to be completed by first party within ninety days, or thereabouts, after the same is located as above provided, and payment for same shall be due from date of completion. In case first party shall be delayed in the execution of this contract by strikes, storms, unavoidable accidents, and other causes over which it has no control, then the time limit for the completion of this contract shall be extended for a period of time equal to such delays. For the purpose of forming a corporation to own and operate said factory and fully carry out the intention of subscribers, it is hereby agreed that, when this contract is closed, second parties are to incorporate under the laws of the state, fixing the aggregate amount of the capital at not less than the contract price, divided into shares of one hundred dollars each, or in accordance with the laws of the state, which are to be issued to the subscribers in proportion to their paid up interests in said factory. The specifications and description of said factory building and machinery attached hereto, and the provisions following same, are a part of this contract. First party agrees to furnish at the expense of second parties an experienced processor for the first season, if second parties give first party thirty days' written notice that they desire one. All contracts with agents must be in print or writing. For the full and faithful performance of our respective parts hereof, we bind ourselves and successors. Executed and dated this 8th day of February, 1906. The Hastings Industrial Company, per O. Pressprick, Special Agent."

The aggregate amount of \$6,900 was subscribed by various citizens of Bainbridge under this contract. The defendants subscribed for three shares, or \$300. The suit is for this unpaid subscription. The defense relied upon was that this contract was not binding until the amount of the contract price, \$6,900, had been subscribed and the

contract closed by the special agent of the plaintiff signing the same; that defendants were released from this subscription by the special agent of the plaintiff, who stated that he had authority to make such release, almost immediately after they had made the subscription, before the requisite amount of \$6,900 had been subscribed and before the contract had become executed by the special agent signing and accepting the same for the plaintiff. This verbal agreement releasing the defendants was entered into while the contract was unilateral and before it became binding on either party. It was not denied that the agent had released the defendants from the contract. His right to do so was challenged. Nor was it denied that this release was made by the agent before the \$6,900 had been subscribed, and before he had closed the subscription and accepted the contract. We do not think the agent's authority to release is material. He was the special agent charged with the work of getting the subscriptions and closing the contract for the industrial company. He certainly was the proper agent for the defendants to notify of their intention to withdraw from the contract. It cannot be doubted that the contract was executory and not binding upon either party unless the \$6,900 was subscribed and the subscription closed and the contract accepted. Until these conditions were fully performed, the contract was inchoate and incomplete, and either party had the right to withdraw therefrom. The right of withdrawal was given by law, and did not depend upon the assent of the other party. Whether the defendants' proposition be considered as an agreement to pay so much for the erection of a canning factory, or as an offer to subscribe so much to the stock of a corporation on certain conditions, they withdrew this proposition or offer before acceptance and completion of the contract; and we think they had a clear right to do so. Any unaccepted offer either to pay money or to subscribe for stock may be legally withdrawn. Civ. Code 1895, § 3645; 2 Clark & Marshall on Private Corporations, § 451, and notes. We do not deem it important to decide the other questions in the record, as our judgment of reversal on the foregoing point is conclusive of the case.

Judgment reversed. \*

(2 Ga. App. 274)

LIVINGSTON v. U. ANDERSON & SON.  
(No. 450.)

(Court of Appeals of Georgia. July 4, 1907.)

1. SALES—DELIVERY—WAREHOUSE RECEIPT.

Delivery of a warehouse receipt is constructive delivery of the articles which it represents, but constructive delivery will not suffice if actual delivery at the time of the sale is impossible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 383.]

## 2. SAME — WARRANTY — BREACH — RIGHTS OF PURCHASER.

The delivery of a warehouse receipt implies a guaranty on the part of the seller that the articles represented by the receipt are in existence and in the custody of the bailee therein specified; and for a breach of this implied warranty the purchaser, on failure of actual delivery, may recover the purchase price paid by him, or proceed against the warehouseman, at his option. The right of action against the warehouseman is not exclusive of the purchaser's remedy against the vendor, should the purchaser elect to rescind the contract of purchase for the reason that delivery was impossible at the time of his purchase.

(Syllabus by the Court.)

Error from City Court of Eastman; A. D. Gale, Judge.

Action by J. K. Livingston against U. Anderson & Son. Judgment for defendants, and plaintiff brings error. Reversed.

De Lacy & Bishop and W. M. Morrison, for plaintiff in error. D. M. Roberts & Son and Tye, Peeples, Bryan & Jordan, for defendants in error.

RUSSELL, J. Livingston brought suit against U. Anderson & Son, alleging that between the 24th and 31st days of December, 1903, he bought from them a bale of cotton, represented by a warehouse receipt as follows.

Eastman, Ga., Nov. 7th, 1906.  
Received of T. L. Kirkley.

Marks.	No.	Weights.	Wet.	Reweights.
1	477	611		

Petitioner further alleged payment to the defendant of \$76.38 for said cotton, and that thereupon the warehouse receipt representing the cotton was delivered to him, that petitioner presented the receipt and the warehouseman failed to deliver the cotton, and that thereupon petitioner took the receipt back to defendants and tendered it to them, and demanded of them the return of the purchase money paid for the cotton, which defendants refused to do. The petition further alleged that the bale of cotton in question was not in the warehouse at the time of his demand, but had, in fact, been shipped out of the warehouse some time before defendants sold the same to plaintiff, of which fact plaintiff had no knowledge or notice until after his purchase from defendants, and until after said receipt was presented to the warehouseman and delivery of the cotton demanded thereunder. The petitioner further averred that, by reason of his purchase and the payment of the agreed price, it was the duty of the defendants, and the law implied a contract, to deliver to peti-

tioner the bale of cotton represented by said warehouse receipt, and that it would be delivered to him by said warehouseman on presentation of the receipt. The petitioner alleged that he had fully complied with the terms of the contract of purchase for the bale of cotton by paying defendants the entire purchase price, relying upon their undertaking and contract to deliver the bale of cotton to petitioner, and that defendants received and accepted from petitioner the full purchase price, to wit, \$76.38. The failure and refusal of the warehouseman to deliver the cotton, and the failure and refusal of U. Anderson & Son to deliver it to petitioner in pursuance of the sale and of defendant's contract and agreement to deliver to him, is alleged as a breach of contract by the defendants, and judgment is asked "(a) for the recovery of said bale of cotton and the hire thereof, or its value; or (b) for the damages resulting to petitioner from the breach of contract; or (c) for the recovery of the purchase money of said cotton paid to U. Anderson & Son, and interest thereon from November 7, 1903, treating the contract for the sale of said cotton to petitioner as rescinded by reason of the facts hereinbefore set forth, and petitioner, before the commencement of this suit, having tendered and now hereby continuously ten-

Harrell's Fire-proof Warehouse.  
W. F. Harrell, Proprietor.

One bale cotton. Marks, numbers etc., as per margin, subject to the presentation of this receipt or order on paying expenses and all advances. Acts of Providence and fire excepted.

W. F. Harrell, for the Proprietor.

dering back to said U. Anderson & Son said warehouse receipt delivered by them to petitioner."

The defendants admitted, in their answer, the sale of the cotton to the plaintiff, and the delivery of the warehouse receipt as above set out; that the bale of cotton was not delivered by the warehouseman, and that the plaintiff tendered back the warehouse receipt and demanded back the purchase price; and that they refused to pay the plaintiff the value of the bale of cotton or to deliver the cotton to him or to return to him the amount of the purchase money paid therefor. The defendants set up as their defense that they purchased the bale of cotton in the usual course of business; that they bought by sample and sold the same way, obtaining the warehouse receipt from the party to whom it was issued, and delivered the receipt to the plaintiff; that the plaintiff knew the warehouse in which the cotton was stored, as shown by the receipt, and knew that the defendants did not have the cotton at their place of business; that



the defendants acted in good faith, believing that a warehouse receipt meant something, and that when a warehouseman issued a receipt, agreeing to hold the cotton represented by it until the cotton was delivered back to him, this agreement would be kept and the bale of cotton would remain in the warehouse until the cotton was surrendered. Defendants insisted that plaintiff's cause of action was against the warehouseman, and that plaintiff's petition drew them into useless litigation, and they asked for damages against the plaintiff.

The case was submitted to the judge, without the intervention of a jury, upon the following agreed statement of facts: "It is agreed by and between the parties and their attorneys in the above-stated case that the facts are as follows: Plaintiff bought from defendants during the latter part of December, 1903, the bale of cotton described in the warehouse receipt set forth in plaintiff's petition, the same being the original warehouse receipt given for said cotton, and paid defendants the agreed price of \$76.38 therefor, and defendants delivered to plaintiff or his agent said warehouse receipt. As a matter of physical fact, the cotton was not in the warehouse at the time of said sale, but had some time previously been shipped away by M. H. Edwards & Bro., who claimed it under a duplicate receipt issued on the same day as said original receipt, but after the issue of said original receipt; but Livingston did not know of the claim of Edwards & Bro., or of said shipment, until after he bought from defendants and until plaintiff presented the receipt he got from defendants to the warehouseman and demanded the cotton, but both plaintiff and defendants supposed the cotton was in the warehouse at the time of the sale by defendants to plaintiff. When plaintiff presented the receipt to the warehouseman and demanded the cotton and learned that it was not there, but had been shipped away before the purchase from defendants, he took the receipt back to the defendants, and demanded of them either the bale of cotton or the return of the purchase money he had paid to them for it; and defendants refused either to deliver the cotton or return the purchase money, and still refuse to do so, and plaintiff has never, in fact, received the cotton or the return of the money he paid for it. Defendants claim that his claim or right of action, if any, should be against the warehouseman. Defendants paid T. L. Kirkley \$62.63 for said bale of cotton by their check on the Citizens' Banking Company November 7, 1903, and then received from Kirkley said original warehouse receipt, which they delivered to the plaintiff at the time of selling said bale of cotton to plaintiff, and said check was paid by said bank." The trial judge rendered judgment for costs in favor of the defendants, and the plaintiff asks for a review of that judgment by direct bill of exceptions.

The question in the case is whether the plaintiff's right of action against the warehouseman is his only remedy, or whether he has not also the right of recovery against the defendants for the amount paid to them for the bale of cotton represented by the warehouse receipt which he tendered back to them with a demand for his money. It is undisputed that at the time the warehouse receipt was delivered to him there was no cotton in the warehouse subject to delivery by virtue of that receipt. It is likewise undisputed that that fact was not known to either of the parties. It is unquestioned that the plaintiff made his tender of the receipt within 30 days from the time that he became aware that the bale of cotton would not, and could not, be delivered by the warehouseman. The plaintiff can maintain an action against the warehouseman, and he could have brought such an action. Defendants contend that this was his only remedy; and this seems to have been the view of the trial judge. In our opinion the plaintiff not only had the right to bring an action against the warehouseman, but he might, at his option, have treated the contract as rescinded; and, having tendered back the receipt within a reasonable time, he was, under the agreed statement of facts, entitled to recover the \$76.38 paid by him, with interest from the time of demand for repayment.

The cases cited by the learned counsel for the defendant in error establish only a proposition as to which there can be no dispute—that this plaintiff could have brought an action of trover against the warehouseman, or could sue and recover the value of the bale of cotton from the warehouseman. To this effect is the ruling in *Nall v. Farmers' Warehouse Co.*, 95 Ga. 770, 22 S. E. 665, *Zorn v. Hannah*, 99 Ga. 634, 25 S. E. 829, and *Citizens' Banking Co. v. Peacock*, 103 Ga. 171, 29 S. E. 752, and *Peacock v. Citizens' Banking Co.*, 110 Ga. 284, 34 S. E. 851, so far as affects this case. In *Central Ry. Co. v. Exchange Bank*, 101 Ga. 353, 28 S. E. 866, it is said: "Cotton packed into bales is certainly personalty. The transfer or surrender of warehouse receipts, or other symbols representing cotton, may very properly be regarded as equivalent to an actual physical delivery of the cotton itself, and therefore will operate as a constructive delivery passing title." But in that case the cotton in question was at the warehouse, was levied upon by an officer, and the only question involved, as stated by the Supreme Court on page 351 of 101 Ga., and page 865 of 28 S. E., was: "In whom was the legal title to this cotton at the time of the levy?" That question was to be answered by determining whether one Roosevelt was or was not the agent of the claimant, and the court decided that he was not such agent. That was the only issue passed upon by the court. In *Farmers' & Merchants' Bank v. Bennett*, 120 Ga. 1012, 48 S. E. 398, the defendant came

into possession of warehouse receipts without the consent or knowledge of the plaintiff, presented them at the warehouse, and received two bales of cotton, and disposed of them without any authority from the plaintiff; and it was held that the bank, as pledgee, might either bring an action of trover against the defendant, or waive the tort and sue in assumpsit for the market value of the cotton. In the case of *Rawls v. Saulsbury*, 66 Ga. 397, nothing more is held, so far as applicable to this case, than that the plaintiff could have brought an action against the warehouseman, and the same thing may be inferred from *Gunn v. Knoop*, 73 Ga. 510. All of these cases, as well as *Shepard v. King*, 96 Ga. 84, 23 S. E. 113, recognize that the transferring of a warehouse receipt is a mode of effecting delivery, and that it is further true that a sale may be completed without actual delivery of the goods sold. In all of the cases we have been able to examine, the personal property was in the hands of the bailee at the time of the transfer of the symbol representing such property. In this case it is admitted that, unknown to either party, the bale of cotton described in the warehouse receipt delivered by the defendants to the plaintiff was not at the time of such transfer in the custody of the bailee—the warehouseman. The warehouseman could not deliver the cotton. He might not be able to respond to a judgment for the value thereof, and, in either event, the plaintiff had received nothing for his money, except a demand and right of action against the warehouseman. This makes a case, as to its facts, unlike any which has been expressly ruled in this state. If the Supreme Court has ever held (while holding that the pledgee or transferee of a warehouse receipt can proceed against the warehouseman) that the holder of such receipt, where the cotton or other goods cannot be reached, is confined solely to an action against the warehouseman, we have been unable to find it; and, in the absence of a distinct ruling to that effect, we think that the plaintiff has his option to proceed, if he chooses, against either the warehouseman or the defendants in this case, because there was no cotton which could be delivered by the warehouseman, and upon his discovery of that fact he promptly treated the contract as rescinded, offered to restore the receipt, and made timely demand for the purchase price. When Livingston brought this action on the case, he elected to take, and asked for, a judgment against Anderson & Son for the purchase money he paid them for the cotton, with interest thereon. At the time of the purchase there was no such cotton; and to deny Livingston the right of recovery would be to permit Anderson & Son to sell him a bale of cotton which they did not have, but which they were supposed to have, and get his money for it, and thereafter neither deliver the cotton nor return the

purchase money, and thus get Livingston's money for absolutely nothing.

It is clearly held in *Biggers v. Pace*, 5 Ga. 172, that, notwithstanding title may have passed from seller to buyer, yet, if the seller refuses to deliver the goods, the buyer may either bring trover to recover the goods, or a special action on the case for damages. Where one party to a contract is ready and willing to perform and the other is not, the first may maintain an action against the other. So that, granting that the title would have passed, if the defendants had had the cotton in the warehouse, by the delivery of the warehouse receipt, under the doctrine in the *Biggers Case*, we think this plaintiff can recover. As we have stated above, the effect of the rulings of our Supreme Court is simply that the delivery of warehouse receipts is such constructive delivery of the articles therein described as will pass title; and a provision to the same effect in favor of pledgees is contained in Civ. Code 1895, § 2956. But, as a person selling personal property is bound to deliver the thing sold to the purchaser, and as the law makes it his duty to do so whether he in express terms agrees to deliver the articles sold or not, the very fact of selling the thing raises an implied contract of delivery. A constructive delivery by delivering a bill of sale or a warehouse receipt for the articles sold will not relieve the seller from making actual delivery of the thing which such bill of sale or warehouse receipt represents, where the uncontradicted evidence shows that such article was not in the possession of the bailee at the time of the sale. The constructive delivery relies upon the presumption that the property is, as it purports to be, in the possession of the warehouseman or the bailee. If, as a matter of fact, the property of which the warehouse receipt was a symbol has already passed from the possession of the bailee, there is no constructive delivery. The seller must then rely upon actual delivery, or the purchaser may treat the contract as rescinded, and recover damages for the breach of the contract. The law declares the delivery of a warehouse receipt for cotton to be a constructive delivery of the cotton represented thereby for the sole purpose of passing the title, so that an action in trover against the warehouseman issuing the receipt can be predicated thereon by the holder, just as if there had been an actual delivery of the cotton itself, in the event of a conversion by the warehouseman or his refusal to deliver the cotton to the holder, and in such case the warehouseman will not be heard to deny the title of the holder of his own receipt, whereby he obligated himself to deliver the cotton upon the presentation and surrender of the receipt. But this does not relieve the seller from making an actual delivery of the cotton when demanded by the purchaser; and a refusal to make such actual delivery subjects the seller, in case the receipt really represented nothing

tangible at the time of the sale, to an action by the purchaser for the recovery of the cotton, or the purchase price paid therefor. The sale of the cotton and the delivery of the warehouse receipt therefor to a purchaser is equivalent to a warranty on the part of the seller that the cotton is in the warehouse. This must be conceded to be true, or, at best, the purchaser would be only buying a lawsuit; and but few are anxious for that class of property. If the property represented by the receipt is not in fact in the warehouse (as the purchaser has a right to expect it to be), there has been on the part of the vendor a breach of the implied warranty arising from the fact of sale and delivery of the receipt. In making such a sale, the vendor not only says that he has title, but he in effect says to the purchaser: "I own a bale of cotton, and it is in the warehouse, with the marks and numbers and the weight shown in the warehouse receipt which I now deliver to you, and all you have to do is to take this receipt to the warehouse and get the cotton. I guarantee that you will now find it there and get it on presentation of this receipt." If, in fact, the seller had no such bale of cotton in the warehouse at the time, but it had been previously carried away to parts unknown, it seems to us that, if it is out of the power of the vendor to deliver the thing sold, he should at least be liable to the purchaser for the return of the purchase money paid him.

In this case the defendants prevented the completeness of the plaintiff's title by selling him a bale of cotton that they did not actually have and could not deliver in pursuance of the sale, and upon the representation, necessarily implied from the circumstances of the transaction, that the cotton was in the warehouse, when, in fact, it had been several weeks previously taken out of the warehouse and shipped away by an adverse claimant. The defendants cannot dispute the plaintiff's title, for it came through them; and the defendants cannot defend by questioning the sufficiency of the plaintiff's title, because the act of the defendants themselves prevented the completeness of their title. See *Holton v. Carter*, 90 Ga. 299, 15 S. E. 819.

According to the evidence, there was a mutual mistake of fact on the part of both parties in this case. When Anderson & Son undertook to sell the bale of cotton to Livingston and he paid them for it, Anderson & Son, as well as Livingston, erroneously believed that the cotton was in the warehouse. As a matter of fact, it was not there at that time; but some time before the transaction had been shipped away to parts unknown. As soon as this fact became known to Livingston, he undertook to rescind the contract of purchase, and treated it as rescinded, and took the warehouse receipt back to Anderson & Son and tendered it, demanding that the purchase price be refunded, and they refused to accept the receipt or refund the purchase

money. A contract predicated upon a mutual mistake of fact may be rescinded. It is undisputed that in this case both parties were laboring under the belief that the cotton was in the warehouse, and based their contract upon that belief, when as a matter of fact it was not there. Livingston, having tendered back the warehouse receipt to Anderson & Son when the mistake was discovered, rescinded the contract. And Livingston having done all that a court of equity could have required him to do, and the exercise of affirmative chancery powers of extraordinary equitable relief not being asked, it was not necessary for the plaintiff to go into a court of equity, but, the contract of purchase being treated as rescinded, the plaintiff could sue for the recovery of the purchase money paid. The action was properly brought, and, under the admitted facts, the court erred in not rendering a judgment for the plaintiff for the amount of the purchase price, with interest thereon.

Judgment reversed.

(2 Ga. App. 384)

#### HAMMOND v. STATE. (No. 507.)

(Court of Appeals of Georgia, July 25, 1907.)

##### 1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

The evidence justified the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1994.]

##### 2. SAME—INSTRUCTIONS.

The instructions complained of, when taken in connection with the context, do not present any grounds of material or reversible error. (Syllabus by the Court.)

Error from City Court of Eastman; W. M. Clements, Judge.

Bill Hammond was convicted of crime, and brings error. Affirmed.

De Lacy & Bishop and D. M. Roberts & Son, for plaintiff in error. Chas. W. Griffin, Sol., W. M. Morrison, Sol., and Tye, Peeples, Bryan & Jordan, for the State.

POWELL, J. The trial judge charged: "Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is held necessary to justify a verdict of guilty." Exception is taken to so much of this instruction as states that "In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction," on the ground of its irrelevancy to the issue. While in criminal trials it is not appropriate that the judge should ordinarily refer to the rule of proof applicable in civil trials, yet, taken in connection with the context and with the fact that the judge fully instructed the jury as to the benefit of reasonable doubt to which the defendant was entitled and as to the presumption of innocence in his favor, it is

clear that no injury resulted to him. *Jackson v. State*, 125 Ga. 102, 53 S. E. 607 (3).

Further isolated excerpts from the charge are excepted to. When viewed in light of the entire charge, they present no ground of reversible error.

Judgment affirmed.

(2 Ga. App. 346)

**WESTERN & A. R. CO. v. CLARK.** (No. 324.)

(Court of Appeals of Georgia. July 18, 1907.)

**1. RAILROADS—KILLING STOCK—EVIDENCE.**

In the absence of positive evidence of negligence, or where the only express evidence of negligence in behalf of the plaintiff is a mere expression of opinion, the presumption of negligence arising against a railroad company from proof of the killing of an animal is met and overcome by evidence for the defendant company showing that the animal could not have been seen soon enough to avoid the casualty, and after it was discovered all diligence was used to prevent the killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1578-1581.]

**2. ERROR, WRIT OF—FINDING OF JURY—CONCLUSIVENESS.**

But where the evidence for the plaintiff shows negligence as a matter of fact, and is in material conflict with the evidence introduced by the defendant for the purpose of rebutting the presumption of negligence, an issue of fact is raised which must be determined by the jury, and their finding thereon will not be disturbed by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3935.]

**3. JUSTICES OF THE PEACE—CERTIORARI—ANSWER.**

Unless the point be waived, a judge of the superior court commits no error, of which plaintiff in certiorari can justly complain, in overruling the certiorari, where the answer to the writ of certiorari does not verify the statement in the petition that a verdict and judgment were rendered against it in the court in which the case originated, or disclosed what disposition (if any) was made of the case in that court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 794, 795.]

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; *A. W. Fite*, Judge.

Action by *J. W. Clark* against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See 57 S. E. 916.

*W. H. Odell* and *R. J. & J. McCamy*, for plaintiff in error. *W. E. Mann*, for defendant in error.

**RUSSELL, J.** This case has been to the Supreme Court, and is reported in 121 GA. 419, 49 S. E. 290. No opinion follows the judgment rendered in the headnote. So far as appears from the headnote, the judgment of the lower court was reversed at that time because the evidence in behalf of the railroad company, rebutting the presumption of negligence arising from proof of the killing of the animal by the defendant company's

train, was uncontradicted, except by a mere expression of opinion by one witness. We have not thought it necessary to examine the original record transmitted to the Supreme Court on the former hearing, because, regardless of what may then have appeared, there is in the record before us a direct conflict in the evidence upon the subject of negligence as related to the killing. This issue of fact it is the exclusive province of the jury to decide, and we have neither the power nor disposition to disturb their finding. It appears that the engineer and fireman rebutted the presumption of negligence arising from the killing of the steer by the defendant company's train by testifying that they did not see the animal in question (and on account of a curve could not see it) until it was within 20 or 30 feet of the engine. They both swore that they were looking ahead, and that the steer was killed 450 yards north of the public road crossing. Both swore it was too late when the animal was seen to do anything to stop the train, and that nothing was done. Under this evidence the presumption of negligence would have been rebutted, and without more a finding for the plaintiff would not have been authorized. In the answer, however, appears the testimony of two witnesses for the plaintiff, which is in direct conflict with the evidence in behalf of the defendant, as to the only material issue in the case. The only real question in the case was whether the cattle came so suddenly on the track from previous concealment that it was impossible for the train crew, though ever so diligent, to prevent the casualty. The two witnesses for the plaintiff testified that the steer could have been seen for 250 yards, that there was nothing to prevent the engineer and fireman (either embankment, curve, or other obstacle) from seeing if they had been looking out. One of these witnesses stated that he saw the killing; that the cattle were in plain view, and could have been seen by the engineer, if he had been looking out, for a distance of 280 measured yards; that no effort was made to stop the train before the killing; that the speed of the train was not slackened, and the whistle was not blown. According to the plaintiff's evidence, the killing could have been prevented, because the engineer himself testified that the train could be stopped in 136 yards. According to defendant's testimony the accident could not be prevented; and this clearly raised an issue of fact, which could not be settled except by the jury. As it does not appear that their finding was induced by or dependent upon any error of the court, it cannot be disturbed.

We have passed upon this phase of the case only because no notice seems to have been taken in the court below of the defect in the magistrate's answer, or, at least, the plaintiff in error was given the benefit of the doubt as to the unexpressed intention of the magistrate, and the point was waived.

It doubtless was the intention of the magistrate to adopt the allegations of the petition as to the judgment rendered and the assignment of error, but he failed to say so; and the judgment of the superior court in overruling the certiorari would be sustained if his decision had been based only on the ground that the answer did not disclose what disposition was made of the case in the trial court. The language of the answer is as follows: "And now comes the defendant, answering the writ of certiorari served on him, and says that the following is also held as his answer, except as follows." This is all of the justice's answer, except that following the words above quoted he purports to give the substance of the testimony of two witnesses for the plaintiff (defendant in certiorari). We would have decided the case upon the principle announced in *Stoner v. Magins*, 116 Ga. 797, 43 S. E. 45, and frequently since reaffirmed, without any discussion, except for the fact that the point seems to have been waived in the court below. It was at least treated thus by the trial judge; for the answer of the magistrate was traversed, a trial had upon it and a verdict rendered, finding against the traverse. As stated above, we think that the magistrate intended to adopt the allegations of the petition for certiorari, so as to verify the statement therein that a verdict and judgment were rendered against it in his court. But he failed to do so, and for that reason, if for no other, the judgment of the superior court in overruling the certiorari must stand affirmed.

Judgment affirmed.

(2 Ga. App. 333)

HOLT v. STATE. (No. 506.)

(Court of Appeals of Georgia. July 25, 1907.)

1. CRIMINAL LAW — TRIAL — REMARKS OF COURT.

It is never necessary or proper for a court, during the trial of a case and in the hearing of the jury empaneled therein, to relieve itself by reference to the right of the Supreme Court to reverse its rulings to which respectful objection is being made, and by suggesting that counsel try the remedy. In a case stubbornly contested and close and doubtful, to intercept, cut off, and prevent a question from being asked a witness by defendant's counsel, with the remark: "I may be wrong about this. You have your remedy. You can go to the Supreme Court. I won't permit him to testify about a matter on the former trial until the record is read to him"—was prejudicial to the defendant, and it is such an intimation of the court's opinion that the defendant is guilty as requires the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1520-1526.]

2. SAME.

"The fact that a defendant in a criminal case may take up his case to the Supreme Court is no reason why he should not have meted out to him by the court and jury the full measure of his legal rights." *Hodges v. State*, 15 Ga. 118.

3. SAME—NEW TRIAL—CROSS-EXAMINATION.

The right of a defendant to test the consistency or improbability of a witness' story, as well as his interest or feeling in the case, by cross-examination, thorough and sifting, is secured to every party as to witnesses called against him. Civ. Code 1895, § 5282. And a material abridgement or denial of this right is ground for a new trial. *A. & B. Ry. v. McManus*, 1 Ga. App. 302, 58 S. E. 258.

(Syllabus by the Court.)

Error from City Court of Eastman; W. M. Clements, Judge.

Ed Holt was convicted of crime, and brings error. Reversed.

De Lacy & Bishop and D. M. Roberts & Son, for plaintiff in error. Chas. W. Griffin, Sol., W. M. Morrison, Sol., and Tye, Peeples, Bryan & Jordan, for the State.

RUSSELL, J. Judgment reversed.

(3 Ga. App. 323)

OHLEN v. ATLANTA & W. P. R. CO. (No. 158.)

(Court of Appeals of Georgia. July 18, 1907.)

1. CARRIERS—INJURY TO FREIGHT—BURDEN OF PROOF.

A common carrier, sued on its common-law liability for loss or injury of goods received by it for transportation, may relieve itself of liability by showing that the goods were damaged before it received them. Where it does not appear either that the carrier received the goods as in bad order or that they were in fact in bad order when received, the presumption is that they were in good order, and the burden of proof is upon such carrier to show that it was free from negligence, and that its negligence did not cause or contribute to the damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 581.]

2. SAME—DAMAGES.

Where there was evidence of the delivery by the carrier in a damaged condition of an entire shipment, and that the goods were originally shipped in good condition, and evidence as to the amount of damage, authorizing the recovery of a larger amount as damages on the entire shipment, it was error to direct a verdict for only a portion of the damaged goods, as to which the defendant conceded liability.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reld, Judge.

Action by F. X. Ohlen against the Atlanta & West Point Railroad Company. From a verdict for plaintiff for less than the amount claimed, he brings error. Reversed.

Moore & Pomeroy, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

RUSSELL, J. Ohlen filed suit in the city court of Atlanta against the Atlanta & West Point Railroad Company, to recover damage for 109 kegs of fish shipped from St. Andrews, Fla., to Atlanta, Ga. This suit is based upon two counts: First, the statutory action against the last of the connecting lines of carriers; and, secondly, the common-law liability. The plaintiff insisted only upon the

common-law count; and hence the count based on section 2298 of the Civil Code will not be considered. The court directed a verdict for \$8 in favor of the plaintiff. The plaintiff excepted, and brings the case to this court for review.

There are two assignments of error. The first assigns error upon the overruling of plaintiff's objection to a freight bill "dated May 4th, bearing the name of F. H. Allen, covering car 9077, 100¼ kegs of fish, marked, 'Weight 8,750 pounds,' with \$51.20 freight, marked, 'Paid on May 14, 1904,' and bearing the signature of S. C. McGill, Agent"; the objection made by the plaintiff being that the evidence was immaterial, irrelevant, and illegal, and that it was an admission by the defendant in its own favor. The second assignment of error excepts to the ruling of the court in directing the verdict over the plaintiff's objection. We shall consider the second assignment first, because the principles involved are controlling in the case.

While the verdict was directed for the plaintiff, it was in effect, a verdict directed for the defendant, because the defendant conceded that one keg was lost, and one keg so damaged as to be worthless, and tendered \$8 and court costs in court. So far as insisted on by the plaintiff, the petition alleged that on or about the last day of April, 1904, he bought and had shipped to him from St. Andrews, Fla., to Atlanta, Ga., 109 quarter kegs of fish, which were delivered to him by the defendant in Atlanta on or about May 14, 1904; that when shipped the fish were in good order, and not in a damaged condition, but when delivered they were decayed, unmerchantable, and in a badly damaged condition; and that a portion of the fish (one-fourth keg) was never delivered. He charged that the time consumed in conveying the fish was unreasonable and unnecessary, and that this fact contributed in a measure to their damage, that this shipment of fish should have arrived in Atlanta on or about May 4, 1904, and that the defendant wrongfully and negligently held and refused to deliver the shipment until on or about May 14, 1904, which fact, he charged, contributed to their damage.

The evidence for the plaintiff showed that one Ponder, as his broker, received the bill of lading from him and sold the fish to J. J. & J. E. Maddox while they were in transit. When the bill of lading arrived about the 1st of May, Ponder telephoned to the office of the defendant company at Atlanta, and inquired for the fish, and was told that they were not there. He then called on the cashier at the office of the Atlanta & West Point Railroad, about a week after he received the bill of lading, and was told that the fish were not there. Two or three days later he again made inquiry, and was told that they had not arrived. He then went into the depot and made a personal search, and found the fish, marked "F. X. Ohlen." This

was between the 8th and 10th of May. After the fish were found, they were not delivered until the 14th of May; for the reason that the defendant company insisted on collecting a larger amount of freight than that called for in the bill of lading. The fish were sold to Maddox at \$3.25 per keg, though the market price was more than that. After the fish were delivered to Maddox, it was discovered that they were rotten and of no value. Maddox refused to pay for them, and tendered them back. The tender was waived, because it was apparent that the fish were worthless. The witness further testified that a shipment of fish from St. Andrews, Fla., should reach Atlanta within three or four days after shipment. It further appeared in the evidence that permitting fish of the character in question to sit in a hot warehouse for a number of days would cause them to decay. It appeared from the testimony of Mr. Maddox that there was no brine in the kegs when they were opened. He also noticed Ohlen's name on them, and could not say they were only marked with the initials "F. X. O." He also testified that the market value of the fish between the 1st and 15th of May was \$5 a keg. The agreed price was \$3.25 a keg.

Under a notice to the defendant, the bill of lading was produced and introduced in evidence for the plaintiff, as follows: "Pensacola, St. Andrews and Gulf Steamship Co. Consignee's receipt. Original. Received in apparent good order from H. W. Steinhölder of date April 29, 1904, at St. Andrews, Fla., consigned to F. X. Ohlen, Atlanta, Ga., marked F. X. O., 104¼ kegs fish. Rate 63c per hundred pounds. Weight 8750. [Signed] C. Wisenburger, Agt." Indorsed: "Deliver to bearer, May 5, 1904. Frank X. Ohlen." Plaintiff also introduced a letter from Ponder to McGill, agent of the Atlanta & West Point Railroad, as follows: "We hold B/L for 109 packages salt fish, which from marks on package we found out arrived here on the 4th inst. We inquired at the depot in person once or twice, and over the phone, if goods had arrived, and were informed in the negative. On the 10th inst. we searched for the goods through your depot and found them there. Rate of freight on B/L is indorsed 63c per cwt., and we have in our possession letter from E. R. Cobb, G. F. A. of Pensacola, St. Andrews & Gulf Steamship Co., who issued B/L giving rate from Cromston, Fla., to Atlanta, Ga. of 63c. We have been refused delivery of the shipment unless freight charges in full, which is more than 63c per cwt., be paid. Weather is getting hot and fish are being damaged every day they set in warehouse, and this is to put you on notice that we shall demand of your road damages, whatever they might be, and if the freight charges are not adjusted at once we will reject the shipment entirely and bring suit for amount of shipment." Also letter from S. C. McGill, agent, to C. B. Ponder Company, of May 14,

1904, as follows: "Confirming my telephone message to your bookkeeper this a. m., this is to notify you that we are ready to protect rate of 63c per cwt. on salt fish from St. Andrews, Fla., to Atlanta, Ga. Will you kindly send down and get shipment, which is at our depot?" According to the testimony, the fish were put up in brine, in little quarter barrels, with wooden hoops around them. They were put up to keep, and in cool weather ought to keep 60 or 90 days. "They would go to pieces quicker, if stored in a warm place for any length of time." It was also in evidence that, so far as its general appearance was concerned, the kegs were apparently in good condition. And the testimony showed that, if there was a leakage, it would make the kegs lighter, though there was no evidence that the kegs were weighed before delivered.

In our opinion the exception to the verdict directed by the court is well taken. Considered by itself, the testimony in behalf of the plaintiff entitled him to a recovery for the market value of the entire shipment of 109 kegs, and, considered in connection with the testimony for the defendant, the most that can be said is that an issue of fact was presented which should have been submitted to the jury. We apprehend that our learned Brother of the trial bench was controlled in his decision by the ruling announced in *Evans v. A. & W. P. R. Co.*, 56 Ga. 502, in which it was held that the receipt of corn in apparent good order given by an agent of a steamboat, which corn was to be carried by water to Memphis and thence by rail to La Grange, furnished no evidence that the defendant received the corn in good order, or apparent good order, or as in good order. In our judgment the decision above cited has no application whatever to the case at bar, although there is a similarity as to the facts. In the *Evans Case* it appears that the action was based upon section 2084 of the Civil Code of 1895, now section 2298, and the decision is based entirely upon a strict construction of that statute; Judge Jackson, in rendering the opinion, saying, "Our statute (section 2084 of the Code) makes the last company of connecting railroads liable. It is silent in respect to any connection with steamboats." But, even in that case, it was held that if it had been proved that any of the connecting railroads received the corn in good order, or as in good order, "then the presumption would have arisen that the corn remained in that condition of good order from connecting road to connecting road until it reached defendant, and hence that it was received by plaintiff as in the good order in which it left the other road, and such presumptive proof would have been sufficient to carry the case to the jury, and, unless rebutted, to have authorized a recovery from the defendant. Such seemed to be the authorities and principle and practical good sense, and the convenience of the public sus-

tain it. But this case breaks down from the fact that there is no positive proof that the defendant received this corn in good order or as in good order, and no presumptive proof thereof by proof that any road with which it connected so received the corn, nor any proof that it received the corn from any other carrier." Under the evidence submitted by the defendant in the form of the freight receipt, had the plaintiff insisted on his statutory remedy under Civ. Code 1895, § 2298, his case would not have broken down, as Judge Jackson termed it, for lack of proof that a road with which it connected received the fish in good order, or that it received the fish from another carrier. It must be borne in mind, however, that the statutory action predicated on section 2298 was expressly abandoned by the plaintiff. Perhaps it was abandoned on account of the decision in the *Evans Case*, but, in any event, as that case was brought under the provisions embodied in section 2298 (which was formerly section 2084 of the Code), the ruling in the *Evans Case* is not in point. Where the action is based on the common-law right of action, the carrier is bound, if he receives goods in good order, to deliver them in good order, whether there be a bill of lading or no bill of lading, a connecting carrier or no connecting carrier. The general rule as to the common carrier's liability for goods in his possession as carrier (and regardless of contractual exceptions) is that the carrier is liable for all loss or destruction of or injury to such goods not occasioned by the act of God or the public enemy. Therefore, where the loss is not due to the excepted causes, proof of negligence is immaterial, and the carrier cannot escape liability by proving reasonable care and diligence. Under the common law the carrier is absolutely liable to deliver the goods in the condition in which it receives them, with only the exception stated in the rule above. This general rule is stated and illustrated by Judge Nisbet in the early case of *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 398. In the more recent development of the rules of the carrier's liability, it has been held that he is not liable for loss or damage due to the intrinsic qualities of the goods carried. But this exception is not included in the exception made for the "act of God" in the common-law rule. The act of God, as expressive of a cause of loss or damage, means a casualty not due to human agency, not only not due to it, but one which is in no way contributed to by human agency.

With the rule of common-law liability settled, it is clear that the question of fact in this case is: What was the condition of the fish at the time the defendant received the kegs containing them? The evidence is undisputed that the fish were received in a damaged and worthless condition from the defendant. By this proof the plaintiff established the fact that he had not contributed to the injury, and shifted to the defendant

the burden of showing responsibility for the bad condition of the fish to be chargeable to some one else, either a connecting carrier or the shipper, where it was shown that the goods were recently in good condition. The carrier had the right to refuse the shipment when tendered to him, whether by the original shipper or by a connecting carrier, if in bad condition, to inform himself of the condition and nature of the goods before receiving them for shipment, and he had the best opportunity of furnishing information as to who was responsible for the unsound or damaged condition of the shipment. It can be presumed that the fish were at one time sound, and, whether the defendant received them from the shipper or from a connecting carrier, if a carrier delivers them in bad condition from his hands, the presumption will arise that the damage accrued while in his custody; for the reason that a carrier is not required to transport articles unfit for shipment or in bad condition without at least being able to prove that fact. On the other hand, in most instances all that the consignee can prove is the condition of the goods at the time he received them, and the fact that they came from the custody of the carrier. For this reason, we think that the plaintiff made a prima facie case when he proved that the goods had been in possession of the defendant as a carrier from May 4th to May 14th, and, when delivered by the carrier, were worthless. It then became the duty of the carrier to show that the goods were in bad condition when delivered to him; and, upon failure of such proof, the presumption that they would not have been received by him except in proper condition to be shipped is not rebutted, and the carrier becomes liable for the damage. We are aware that this rule imposes a burden upon the carrier for hidden defects in some cases, but the carrier will still be protected by the rule which relieves from liability where the injury or destruction of the shipment is caused by the act of the shipper, or by violation by the shipper of reasonable rules made by the carrier, or where there is a fraudulent concealment of the nature or value of the goods, or where the shipper dissuades the carrier from inquiry and thereby misleads the carrier as to the nature and value of the shipment, or where the goods are insufficiently packed, if the defect is not known to the carrier and the carrier is without fault.

The Supreme Court in the case of *Breed v. Mitchell*, 48 Ga. 537, fully justifies our holding in this case. Judge McCay, delivering the opinion for the court, says: "Whatever may be the rule as to the presumption of the condition in which goods are received, it is certainly true that the carrier will be presumed to have received the goods in good order for shipping; that is, that they were in such condition that they could be moved

without loss. A carrier is not bound to receive goods which cannot be moved without loss. A man may have a right to compel a carrier to ship damaged goods, but he cannot compel him to ship goods that are so badly packed as that they cannot be transported. At any rate, it is but a fair presumption that, when the carrier got the goods, they were in such a condition as that they were capable of being transported." And upon the same principle we hold that, if a carrier can be compelled to ship damaged goods, it is his duty to know it. He is best prepared to prove it, and is so out of the ordinary rule of business transactions that, in the absence of proof that he did receive the goods in damaged condition, it is fair to presume that he received them as in good condition, if not actually in good condition. It is in evidence in this case that the goods were actually received from a connecting carrier, the Western Railroad of Alabama, and carried in the same car to Atlanta, by the defendant; and, as said by the Supreme Court, in *Paramore v. W. R. Co.*, 53 Ga. 386: "If the carrier who receives them finds that they are not in good order, that damage has already occurred, he can protect himself. It might be his duty to receive them in such order and to deliver them—that is, he may be compelled to receive even damaged goods—but he is not bound to receive them when they are so badly packed that they cannot be received without loss. *Breed v. Mitchell*, 48 Ga. 533. So the defendant was not bound to receive these cars from the Atlanta & West Point Railroad with the hogs so crowded that they were in danger of suffocation. If it did, it made the act of that road its own act, and was bound for the damages resulting from it. And the burden is on it to show whether the suffocation occurred before or after its receipt of such cars." In this case the car containing the goods was received by the Atlanta & West Point Railroad Company from the Western Railroad of Alabama, instead of being received by the Western Railroad of Alabama from the Atlanta & West Point Railroad Company, as in the *Paramore* Case, and the shipment is fish, whereas hogs were being carried in the case cited; but the rule must be the same. The goods in each case were destroyed, so far as practical use was concerned, and the burden is on the carrier delivering the goods to show whether the injury occurred before or after its receipt of the shipment. It is true that the action in the *Paramore* Case was based on section 2084 of the Code, but that fact would not vary the sound reasoning upon which the presumption of receipt in good order is based. The court further proceeds to say that, if the goods be in bad order or damaged, any road can so specify in its receipt and be protected; and that, if a carrier can protect himself against liability for the receipt of goods in bad order—in an unmerchantable condition—"at least the bur-



den is on him of showing that it was not by his default or his own negligence that the injury was caused." While this action, so far as recovery is concerned (plaintiff having abandoned the first count), is not based upon section 2298, still, as a matter of fact, it appears from the receipt offered by the defendant that the goods were delivered in good order by the Louisville & Nashville Railroad Company to the Western Railroad of Alabama, and that that road, without change of cars, delivered the goods to the defendant company. So that, if we consider the goods in the light of the receipt, they must be presumed to have been in good order when received by the defendant, and the burden is shifted to the defendant to show the contrary. Furthermore, the bill of lading issued by the initial carrier, the steamboat company, is in evidence, and recites that the goods were received in good order. And in *Bell v. W. & A. R. Co.*, 125 Ga. 512, 54 S. E. 532 (a case based upon the common-law liability of the carrier), it is held that "the bill of lading issued by the initial carrier plays an important part in the plaintiff's case, whether the plaintiff relies upon the count growing out of the breach of duty arising under the contract, or on the count charging liability on the part of the defendant under Civ. Code 1895, § 2298, as being the last connecting carrier who received the goods in good order. In the first instance, though the consignee be not a party to a contract of carriage between a railroad company and a shipper, the consignee may make proof of such contract with a view to showing that the company became liable to him for a failure to comply with its legal duty as a common carrier." And in the same case (page 513 of 125 Ga., and page 533 of 54 S. E.) it is held that, "when a connecting carrier who has completed the transportation and delivered the goods to the consignee in a damaged condition is sued for the loss in value, upon proof that the initial carrier received the shipment in good order, the jury have the right to infer that they continued in that condition down to the time of the delivery to the carrier making the delivery to the consignee, and that injury or loss occurred while in his possession. If nothing more had appeared than that the consignor delivered the cabbages to the initial road in good order, the plaintiff would have shifted the burden on to the defendant company of showing that it was not responsible for their damaged condition when delivered." The cases of *Henry v. Central R. Co.*, 80 Ga. 815, 15 S. E. 757 (1), and *W. & A. R. Co. v. Exposition Mills*, 81 Ga. 529, 7 S. E. 916, 2 L. R. A. 102, sustain our holding that, where a railroad company is sued on its common-law liability for damages to goods delivered by it in a damaged condition, the presumption arises that it received the freight in good order, and that this presumption must be rebutted by proof. In *Henry's Case*, cited above, it is held that where it

does not appear either that the carrier received the goods as in bad order or that they were in fact in bad order when received, the presumption is that they were in good order. *Hutchinson on Carriers* (3d Ed.) § 1348, is authority for the proposition that the bill of lading issued by the initial carrier is competent evidence to establish the condition of goods at the time of their delivery to such carrier, and that, where goods are received as in good order by the initial carrier, the presumption is that the goods remained in the same good condition when they came into the possession of the carrier sued. Section 2298 of the Civil Code of 1895 has reference only to railroads, and consequently the bill of lading issued in this case by the steamboat company would not have been competent evidence had the count for the statutory remedy been relied on; but, as only the count based on the common-law liability of the defendant was insisted upon, the bill of lading issued by the steamboat company, the initial carrier, was properly admitted. Its contents established the fact that the goods were delivered by the consignor in good order, and certainly, in connection with the other evidence in the case, raised the presumption that the defendant, the Atlanta & West Point Railroad Company, received them in good order. This presumption, unless rebutted, entitled the plaintiff to a recovery; and consequently it was error to direct a verdict for an amount so small that it amounted to a verdict for the defendant.

Judgment reversed.

(3 Ga. App. 317)

#### STILES v. SHEDDEN. (No. 445.)

(Court of Appeals of Georgia. July 10, 1907.)

##### 1. TRIAL—RIGHT TO OPEN AND CLOSE.

In an action upon a contract, the defendant is entitled to open and conclude when, by his pleadings, before the introduction of any evidence, he admits a prima facie case for the plaintiff; that is to say, such a case that, if no evidence were introduced, the plaintiff would be entitled to take judgment for the full amount authorized by his petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 50.]

##### 2. BILLS AND NOTES—DELIVERY—TITLE.

The title to a negotiable promissory note indorsed in blank by the payee may thereafter pass by delivery to subsequent holders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 463.]

##### 3. TRIAL—INSTRUCTIONS.

Instructions inapplicable to the pleadings and the evidence, and therefore tending to confuse the jury, should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 587.]

##### 4. SAME.

The court should not single out one of several issues and instruct the jury that it is the main issue; nor should he instruct them that this issue is to be determined by a consideration of the evidence of the witnesses who have testified on the stand and by interrogatories, where material documentary evidence has been introduced upon the question.

## 5. SAME.

Instructions tending to mislead the jury as to the true nature of the defense set up in the case should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 569.]

## 6. EVIDENCE—OPINION EVIDENCE.

Where a witness has stated that a note was turned over to another for a specific purpose, he may, as against the objection that it is opinionative, testify that this purpose has ended.

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by R. F. Shedden against William H. Stiles. Judgment for plaintiff, and defendant brings error. Reversed.

Shedden sued Stiles upon a promissory note for \$500. The note was signed by Stiles, payable to himself or order, indorsed by himself and George T. Hodgson; both the indorsements being in blank. It also bore the indorsement: "For collection account of English-American Loan and Trust Co., Roby Robinson, Cashier." The defendant's answer admitted the execution of the note, and that the same was transferred by indorsement to Shedden. He set up in defense that the note was an accommodation paper, wholly without consideration; that it was obtained by Hodgson for Shedden at Shedden's instance and request, with the sole view that Shedden might use it as collateral; that these facts were fully known to Shedden at the time he took the note; that he paid nothing for it; that Shedden, recognizing this to be the fact, had never prior to the bringing of the suit presented the note for payment, or claimed that Stiles owed him anything on it, though nearly 10 years had elapsed in the meantime; that the note had long since served its purpose, and would have been canceled and returned, but for the fact that the parties thereto were under the impression that it had been destroyed. The defendant, therefore, alleged that he was not indebted to Shedden on the note, and that the latter was not a bona fide holder of the same for value. Upon this plea the defendant claimed the right to open and conclude. The court overruled this demand, and allowed this privilege to the plaintiff. This ruling is the basis for one of the exceptions taken in the record. The oral evidence was conflicting. That of the defendant tended to show that Shedden was the general agent and Hodgson the local agent of the Mutual Life Insurance Company; that Hodgson borrowed money from Shedden, and Shedden borrowed in New York; that Hodgson, in addition to certain notes which he put up as collateral for the loan made by Shedden to him, as an accommodation to Shedden executed his notes in blank to the sum of \$100,000, and turned them over to Shedden in order that the latter might borrow money on them; and that at Shedden's instance he also, for the same purpose, obtained notes from his friends, getting them

from Stiles, his partner, from Mure, his brother-in-law, Hodgson, his nephew, and Nicholson, his office boy, and the note in suit was of this number. When business connection between Hodgson and Shedden closed, all of these notes, except the one in suit, were returned by Shedden. By oversight the one in suit was not returned. Shedden, as a witness in his own behalf, denied all this, and said that he had bought this note from Hodgson and had paid him \$500 for it. A large amount of letters and other documentary evidence was introduced by the defendant, tending strongly to support his plea. We mention this fact because exception is taken to a charge of the court tending to eliminate this evidence from consideration by the jury. The jury returned a verdict for the plaintiff. In the motion for a new trial, the plaintiff in error assigned error upon the following instructions of the court to the jury: (1) "The plaintiff contends that he bought this note from one George T. Hodgson, and that he paid value for it according to its terms—in other words, that the note was discounted to him and that he took it up, paying value for it; that it was not a mere accommodation to him at all; that he did not receive it that way, and did not use it that way. You look to the evidence, gentlemen, and see what the plaintiff contends, and examine the note, which will be before you, and see if there is any evidence that it was used by the plaintiff at all; and I charge you that as this is a negotiable paper, if he had used it, it would have been necessary for him to have made an indorsement upon the note." (2) "I charge you that every transferrer of a negotiable instrument, whether by indorsement or delivery, warrants (unless otherwise agreed by the parties) that he is the lawful holder and has a right to sell, that the instrument is genuine, and that he has no knowledge of any facts that prove the instrument worthless, either by insolvency of the maker, payment, or otherwise." (3) "I charge you that the title of the holder of a note cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in the defense which he seeks to make. I charge you that an indorsement or assignment of any bill, bond, or note, when the same is sued on by the indorsee, need not be proved, unless denied on oath." (4) "I charge you, gentlemen, that the main question for you in this case is this: Did the plaintiff pay Hodgson a valuable consideration for this note? And, in determining this, you will look to all the evidence as it comes to you from the witnesses, and the evidence presented by interrogatories." (5) "This being a negotiable instrument, if this plaintiff came into possession of it for a valuable consideration before it was due, and without any notice of any dishonor, he would be entitled to recover. I charge you that in support of the defendant's contention he must show, by a preponderance of the evidence, that Shedden

did not pay Hodgson a consideration for the paper." Other portions of the charge are excepted to; but, as this court finds no error in them, it is not deemed necessary to set them out here. Another ground of the motion for a new trial complains that the court excluded from the jury the answer of the witness Hodgson, as follows: "This note most assuredly has served the purpose for which it was given, and it should have been returned to me when I made demand upon Mr. Shedden for the return of all my collateral notes, at which time most, and, as I thought, all, of them had been returned; and this one was included in my demand for their return." Other exceptions taken to rulings upon evidence are not considered material. There is in the motion also a ground of newly discovered evidence; but, as the affidavit as to the diligence used by client and counsel to discover this evidence before the trial is not sufficient (for it states the fact of such diligence as a mere matter of conclusion, without giving any facts upon which the conclusion is based), the court does not consider it.

Thos. W. Milner & Son, for plaintiff in error. P. S. Ethridge and J. M. Moon, for defendant in error.

POWELL, J. (after stating the foregoing facts). 1. Under the pleadings the defendant took the burden of proof, and was entitled to the opening and conclusion. In actions *ex contractu* the test is: If under the pleadings the plaintiff would be entitled to a judgment in his favor for the full amount authorized by his petition, without the introduction of any proof, unless the defendant by his evidence can affirmatively avoid the *prima facie* case admitted in plaintiff's favor, the defendant is entitled to open and conclude. In this case, the defendant having admitted the execution of the note and the transfer to the plaintiff, he admitted a *prima facie* case in the latter's favor. The rule does not contemplate that the defendant shall admit an absolute case for his adversary—only a *prima facie* case.

2. The instruction set out above and numbered 1 is so manifestly erroneous that we attribute it to a *lapsus linguae*. Of course, a negotiable note already indorsed in blank by the payee may pass by delivery, and in the case at bar Shedden could have used the note without putting his indorsement thereon. *Heard v. De Loach*, 105 Ga. 500, 30 S. E. 940. Indeed, under the evidence, we cannot reasonably account for the subsequent indorsement of the English-American Loan & Trust Company upon any other theory than that Shedden passed the note to it by delivery. We can readily appreciate how harmful this instruction could have been to the defendant, coming as it did at the beginning of the charge; for one of the defendant's contentions was that Shedden took this

note as accommodation paper, in order that he might obtain money on it, a contention strenuously denied by the plaintiff, and this instruction practically settles the matter by informing the jury that Shedden could not have used the note without putting his indorsement on it; whence would arise the conclusion that he had not used it, and from that naturally the inference that he had not obtained it for that purpose.

3. The instructions numbered 2 and 3, while in the abstract correct statements of law, were inapplicable to the pleadings and the evidence, and therefore tended to confuse the jury. It is error to give such instructions. *Culberson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, and the long line of cases cited in 7 Michie's Dig. Ga. Rep. 570, et seq.

4. The instruction numbered 4 is erroneous for two reasons: First, because it singles out one of the issues and gives judicial weight to it by characterizing it as the "main question," especially so when under the pleadings and the evidence this is not necessarily so, for, although the plaintiff might have paid a valuable consideration for the note, if he took it with notice of its true consideration, or rather lack of consideration; he would not be entitled to the protection of an innocent holder. Then the instruction eliminates from the consideration of the jury all of the documentary evidence introduced. *Lamar v. Glawson*, 38 Ga. 252; *Bowden v. Achor*, 95 Ga. 244 (8), also 245 (11), 22 S. E. 254; *McLean v. Clark*, 47 Ga. 24; *Myers v. State*, 97 Ga. 76, 102, 25 S. E. 252.

5. As to the instruction numbered 5, the error is that it overlooks the fact that notice of an original lack of consideration, and not notice of dishonor, was the contention of the defendant.

6. The evidence of Hodgson, set out above, was improperly excluded. He had stated the purpose for which the note had been delivered to Shedden. It was not opinionative for him to state that this purpose had ended. It is strenuously urged upon us that the judgment should be reversed upon the facts. While we must concede that the verdict is apparently strongly contrary to the weight of the evidence, yet this is a matter which addresses itself to the jury and to the trial judge, not to this court. We look only to see if there is any evidence to support the verdict.

Judgment reversed.

(2 Ga. App. 376)

WESTERN UNION TELEGRAPH CO. v.  
COOPER. (No. 820.)

(Court of Appeals of Georgia. July 25, 1907.)

1. TELEGRAPHS—ERROR IN TRANSMISSION—AGENCY.

This case is controlled by the decision of the Supreme Court in *Brooke v. Western Union*

Telegraph Company, 46 S. E. 826, 119 Ga. 695, and cases therein cited, in which it is held that in the transmission of a telegraphic message the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission of the message.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 37.]

## 2. SAME—CONTRACT FOR TRANSMISSION—JURISDICTION OF JUSTICE.

The contract for sending a telegraphic message is made with the sender, and not with the addressee or sendee; and hence any action brought by the sendee for delay in delivery must be an action *ex delicto* for breach of public duty due to the negligence of the telegraph company in failing to transmit or deliver a message in accordance with its legal duty. As held in the case of *Wilson v. Western Union Telegraph Company*, 52 S. E. 153, 124 Ga. 181, an action by the sendee must allege a breach of duty. The only right of action of the sendee is for the tort arising out of the breach of a legal duty, of which a justice's court has no jurisdiction. Nor does an appeal to the superior court invest such court with jurisdiction. *Berger v. Saul*, 34 S. E. 1036, 109 Ga. 240.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 48.]

## 3. ERROR, WRIT OF—REVERSAL—WANT OF JURISDICTION BELOW—CONSENT OF PARTIES.

A suit in a court having no jurisdiction of the subject-matter is a nullity, and, when it appears from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, that judgment will be reversed, although the point may not have been raised in the lower court. "Consent of parties \* \* \* cannot give a court jurisdiction of a subject-matter when it has none by law; and, when this court discovers from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, and the case is brought here for review upon writ of error, this court will of its own motion reverse the judgment." *Smith v. Ferrario*, 31 S. E. 38, 105 Ga. 53.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; E. J. Reagan, Judge.

Action by W. O. Cooper against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell and Lamar Rucker, for plaintiff in error. M. D. Irwin and R. B. Fortune, for defendant in error.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 346)

## RATCLIFF v. SMITH et al., Commissioners. (No. 323.)

(Court of Appeals of Georgia. July 18, 1907.)

### CERTIORARI—DISPOSITION OF CAUSE.

Where a petition for certiorari alleged that a trial was had before road commissioners of the petitioner, charging him with being a road defaulter, and a judgment rendered fining him \$3 as such defaulter, and the answer to the writ of certiorari did not verify the statement that a judgment was rendered against him by said road commissioners, or disclose what disposition was made of the case by them, and no exception was taken so as to require the commissioners to answer more fully so as to verify the allegation as to the rendition of the judgment

complained of, this court cannot reverse a judgment of the superior court overruling the certiorari. *Landrum v. Moss*, 1 Ga. App. 216; *Stoner v. Magina*, 43 S. E. 45, 116 Ga. 797; *Manning v. Gainesville*, 53 S. E. 1002, 125 Ga. 239; *Jessey v. Dean*, 50 S. E. 130, 122 Ga. 371. (Syllabus by the Court.)

Error from Superior Court, Gilmer County; Geo. F. Gober, Judge.

Action by J. G. Smith and others, commissioners, against T. R. Ratcliff. From a judgment of the superior court overruling certiorari on judgment for the commissioners, defendant brings error. Affirmed.

A. N. Edwards and N. A. Morris, for plaintiff in error. B. F. Simpson, for defendants in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 378)

## MAYOR AND COUNCIL OF AMERICUS v. JOHNSON. (No. 391.)

(Court of Appeals of Georgia. July 25, 1907.)

### 1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.

Municipal corporations are required to keep their streets and sidewalks in safe condition for travel in the ordinary modes by day and by night; and are responsible if they fail to exercise ordinary and reasonable care and diligence for the accomplishment of this end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1616.]

### 2. SAME—CARE OF TRAVELER.

A traveler using a street or sidewalk is required to use ordinary care to avoid being injured by any defect therein or obstruction thereon. What amount of lookout for defects or obstructions he must observe in order to meet this requirement is a question of fact for the jury, to be determined by the circumstances of each case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1673, 1754-1756.]

### 3. NEGLIGENCE—ORDINARY CARE.

An instruction to the jury which, in attempting to define ordinary care, makes the jurors the standard of what is a prudent person, is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 372.]

### 4. DEDICATION — ACCEPTANCE — NECESSITY — EVIDENCE.

In order to bind a municipal corporation for the care of a strip of land offered by an abutting owner as a sidewalk, acceptance by the proper city authorities must be shown. The acceptance may be express or implied. If express, it can be shown only by the minutes of the official tribunal. If implied, it may be shown by proof that the sidewalk was worked and used under authority of the council, or other body having such matters in charge. Testimony that work was done upon the sidewalk by the street hands of the municipality, or by its engineer, or under the directions of its street committee, is admissible for the purpose of raising the inference that the work was done by authority of the municipal body.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64, 83.]

(Syllabus by the Court.)

Error from City Court of Americus; O. R. Crisp, Judge.

Action by Aline Johnson against the mayor and council of Americus. Judgment for plaintiff. Defendant brings error. Reversed.

Lane, Maynard & Hooper, for plaintiff in error. E. A. Nisbet and Blalock & Cobb, for defendant in error.

POWELL, J. The plaintiff obtained a verdict against the city of Americus on account of injuries received by her through her having fallen over a stump which she claimed was situated upon the sidewalk on the north side of Church street, in that city. There was sharp conflict in the testimony as to whether the stump was within or without the northern margin of the sidewalk, and also as to whether the walk on the north side of the street was a sidewalk, in the sense of a walk used as a portion of a public street and under the control and responsibility of the city government. The injury occurred at night; but there was an electric arc lamp nearby. The plaintiff admitted that she had seen the stump prior to the time of the injury; but explained that she had been accustomed to use the walk on the south side of the street, and was present on the north side on this occasion only by reason of the fact that the other side was temporarily obstructed, and that it had escaped her attention and memory that there was a stump on the walk she was using. The defendant introduced proof showing that, under the deeds by which the city held title to the street, this stump and probably the entire walk on the north side of the street were beyond the limits of the street. The plaintiff introduced evidence showing that the owner of the abutting property on the north side of the street had set his fences back, and had offered a dedication of the strip of land on which the stump was situated for the purposes of a sidewalk, and that the street force of the city had worked it as a part of the street. The minutes of the city council were introduced, showing that that body had never formally accepted the dedication. In the motion for a new trial several exceptions were taken to instructions of the court to the jury, and to rulings upon evidence. Upon that motion being overruled, the city brings error.

1. The degree of diligence required of municipal corporations in the maintenance of their streets and sidewalks is now well settled. It is required that they keep their streets and sidewalks in safe condition for travel in the ordinary modes by day and by night; and they are responsible for a failure to exercise ordinary and reasonable care and diligence to this end. Whether they have exercised that care and diligence is a question of fact, to be determined by the circumstances of each case. In determining this question, regard must be had as to whether the street is newly opened or has been in existence for some time, whether the

municipality is small and poor, or populous and wealthy, whether the street is a frequented thoroughfare or a remote passageway. After viewing these and all other legitimate considerations, the jury must determine whether, in the light of all the circumstances, the municipality has used reasonable diligence to make the highway safe. *Idlett v. Atlanta*, 123 Ga. 821, 51 S. E. 709; *City Council of Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389, and citations; *Elliott's Roads and Streets*, § 613.

2. The court instructed the jury as follows: "I charge you that there is no duty on a person walking on a sidewalk to watch for the condition of the sidewalk, because the law imposes it upon the municipality to have it reasonably safe." Every person is bound to ordinary care to prevent injury to himself from another's negligence. The judge in another portion of the charge gave the jury this principle; but this, instead of curing the error, tended to aggravate it, for, when the two instructions are taken together, it is tantamount to saying that, while every person is bound to exercise ordinary care to prevent injury to himself, this degree of care would not require him to watch for the condition of the sidewalk. This is obviously a question for the jury. *Détrage v. Rome*, 125 Ga. 804, 54 S. E. 654. While the jury may take into consideration the duty of the municipality to keep the sidewalk safe, as a circumstance tending to excuse the plaintiff from exercising as much caution for his own protection as otherwise he ought to use, yet this is to be given only such weight in determining the matter of his contributory negligence as the jury may believe it is entitled to under all the facts of the case. In this case the plaintiff knew there was a stump on the sidewalk. Some courts hold that this mere knowledge would defeat a recovery; but our courts, following the stronger current of authority, hold that the plaintiff's knowledge of the defect is not conclusive upon this subject. "The fact that a traveler voluntarily attempts to pass with knowledge of the defect or obstruction is not ordinarily conclusive evidence of a want of due care; but, if he has or ought to have notice thereof, he must exercise such care as the circumstances demand, and, if an ordinarily prudent person would not attempt to pass under the circumstances, he will be guilty of contributory negligence." *Elliott, Roads and Streets*, § 636. *Idlett v. Atlanta*, 123 Ga. 823, 51 S. E. 710, and citations; *Harrell v. Macon*, 1 Ga. App. 413, 58 S. E. 124, and citations. One of the exceptions taken in the record is that the court erred in failing to charge the jury "that, if the plaintiff knew that the stump over which she fell was upon the sidewalk, a greater degree of diligence should have been exercised upon her part to avoid the injury, and that, if she failed to exercise a greater degree of diligence than that required of a person walking along

the sidewalk and having no knowledge of any defect or obstruction in the sidewalk, she would not be entitled to recover." From what has just been said it is manifest that this exception is not well taken. The degree of care is the same whether the traveler has knowledge of the defect or not. Ordinary care and diligence is the requirement in either situation. To constitute ordinary care in the case where knowledge exists may require the exercise of more caution, of more forethought, of more circumspection, or the employment of more acts of prudence than in the case where the knowledge does not exist, but the degree of care is always the same. The court should leave to the jury, untrammelled by any intimations further than a statement of the general legal rules applicable, the whole question of what acts the plaintiff should have done or should have refrained from doing under the particular situation.

3. In defining ordinary care the trial judge used this language to the jury: "Ordinary care is that care which you and the general care of men would exercise in taking care of your own property and affairs." A charge which makes the individual jurors the standard of prudence is erroneous. *Coleman v. Allen*, 79 Ga. 643, 5 S. E. 204, 11 Am. St. Rep. 449. The individual jurors might be extremely cautious men, or, on the other hand, might be somewhat careless; for uprightness and intelligence, not care and caution in handling one's affairs, is the test of the qualification of a juror, but from that intelligence, "from their observation, from their common sense, their common knowledge and experience" the jurors determine the standard of ordinary prudence, of ordinary care and diligence. *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389.

4. To constitute a sidewalk a portion of a public street by dedication, both dedication and acceptance must appear; but both these elements may be shown by implication. To bind the city, the acceptance must be made by the public authorities; as to the city of Americus, under section 43 of its charter, by the mayor and city council. Acts 1889, p. 972. If a formal acceptance be relied upon, this can be shown only by the minutes of the council. *Parsons v. Trustees*, 44 Ga. 538. If implied acceptance be relied upon, it may be shown by proof that the street or walk was used or worked as a highway under the authority of the council. Mere use by the members of the public is not sufficient. "Acceptance may be implied from repairs made and ordered, or knowingly paid for by the authorities which have the legal power to adopt the street or highway." *Abbott's Municipal Corp.* § 736; *Kelsoe v. Oglethorpe*, 120 Ga. 954, 48 S. E. 366, 102 Am. St. Rep. 138; *Georgia R. Co. v. Atlanta*, 118 Ga. 489, 45 S. E. 256; *Parsons v. Trustees*, supra; *Elliott's Roads and Streets*, §§ 151-154. There was sufficient evidence both as to the

dedication and acceptance to authorize the submission of the same to the jury. Testimony that work was done upon the sidewalk by the street hands of the city, or by the city engineer, or under the direction of members of the street committee, is admissible for the purpose of raising the implication that the work was done under authority of the city council.

There being evidence tending to show that the stump was not on the land originally bought by the city for a street, and also a dispute as to whether the street had been widened by the donation of the abutting landowner and acceptance by the city of an additional strip to be used for the sidewalk, both these questions should have been submitted to the jury.

Judgment reversed.

(3 Ga. App. 337)

LEE & ANDERSON v. LOUISVILLE & N. R. CO. et al. (No. 287.)

(Court of Appeals of Georgia. July 18, 1907.)

1. GARNISHMENT—PROPERTY SUBJECT—SETTLEMENT OF TORT.

When a summons of garnishment has been served upon the defendant in an action for damages, and when, in compromise of such an action, an agreement is made by the defendant thus garnished to settle the plaintiff's claims for injuries alleged, the proceeds of such agreement or the sum agreed to be paid is subject to garnishment issued in behalf of a creditor of the plaintiff in the suit for damages. While liability on the tort is not garnishable, the amount agreed to be paid in settlement thereof is subject to garnishment. He who disregards a summons of garnishment does so at his peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 214-216.]

(Syllabus by the Court.)

2. SAME.

Liabilities for torts are not subject to garnishment until liquidated by judgment or otherwise. The burden is on the plaintiff to show, upon traverse, that funds have come into the garnishee's hands, prior to the service of the summons of garnishment or pending the same, subject to the proceedings. This is not done by showing that the defendant claimed a cause of action for tort against the garnishee, and that without admitting liability the garnishee, after service of summons, bought peace by paying to the defendant a sum of money in cash or in a negotiable instrument which the defendant immediately negotiated to a third person; it not appearing that there was any other agreement liquidating the defendant's demand against the garnishee. (Per Powell, J., dissenting.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by Lee & Anderson against J. T. Wright. Judgment for plaintiffs. Summons of garnishment served on the Louisville & Nashville Railroad Company and others. Judgment for garnishees, and plaintiff brings error. Reversed.

Rogers & Knox, for plaintiff in error. Jos. B. & Bryan Cumming and J. M. Pace, for defendants in error.

RUSSELL, J. Lee & Anderson held a *fi. fa.* against J. Tom Wright, obtained in the county court of Newton county. Summons of garnishment, based upon this judgment, was served on certain railroad companies on the 24th of April, 1906, requiring them to answer at the July term, 1906, of Newton county court, what property, money, or effects of the defendant they had at the date of the service of the summons of garnishment, and also what property, money or effects of the defendant may have come into their hands at any time from the date of said service to the date of the answer, and also what they owed the defendant at the date of the service, and also what they may have become indebted to the defendant at any time between the date of the service of the summons and the answer. At the time of the service of said summons there was pending in the Circuit Court of the United States for the Northern District of Georgia, at Atlanta, a suit for \$15,000 for damages for personal injuries alleged to have been sustained on March 4, 1905, in which said J. T. Wright was plaintiff and the garnishees were defendants. On the 14th day of May, 1906, while the trial of said case was in progress, there was a parley between plaintiff and defendants therein, the outcome of which was that the garnishees agreed to pay J. T. Wright the sum of \$1,750 in full settlement and release of any and all claims whatsoever growing out of said injury. On the same day the garnishees gave to Wright a sight draft for \$1,750 in full settlement of any and all claims and damages incident to the alleged personal injuries, which draft was paid by the garnishees on the 15th day of May, 1906, in full. The garnishees thus ignored the garnishment of plaintiffs in *fi. fa.*, and paid the whole amount of said \$1,750 to said Wright. The garnishees filed their answer at the July term, 1906, of the county court of Newton county, denying that they were indebted to J. T. Wright at the time of the service of the summons of garnishment, or that they had become indebted to him at any time since the service, in any sum whatever which was subject to the process of garnishment, or that they owed him any debt; but the answer stated the facts substantially as herein set out. The answer was traversed by the plaintiffs in *fi. fa.*, and the case was appealed by consent to the superior court. On the trial the plaintiffs tendered in evidence their *fi. fa.* against Wright, obtained at the October term, 1903, of Newton county court, for the principal sum of \$291.34; also, certified copies of the suit in the United States court and of the judgment of that court withdrawing the case from the jury and dismissing it; also, the paid draft given by the garnishees to said Wright for \$1,750 in full settlement of his claim for damages from personal injuries. The court rendered judgment against the traverse and in favor of the garnishees and the plaintiffs excepted, insisting that the

garnishees acted in their own wrong in ignoring the garnishment and paying the defendant the full amount of money, as the summons of garnishment operated as a lien from the time of service up to the time of making the answer, and that by no act of the debtor or the garnishees or both could the lien be defeated.

Two questions are presented. Is the fund, for any reason of law or public policy, exempt from garnishment? Or are the garnishees protected by reason of the fact that the draft outstanding in the hands of other persons might subject them to liability to pay the amount a second time? A claim for tort is not subject-matter of garnishment; and it is insisted that agreements to settle or compromise should not be hampered or thwarted, because it is to the public interest that such cases be settled. The draft in this case was drawn by a railroad company on itself "An order for money, drawn by a municipal corporation upon its own treasurer, payable upon demand and without condition, is in effect a promissory note and is 'an unconditional contract in writing' within the meaning of Civ. Code 1895, § 4134." *Morgan v. Cobutta*, 120 Ga. 423, 47 S. E. 971. Then, could a promissory note be garnished? We think the court erred in finding against the traverse. Every facility should be afforded to creditors for the collection of debts, and the processes of courts should not be disregarded and condemned unless the right to ignore them is unquestioned. With the exceptions hereafter mentioned, garnishment reaches everything due at the time of service of garnishment, and everything becoming due by the garnishee to the debtor up to the time of the answer. Having been served with process of garnishment, if there is any time between the service of the summons and the date of his answer when he becomes indebted to the garnishing plaintiff's debtor, no matter what the manner of his payment, he pays at his own peril. The public policy which favors the compromise and settlement of lawsuits is not superior to the public policy in favor of collecting a just debt and requiring that the proper notice be taken of the process of the courts. The question then is: Was there any time after the service of the summons when the garnishees in this case were indebted to Wright, the defendant in garnishment? If there was any such time, the lien of the garnishment would attach. It is immaterial whether the garnishees were liable to Wright in tort or not; for that liability is not subject to garnishment. See *Holmes v. Pope*, 1 Ga. App. 338, 58 S. E. 281. The fact that Wright was plaintiff in an action for damages arising from personal injuries to himself is therefore immaterial, unless for some reason or in some way it became the occasion of a contract by which the garnishees became indebted to him. We think the undisputed evidence shows that a debt from the garnishees to Wright was

created by the proposition to pay him \$1,750 and his acceptance. It was not payment, but it was a promise to pay, supported by the consideration that he would dismiss the suit. It was a mutual understanding, creating an obligation on the part of each of the parties and enforceable by either on his compliance with his agreement.

The fact that the garnishees denied liability as to Wright's suit is inconsequential in the case. They bought their peace for the fixed stipulated price which Wright charged for it. The bargain was struck, and they owed him for their purchase until they paid him. The draft was, in effect, a promissory note, but neither the draft nor note is the debt. Each is only evidence of a debt which antecedes it. The note would presume the existence of a debt, but a debt does not depend upon the creation of either draft or note. When the parties in the case in the United States court made their bargain by which the garnishees promised to pay Wright \$1,750, they could have paid it in cash as well as by draft. If they could, then the fact that they gave a draft is immaterial in the elucidation of the question as to whether they are subject to garnishment. To say this would be to hold that the length of time required to discharge a debt determines the question as to whether it is such a debt as will be reached by garnishment already of force and served upon the garnishee. If a garnishee's promissory note or negotiable draft is outstanding when the garnishment is sued out, the garnishee is protected, to prevent him from having to pay the debt twice. But where a garnishee, having no obligation to pay outstanding voluntarily assumes one to the debtor of a garnishing creditor, he cannot invoke protection against a creditor which he himself has created. The garnishees insist that to hold them subject in this case would be to prevent sales for cash by a debtor where a possible purchaser has been garnisheed. We do not think this of necessity follows. We are, at least, not called upon to so decide. Whether this is or is not true when the garnishees gave Wright the draft on themselves, it was to all intents and purposes a promissory note due and payable on demand; and it cannot be questioned that the debt thus evidenced, not being for any admitted or established liability in tort, is subject to garnishment. The very learned counsel for the defendants in error insists that, in accordance with the provisions of the garnishment law applicable to negotiable instruments, the garnishees from the moment they gave the check or sight draft were indebted, not to Wright, but to whomsoever was the bona fide holder at the time it was presented for payment. We do not think that a garnishee required by mandate of the court to answer as to his relation and status, whether as to property in his hands or debt due by him, should be allowed to nullify the process of the court, and at the same time

claim its protection against his own act. But, whether or not we are right in this opinion, when the debt is evidenced by a draft drawn by one on himself, the rule relied upon is not applicable.

We have considered the case wholly from the position that there was no property in the hands of the garnishee up to the time of the answer, and that the only question to be considered was whether any debt, at any time prior to the answer, became due by the garnishee to Wright, the defendant in garnishment. We have borne in mind the uniform ruling that liability for tort is not a debt, and that the debt which arose was independent of any such liability, and that, as insisted by the garnishees (defendants in the action for damages), no such liability in fact existed. But, while liability for tort is not a debt, the fact must not be lost sight of that a garnishee is not only required to answer what he owes the defendant, but he is also made responsible to account to the court for any property of the debtor subject to the garnishee's control and disposal. If A., having B.'s horse in his hands as bailee, answers that after being garnished he exchanged him by B.'s order, for a piece of land in Alabama, not subject to the garnishment, would he be discharged? If, then, the garnishees had any property of Wright in their hands, the lien of the garnishment would attach, and they could not change its status or character. And, while liability for tort is not subject to garnishment, that a claim arising from a tort is property has been held by the Supreme Court. In *Banks v. McCandless*, 119 Ga. 798, 47 S. E. 332, it was expressly held that the contingent liability of a tort-feasor is property which the debtor cannot transfer to the injury of a creditor. If this be true, and if it is based upon any sound reason, can the debtor, with the aid of the garnishing creditor, be permitted to put the property where a creditor cannot reach it? If it be property subject to a creditor's demand, as expressly held in 59 and 119 Ga., will not garnishment hold it until the proper tribunal may at least have an opportunity of adjudging whether it is or is not exempt from the process? We think so. The extent of the holding as to liability for tort was that such liability was not a debt subject to garnishment. The reason for this is apparent, because the amount has not been ascertained; for, after judgment, garnishment is effective to fix a lien on the recovery. Under the ruling in *Westmoreland v. Powell*, 59 Ga. 258, the term "debtor" is applicable to tort-feasors, and is extended so as to include "one who owes another for an unascertained damage to person or property," so far as fraudulent conveyances by that debtor is concerned. And following this with the ruling in 119 Ga., 47 S. E., supra, the court, in our opinion, makes the principle applicable to garnishments by holding that an unascertained claim for damage is property.



And we see no conflict in these holdings. A claim for unliquidated damages may be property (its value dependent upon circumstances very great or very small), while it cannot be a debt because the amount is unknown. As property the claim of Wright in this case was subject to garnishment, and as a promise of the garnishees to pay a certain sum, whereby a debt was created, it was no less subject. In either event the judgment of the trial judge was erroneous.

Judgment reversed.

POWELL, J. (dissenting). I will outline my reasons for dissenting in this case. Before the plaintiffs could recover against the garnishees (the railroad companies), it was incumbent upon them to show that the garnishees were indebted to the defendant (Wright) at the time of the service of the summons of garnishment, or became indebted between that date and the time of filing their answer. Proof that at the time of the service of the summons an action was pending by Wright against the railroad companies is not proof that the companies were really indebted to him. This would be true even as to an action *ex contractu*; and it is irrefragably true as to an action for tort. *Gamble v. Central R. Co.*, 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276. If it had been shown that, as a result of either form of action, a final unappealed judgment had been rendered, this would have been sufficient evidence of an indebtedness from and after the rendition of the judgment. In the case at bar no final judgment was ever rendered. Did the railroad companies, then, become indebted between the service of the summons of garnishment and the date of the answer thereto? If the parties merely liquidated, by agreement, an admitted or established tort, the question should be answered in the affirmative. From the record it is clear they did not do this. In the very proposition of settlement the companies denied liability, and merely offered, as a cash transaction, to buy peace. They offered to buy for cash something which was not, at least so far as the proof shows, a liability against them. This they could do without incurring an indebtedness; for in cash transactions no indebtedness is contemplated by the parties, or by the law. *Bergan v. Magnus*, 98 Ga. 514, 25 S. E. 570; *Mathewson v. Belmont Company*, 76 Ga. 359; *Emery v. Atlanta Exchange*, 88 Ga. 325, 14 S. E. 556. It was a cash transaction; but it is said that the companies did not pay in cash. They did the same thing. They paid by a negotiable instrument; and, as Lord Mansfield says of such instruments in the case of *Miller v. Race*, 1 Burr. 457: "Now they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money

to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Indeed, this court and the Supreme Court recognize that an indebtedness by negotiable instrument is not subject to garnishment, unless the garnishing creditor shows that the bill has become past due in the hands of the defendant, or that it is otherwise so impounded that possibility of its negotiation is excluded. Of course, if the draft given to Wright was not a negotiable instrument, my whole argument falls. It was in the following form: "\$1,750.00. Georgia Railroad. Atlanta, Ga. May 14, 1906. At sight pay to the order of John T. Wright the sum of seventeen hundred and fifty dollars, in full settlement of any and all claims and damages incident to alleged personal injuries sustained at Atlanta, Ga., in the Union Passenger Depot on March 4, 1905. To W. S. Morris, Esq., Treasurer, Ga. R. R. Augusta, Ga. Jos. B. Cumming, Gen. Counsel Ga. R. R." Indorsed: "John T. Wright." Also: "Pay to the order of any bank or banker. Prior endorsements guaranteed. May 14, 1906. Fourth National Bank of Atlanta, Ga., Chas. J. Ryan, Cashier." "A bill of exchange may be drawn upon the drawer himself, and is then in effect the promissory note or the accepted bill of the drawer at the holder's election; and this is true in general of a bill or a draft drawn by a principal on his agent, or by an agent on his principal, or in the principal's business by one agent on another." 7 Cyc. 569. Treated purely as a promissory note, the instrument in question may be properly considered as past due, and therefore not negotiable from the moment of its issue, under the rule stated in Civ. Code 1895, § 3700. Under the same section, if treated (as the holder was entitled to do at his option) as a bill of exchange, it was not due until presented for payment, if presented in a reasonable time. The intention of the parties as derived from the form and nature of the instrument largely controls. It was manifestly not the purpose of the railroad company to give its note payable on demand, but to give a draft made in Atlanta, and not payable until it could be presented in Augusta, and to have it operate and pass as an ordinary bill of exchange. In the case of *Lynch v. Goldsmith*, 64 Ga. 50. Judge Bleckley—and, when in Georgia decisions we speak of Bleckley, "we have reached the mountain from which the drift boulders were detached,"—after deciding as to the applicability of Civ. Code 1895, § 3700, to the instrument then in question, adverts by way of obiter to the proposition that the intention as to the maturity of the instrument should be determined by the purposes it is issued to subserve. In the case at bar the maker of the paper manifestly intended that it should not be payable on immediate demand. The payee likewise so took it, for he imme-

diately negotiated it to the bank. Being a negotiable instrument, the garnishment did not catch the indebtedness thereby represented.

I think therefore that the trial judge decided the case properly, and dissent from the judgment of this court to the contrary.

(2 Ga. App. 333)

**HINES v. STATE (No. 500.)**

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—APPEAL—REVIEW.**

The verdict being fully warranted by the evidence, and no error of law complained of, the judgment of the superior court in refusing the writ of certiorari will not be disturbed.

**2. SAME—ASSIGNMENTS OF ERROR—ABANDONMENT.**

Assignments of error not presented in the brief or argument will be considered as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3011-3013.]

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Bill Hines was convicted of crime, and brings error. Affirmed.

O'Connor, O'Byrne & Hartridge and Donald Fraser, for plaintiff in error. N. J. Norman, Sol. Gen., for the State.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 373)

**STONE v. GARRETT & RUSSELL (No. 407.)**

(Court of Appeals of Georgia. July 18, 1907.)

**BILLS AND NOTES—ACTION ON DRAFTS—EVIDENCE.**

There is no complaint of any error of law, and under the evidence the jury could have properly found no other verdict.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by Garrett & Russell against G. W. Stone. Judgment for plaintiffs, and defendant brings error. Affirmed.

Stone shipped 24 bales of cotton to Garrett & Russell, cotton factors, at Augusta, Ga. From time to time he drew drafts on Garrett & Russell against this cotton. These drafts were cashed by Garrett & Russell, and Stone admitted receiving the money thereon. The drafts were all introduced in evidence, and showed that the total amount advanced exceeded the proceeds for which the cotton was sold by the sum sued for. Suit was brought for this amount in the county court, and appealed to the superior court. The defense was that the plaintiffs had been instructed by the defendant to hold the cotton until he ordered them to sell it, and that they disregarded his instructions and sold

it when the market was down. His letters to the plaintiff, put in evidence, showed that he directed them to sell the cotton and apply the proceeds to the payment of the drafts. This the plaintiffs did in the usual course of trade, and, after applying the proceeds to the payment of the defendant's drafts, there was left the balance represented by the suit. The jury found a verdict for the full amount, with interest. A motion for a new trial was made by the defendant on the general grounds, and was overruled.

E. R. Gunn and W. H. Whaley, for plaintiff in error. Rogers & Knox and Jos. P. Brown, for defendants in error.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 306)

**SOUTHERN STATES PORTLAND CEMENT CO. v. HELMS. (No. 442.)**

(Court of Appeals of Georgia. July 10, 1907.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING—DEFECTS IN MACHINERY—INSPECTION—CONTRIBUTORY NEGLIGENCE.**

In a suit by a servant against the master, the petition should plainly and distinctly set forth the elements necessary to a recovery. Legal results arising from the facts alleged may be pleaded in general terms or in the form of a legal conclusion. A petition so drawn is good against demurrer.

(a) In such a petition, as to the element of the master's knowledge of the defect in the instrumentality causing the injury, if the facts alleged make a case where by law the duty of knowing of the defect is imposed upon the master, the pleader may, without subjecting his petition to successful attack by a demurrer, charge in general terms that the master "knew or ought to have known" of the defect; aliter, where the facts alleged do not as a matter of law devolve this duty upon the master.

(b) Among the absolute duties of the master is that of making inspections for the discovery of defects and dangers in those instrumentalities within the range of which the servant is likely to come in the discharge of his duties; hence, by law, the master ought to know of such defects as a reasonable inspection would disclose.

(c) The servant must allege and prove his lack of knowledge, both actual and constructive, of the defect; but this want of knowledge, especially in cases where the death of the servant has resulted, may be shown circumstantially.

(d) As a general rule, a servant is under no obligation to inspect the appliances about which he works, or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be discovered by superficial observation.

(e) If the allegations of the petition show that the machinery furnished by the master was not reasonably safe for a servant operating it with reasonable care and diligence, the petition is not subject to demurrer on the ground that it is not also alleged that it was not equal in kind to that in general use.

(f) Sections 2611 and 2612 of the Civil Code of 1895 are not statutory in origin. They are not, and do not purport to be, exhaustive of the subject of the reciprocal liabilities and duties of master and servant. They are mere codifications of particular phases of the law as applied by the Supreme Court in certain reported cases, and, for the most part, rest on statements culled in those cases from text-books; and are

therefore to be construed in connection with the entire general law on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 832, 235, 574, 575, 714.]

## 2. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

An amendment to the petition which merely amplifies or varies the acts of negligence from which it is alleged an injury resulted is not subject to the objection that it sets forth a new and distinct cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 687.]

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by F. M. Helms against the Southern States Portland Cement Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The error assigned in this case is the overruling of a general and special demurrer to the plaintiff's petition. The petition, in substance, alleges: (1) The jurisdiction of the court over the person of the defendant. (2) That defendant has damaged plaintiff in the sum of \$10,000. (3) That petitioner is the wife of one Charles E. Helms, who was on the 24th day of October, 1905, killed while engaged at his work as what is known as "oller," at the plant of defendant, where the defendant is engaged in the manufacture of cement, in said county. (4) That "her said husband was at work at said cement plant, and the only duty he had to perform under his contract of employment was to oil the machinery, which he was doing at the time he was killed." (5) That "it was not her husband's duty to watch and keep in repair, or to adjust any of the said machinery, or to examine the same at any time, or to observe or inspect it and note any misconstruction or disarrangement thereof. That he was incompetent to do so, which was known to the said defendant." (6) That "among the machinery of the defendant at said plant there is what is known as 'tube mill' No. 4, which is constructed and connected with and operated by a line of iron shafting, which rests upon a cement wall and extends from an electric dynamo or motor near said cement wall, across said wall to a cogwheel that is attached to the large drum or tube, in which the cement material is in some manner treated. That on top of said cement wall, where the said shafting rests, there is a boxing or journal in which said shaft revolves; and on top of this boxing or journal are two places or small holes made to admit oil therein, and that this particular place and piece of machinery was being oiled by petitioner's husband at the time of his death." (7) That "there is an iron cuff or collar that is made in two pieces that is fastened together on each of the two sides of said shafting by bolts and set screws. The said cuff or collar is made with a trench or groove in the outer circular edge thereof, evidently for

the purpose of permitting the said cuff or collar to be fastened together and around said shafting by means of two iron bolts, and at the same time prevent said bolts and also the set screws (which hold the cuff or collar in place) from protruding beyond the outer surface of the said cuff or collar, and, upon being properly constructed, would present a smooth and regular surface." (8) That "the set screw was an iron or steel screw that went through the edge of the cuff or collar and into a slot or notch in said shafting to hold the said cuff or collar in its proper place. That if the said screw had been properly made, of the right size and length, it would have served its purpose perfectly, and the head of it would have been below the outer surface of the said cuff and down in the trench or groove in the said cuff. Said cuff was placed on said shaft just flush with the edge of the said cement wall on the side next to the dynamo, and this was the side of the wall from which plaintiff's husband had to approach the said oiling places to oil the said piece of machinery." (9) That "the said bolts holding the said cuff together were extended so far at each end as to be dangerous; for the reason that, if any part of the clothing of ordinary kind worn by petitioner's husband happened to come into contact with the cuff while the machinery was in motion, the rapid revolving shaft would cause the ends of said bolts to catch the clothing." (10) That "the head of said set screws protruded quite a way beyond the edge of the said cuff, and that said shaft while in operation made about 200 revolutions to the minute." (11) That "it was her husband's duty to oil said machinery when it was in motion, and that, while he was so doing on the date aforesaid, the head of the said set screw and the ends of the said bolts in the said cuff or collar came in contact with his clothing, and the shaft, being operated by electricity, was rapidly revolving as aforesaid, and caught up his clothing which he had on, and held him by this means and forced his body around as the shaft revolved, and struck his head and other parts of his body against the said cement wall and other parts of said machinery, and in this manner caused his death." (12) That "it was negligence on the part of the defendant to have constructed said machinery as aforesaid, and in permitting it to so remain." (13) That "said machinery could have been made perfectly safe by an expenditure of not more than \$10, by placing guard rails along the outside of said cement wall, just a few inches beyond the said cuff or collar, which would have prevented any injury or danger to petitioner's husband while in the discharge of his duty as oller, and to others in going around said shaft and cuff. Petitioner alleges that the failure on the part of the said defendant to so place such guard rails was negligence." (14) The age and earning capacity of petitioner's deceased husband is alleged.

To the original petition the defendant demurred on the following grounds: No cause of action is set forth. No liability against defendant is shown. No negligence rendering defendant liable is shown. It appears that the alleged injury was caused by the negligence of the deceased. It does not appear that the deceased could not have avoided the injury by exercise of proper care. It appears that the deceased had equal means with the master of observing the danger. There is no allegation that the master knew of the danger, or that the servant did not know of the danger or had not equal means with the master of knowing the danger. It also demurred specially to paragraphs 9 and 13 of the petition, "because it is not alleged that the construction of the machinery therein mentioned is not like that used in other plants of like nature and engaged in the same business," the defendant not being bound to furnish any certain, particular contrivance. It also specially demurred to paragraph 10, in that it was not specific as to the distance the set screw protruded. The plaintiff thereupon filed the following amendment, adding at the close of paragraph 7 the words: "It was the duty of the defendant so to construct its machinery as to make its operation attended with no unusual danger to the said husband of the plaintiff, Charles E. Helms, while performing his duties in connection therewith. This was not done, as defendant was bound to do, but, instead of the said cuff being properly put together, around the shaft in the manner it was made and intended should be, it was unskillfully and carelessly done, for the reason that one of the iron or steel bolts that held the two pieces of the collar together was too long, and protruded beyond the outer surface of the collar from three-eighths to one-half inch. That plaintiff's husband had only been at work at the said place in the capacity of oiler but a few days, and, the said machinery being in motion night and day, he had no opportunity of knowing its improper manner of construction, and that he had no notice given him of it, and, not being a skilled mechanic, did not know how it should be constructed. That plaintiff's said husband could not by ordinary diligence have discovered the defect and danger. That the defendant had a mechanic whose duty it was to see that the machinery was properly constructed, and it was not plaintiff's husband's duty. Besides, it was the duty of the defendant to properly construct and keep in repair all its machinery, and to keep it in a reasonably safe condition. That defendant knew or ought to have known of the defective condition of the said machinery above described." To the amended petition the demurrer was renewed, the following additional grounds being added: As to the statement in paragraph 5 that deceased "was incompetent to do so, which was known to the said defendant," on the ground that the allega-

tion is a mere conclusion of the pleader, and states no facts on which said allegation is based. As to paragraph 2, on the same ground. As to the amendment to paragraph 7, on the ground that it is confused, mixed, and not clear in meaning. As to the statement in this amendment, that "it was the duty of the defendant so to construct its machinery as to make its operation attended with no unusual danger to the deceased," because it states a mere conclusion, with no facts upon which to predicate it. Also as to that portion of the original petition which states that deceased had been at work as an oiler but a few days, on the ground that the number of days is not definitely stated. Also as to the statement in the amendment "that plaintiff's said husband could not by ordinary diligence have discovered the defect and danger," because it states a mere conclusion of the pleader. And as to the statement "that defendant knew or ought to have known of the defective condition," on the same ground. There were other grounds, but all of them are of substantially the same nature as these above set out. Upon the amendment being made, the court struck paragraph 13 of the petition and overruled the demurrer, and the defendant excepts to this judgment. It also complains that the court erred in allowing the amendment.

Blance & Tison, for plaintiff. In error.  
 Jones & Hutchens, for defendant in error.

POWELL, J. 1. In the case of Cedartown Cotton & Export Co. v. Miles, No. 332, 58 S. E. 289, this court undertook to discuss and to elaborate the form and nature of a petition for the recovery by a servant against his master for damages for personal injuries received in the course of the employment. The petition in this case seems to come up to the standard there set. In fact, if the pleader in this case had had the opinion just referred to before him, he could hardly have followed it with greater accuracy. The nature of the servant's employment, of the instrumentality causing the injury, and of the defect which was the immediate cause, as well as the relation existing between these things as bringing about an actionable wrong, are carefully and definitely set forth. Matters of fact are set forth as such, while those matters of which the court will take judicial notice are pleaded as legal conclusions, which is unobjectionable. The petition states that the deceased was employed as an oiler, and connects the employment with the injury, by alleging that in pursuance to the performance of his duty he was engaged at the time he was hurt in oiling the defective pieces of the machinery. The duty of the defendant to furnish reasonably safe machinery is alleged in general terms, and, as said before, this is allowable under the rules of good pleading. The instrumentality is definitely described, and the definiteness of description increases, as, indeed, it should, as it touches

the questions of the relation of the instrumentality to the duties of the servant, to the specific mode of the injury, to the exact nature of the defect, to the negligence of the master and the lack of contributory negligence on the part of the servant; for by alleging the presence of the journal and the oil holes therein it shows the relation of the instrumentality to the duties of the servant. By alleging the presence of a projecting set screw capable of catching clothing, it shows the relation of the instrumentality to the exact mode of the injury. By alleging the presence of this projecting set screw at a place where in the ordinary construction and arrangement of the machine it would not be expected to project, because of the groove into which it should fit snugly, it shows the exact nature of the defect. And from these same things the negligence of the master appears, and by showing the speed at which the shaft and collar revolved it negatives the contributory negligence of the servant. The defect is set forth with certainty, and from the facts stated it appears that it was latent; also, that it was the proximate cause of the injury. As to the element of the master's knowledge, the allegation is "that the defendant knew or ought to have known of the defective condition of the machinery above described." Taken in connection with the other allegations of the petition, this is sufficient. As was said in the Miles Case, supra: "If constructive knowledge be charged to the master, and the facts stated in the petition make a case where by law the duty of knowing is imposed upon the master, the resulting legal conclusion 'that he ought to have known' is not subject to objection." Among the absolute nondelegable duties of the master are those of furnishing reasonably safe machinery and of making inspections for the discovery of defects in those instrumentalities within the range of which the servant is expected to come. *Dennis v. Schofield's Sons Co.*, 1 Ga. App. 489, 57 S. E. 925; *Moore v. Dublin Cotton Mills*, 127 Ga. 610, 56 S. E. 839 (3); *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 791, 49 S. E. 788; *Babcock v. Johnson*, 120 Ga. 1034, 48 S. E. 438 (6); *McDonnell v. Central Ry. Co.*, 118 Ga. 86, 44 S. E. 840. Hence by law the master ought to know of such defects; and it therefore follows that, the preliminary facts necessary to raise the duty having been set forth in detail, the statement of the legal conclusion is unobjectionable. *Pierce v. Seaboard Air Line Ry.*, 122 Ga. 664, 50 S. E. 468. The servant's lack of actual knowledge is not directly alleged, but this element is inferentially shown from the facts stated; and, in the absence of a more specific demurrer pointing out the fact that this is pleaded inferentially, and not directly, we shall hold the petition sufficient. "Demurrer, being a critic, should itself be free from imperfections." Special demurrer must put its finger upon the exact point of weakness. The alle-

gations are that plaintiff's husband had only been at work at the said place in the capacity of an oiler but a few days, and, the said machinery being in motion night and day, he had no opportunity of knowing of the improper manner of construction, and that he had no notice given him of it, and "could not by ordinary diligence have discovered the defect and danger"; and this in connection with the fact that the shaft revolved at the rate of 200 revolutions per minute, which would naturally render the defect ordinarily unobservable, makes a circumstantial case of lack of knowledge. As the Supreme Court says, through Justice Cobb, in the McDonnell Case, 118 Ga. 91, 44 S. E. 843: "Want of knowledge on the part of the servant as to the defects in the machinery may be shown by circumstances, as well as by direct evidence. Of course, in a case like the present, where the servant loses his life, it is impossible in a suit by his widow to show by direct evidence this want of knowledge. If the circumstances are such that it can be reasonably inferred that the servant did not have knowledge, this inference from the facts sufficiently establishes want of knowledge." As a nicety of pleading, it is better to allege the lack of actual knowledge directly, even though the proof be circumstantial. However, in the light of what we have just said, we hold that the petition sufficiently alleges a lack both of actual and of constructive knowledge. As to the element of constructive knowledge, the statement in *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788, is pertinent: "As a general rule, a servant is under no obligation to inspect the appliances about which he works, or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation." See, also, *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 259, 58 S. E. 249.

Since in this case the servant met his death, not from the obvious danger of the rapidly revolving shaft, but from the concealed danger of a projecting set screw, the case is easily distinguishable from the case of *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299, and *McDaniel v. Acme Brewing Co.*, 118 Ga. 80, 38 S. E. 404. It must be remembered, too, in this case that the projecting set screw was located in a place where a servant relying upon the prudence of the master would not ordinarily anticipate it. Indeed, while the construction of the machine seems to have necessitated the presence of a set screw in this collar, yet, since it was also necessary to oil the adjoining bearing, the maker of the machine, obviously anticipating the danger that would exist by leaving the head of the crew exposed, had arranged a groove in the collar into which the set screw might fit without protruding. The negligence consisted not in the use of a set screw, but in leaving it pro-

truding, instead of protecting it by placing it down within the groove. See, in this connection, Labatt, M. & S. § 77, and cases cited in the footnote.

The objection that the petition does not allege that the machinery was not equal in kind to that in general use is not well taken. In the first place, this fact does inferentially, if not absolutely, appear from the allegations made. Also, under Civ. Code, § 2611, the master is bound to exercise ordinary care "in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence." Taken thus conjunctively, these two clauses are measureably accurate in stating the rule upon this subject. In cases involving the law of master and servant we must not forget, in applying the two sections of our Civil Code of 1895 (sections 2611 and 2612), that they are not statutory in origin. They are mere codifications of particular phases of the law as applied by the Supreme Court in certain reported cases; and for the most part rest on statements culled in these cases from Wood's Law of Master and Servant. As we said in *King v. Seaboard Air Line Ry.*, 1 Ga. App. 88, 58 S. E. 252, codification has given them no element of exhaustiveness, but the whole law of master and servant exists just as it did before these sections appeared in our Code; and there are many phases of this branch of the law not covered by these two Code sections. We look to the general law as limiting, explaining, and extending their meaning. The fact that the machinery furnished by the master is equal in kind to that in general use is a circumstance tending to show that he has exercised ordinary care in that respect; but, after all, there is the further test that it must be reasonably safe for all persons who operate it with ordinary care.

With the exceptions of some regrettable lack of unity in form and order of arrangement, a rhetorical rather than a substantial blemish, the petition is well drawn. As amended it sets out a clear, definite cause of action; and the court properly overruled the demurrer.

2. The amendment to the petition was properly allowed, over the objection that it introduced a new cause of action. *King v. Seaboard Air Line Ry.*, supra, and cases therein cited.

Judgment affirmed.

(2 Ga. App. 288)

**EARLY COUNTY v. FAIN.** (No. 345.)  
(Court of Appeals of Georgia. July 10, 1907.)

1. BRIDGES—PUBLIC BRIDGES.

"A bridge which constitutes a portion of the public road is necessarily a public bridge."

2. SAME — REPAIRS — NEGLIGENCE — LIABILITY OF COUNTY.

It matters not by what authority such bridge is constructed, whether by act of the General Assembly or an order of the county

officers, by the road hands or by an individual. If it is a part of the public county road and the public authorities use it, it becomes a public utility, and the duty of keeping it in repair is imposed upon the county authorities, and the county is liable for an injury resulting from a negligent performance of such duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 50.]

(Syllabus by the Court.)

Error from Superior Court, Early County; E. J. Reagan, Judge.

Action by J. R. Fain against Early county. Judgment for plaintiff. Defendant brings error. Affirmed.

R. H. Sheffield, for plaintiff in error. L. M. Rambo, for defendant in error.

HILL, C. J. Fain brought suit in a justice's court against Early county, on account of damages resulting from injuries received by his horse in falling through a public bridge of said county. By consent the case was appealed to the superior court without a trial in the justice's court. The judge of the superior court, without the intervention of a jury, tried the case on the following agreed statement of facts: "That on the 14th day of February, 1904, J. R. Fain was driving along the Ft. Gaines and Damascus public road in a buggy with a horse attached thereto, which was the property of J. R. Fain; that on said public road, about one-fifth of a mile south of Gaines cross-roads, in the 1535 district, G. M., of Early county, a bridge was constructed over a gully or drain, said bridge being under 10 feet in length, by the county of Early by its proper officers, to wit, the superintendent of roads of Early county, Ga., and not constructed under sections 344, 345, or 346 of the Political Code of 1895, since December 29, 1888; that said described bridge formed a part of the Ft. Gaines and Damascus public road, and was a continuation of said public road over a drain, and was used by the public as a public bridge; that on the 14th day of February, 1904, the flooring of said bridge was in an inferior, insufficient, and decayed condition, and that the timbers of said bridge were in an inferior and decayed condition, which was unknown to J. R. Fain, and which was known to the superintendent of the public roads of Early county and the county commissioners of Early county; that on the said 14th of February, 1904, the horse which the said J. R. Fain was driving fell, without fault on the part of J. R. Fain, through said bridge, on account of the inferior and decayed condition of the flooring and the timbers of which said bridge was constructed, and sustained permanent injuries, which decreased the value of the horse in the sum of \$75, in which sum the said J. R. Fain was and is damaged." The court found for the plaintiff \$75, and judgment was entered accordingly. Defendant's motion for a new trial was overruled.

The single question submitted for our deci-

sion is whether the bridge, whose defective condition caused the injury to plaintiff's horse, was a public bridge within the meaning of the Code. The Supreme Court in the cases of *Tatnall County v. Newton*, 112 Ga. 730, 38 S. E. 48, and *Howington v. Madison County*, 126 Ga. 700, 55 S. E. 942, defines a public bridge as follows: "A bridge which constitutes a part of a public road is necessarily a public bridge." The pleading in this case alleged that the bridge in question was constructed by the county authorities since the passage of the act of December 29, 1888, and was a public bridge. The stipulation as to the facts is that the bridge was so constructed since the passage of said act, and "formed a part of the Ft. Gaines and Damascus public road, and was a continuation of said public road over a drain, and was used by the public as a public bridge." The court in the *Tatnall County Case*, supra, says: "If a public bridge, and not within the limits of an incorporated municipality, it seems inevitable that it must be regarded as a county bridge. No matter how the bridge comes into being, if it does so or remains in place with the assent of the proper county authorities, its character as a public concern becomes established." "If an individual builds a bridge, and the public use it, and it becomes a public utility, the public authorities must repair it." *Elliott on Roads and Streets* (2d Ed.) §§ 28, 30, 32; 4 Am. & Eng. Enc. L. (2d Ed.) 921. We therefore conclude that a bridge which constitutes a portion of the public road is necessarily a public bridge. To make it a public bridge, it is not necessary that it be established by an act of the Legislature or an order of the ordinary or county commissioners as a public bridge, and built and repaired according to Pol. Code 1895, §§ 344, 345, 346, with funds raised under section 404, par. 4. It may be built by the road hands and kept in repair by them, or it may be built by private individuals and given to the public. It is nevertheless a public bridge if a part of the public road, and becomes a public utility by public use. It is admitted that the bridge in question was "constructed by the county of Early by its proper officers; that it formed a part of the public road, and was used by the public as a public bridge." Its character as a public bridge is thus established by these admissions under the rulings of the Supreme Court and other authorities above cited. The act of December 29, 1888 (Pol. Code 1895, § 603), very largely extends the liability of counties for injuries caused by defective public bridges. It makes counties primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities. It is admitted that the bridge now under consideration was constructed by the county authorities since the act of 1888. It seems clear that under these admissions, coupled with the other admissions that the bridge was defect-

ive, that the county authorities knew of such defective condition, and that the injuries occurred to the horse because of such defective condition and without fault of the plaintiff, the judgment of the court against the county was inevitable.

The tendency of modern legislation is to greatly enlarge the statutory liability of counties with reference to highways. This is due to the fact that counties are becoming more populous, and are invested with greater powers and provided with larger means of performing their public duties. The distinction which now exists between municipalities and counties as to the duty of keeping in repair highways and bridges, and correlative liability for failure to exercise such duty, will gradually disappear as the reason for such distinction ceases. "Both cities and counties are governmental corporations invested with authority over a designated locality, and what is the duty of one is, in its essential nature, the duty of the other." *Elliott on Roads and Streets* (2d Ed.) § 52; *Dill, Mun. Corp.* (3d Ed.) § 978.

Judgment affirmed.

(3 Ga. App. 295)

BUSH v. WEST YELLOW PINE CO. (No. 386.)

(Court of Appeals of Georgia. July 10, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

In a suit by a servant against his master on account of injuries received through a defective instrumentality furnished to the former by the latter, the servant's knowledge, actual or constructive, of the defect, may usually be considered in establishing either or both of two defenses open to the master—the one, assumption of the risk by the servant; the other, contributory negligence on the servant's part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

2. SAME—COMPLAINTS—ASSURANCES OF SAFETY.

While ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of the employment, so far as he has the capacity to realize and comprehend them, yet this implication may be abrogated by an express or implied contract to the contrary. If the servant complains to the master that the instrumentality appears to be dangerous, and thereupon the master commands him to proceed with the work, and assures him there is no danger, the law implies a quasi new agreement, whereby the master relieves the servant of his former assumption of the risk, and places responsibility for resulting injuries upon the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 649, 650.]

3. SAME—QUESTION FOR JURY.

"If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." The servant by continuing to work after knowledge that the instrumentality is dangerous may defeat his case on the theory that such conduct is within the rule just stated; but the command of the master and his assurances of safety may be shown by the servant as a circumstance tending to excuse him from the exercise of that caution which other-

wise would lawfully be expected of him. Unless the exposure to the danger is obvious and rash, the question whether the servant under the circumstances has been guilty of a breach of due care is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1168-1179.]

#### 4. SAME—PLEADING.

The court erred in sustaining the demurrer to the plaintiff's petition.

(Syllabus by the Court.)

Error from City Court of Valdosta; O. P. Hansell, Judge.

Action by J. T. Bush against the West Yellow Pine Company. Judgment for defendant, and plaintiff brings error. Reversed.

Woodward & Smith and G. A. Whitaker, for plaintiff in error. W. E. Thomas, for defendant in error.

POWELL, J. This case comes to us upon the sustaining of a demurrer to the plaintiff's petition. The allegations of the petition as amended are that the plaintiff was employed as a servant of the defendant in loading cars with heavy lumber. He was unskilled and inexperienced in his work, and unfamiliar with the use of the appliances furnished. This fact was known to the defendant. Pieces of timber called "jumpers" were furnished, with which the lumber was to be slid and loaded. The plaintiff called the attention of the defendant's superintendent in charge of the work to the fact that these "jumpers" did not appear to be of sufficient size and strength to withstand the strain upon them, and also told him that he (the plaintiff) was unfamiliar with the character of the work and the sufficiency of the appliances. The superintendent told him that he (the superintendent) knew his business; that the "jumpers" were properly adjusted and were all right and perfectly safe; that there was no danger, and ordered plaintiff to go ahead with the work. Relying upon these assurances, plaintiff continued in the work. As a matter of fact the "jumpers" proved to be too short, and under the strain gave way; and as a result a piece of timber fell upon plaintiff and injured him.

1. The servant's knowledge, actual or constructive, of the dangerous condition of an instrumentality furnished him by his master, becomes an important matter of investigation, from two distinct phases of the case, when he has been injured through that instrumentality and attempts to hold the master responsible for the injury. First, it may be considered in relation to his assumption of the risk, a matter included by implication in the contract of employment; and then in relation to the question of his contributory negligence. These two aspects are sometimes confounded, but they are distinct. Every student of the law of master and servant recognizes the correctness of Labatt's statement (M. & S. § 1): "The doctrines which define the extent of a servant's right

to recover damages for personal injuries received in the course of his employment represent, broadly speaking, the results of a compromise between the principle that a servant agrees to assume all the risks incident to the work undertaken by him, and the principle that a master is answerable for the consequences of any negligent acts which may be committed by himself or his agents. In the last analysis, therefore, every problem in the law of employer's liability consists essentially in the determination of the question whether the facts under review shall be controlled by the one or by the other of these principles." As a part of the compromise referred to, the law reads into every contract of employment a prima facie agreement on the servant's part that he assumes all the known risks of the employment so far as (his mental and physical development considered) they are within his capacity to comprehend, and also that he will use a corresponding due care and diligence to become informed of and to understand such other risks as are not immediately known and comprehended. This element of assumption of risk may, therefore, in a suit by the servant against the master for personal injuries, be considered as a matter of contract, whereby, if it be applicable under the particular facts of the case, the master escapes civil responsibility, notwithstanding he would otherwise be liable, just as in a suit ex delicto against a carrier for a breach of its public duty to safely carry goods a special contract of carriage may be shown by the carrier to limit his liability. Thus the servant's knowledge of a defect in an instrumentality furnished by the master is a relevant matter of investigation, as tending to show that as to such defect he has assumed the risk; but it is also relevant upon the other phase of the case, that which relates to his contributory negligence. Since no plaintiff can recover for an injury of which his own negligence is the proximate cause, or which he could have avoided by the exercise of ordinary care, it frequently becomes a matter of defense to the master that the servant's exposure of himself to a known danger amounted to a failure to exercise due care, or amounted to contributory negligence. Thus, by viewing the element of the servant's knowledge in separate aspects, we shall the better be able to see the particular effect to be given to the insertion into the case of the new elements of a direct order of the master and of his assurances that the work may be safely done with the instrumentalities furnished.

2. Now, since the assumption of risk is a contractual result, it may be varied as any other term of the contract might be. For instance, it would be competent for the master and the servant to make an express agreement that the servant should not assume any of the risks of the employment, and



such a contract would be enforced by the court. That which otherwise would be implicit yields to that which has become explicit to the contrary. Not only may terms which the law would ordinarily imply into a contract be varied by express agreement to the contrary, but, also, where the circumstances warrant it, the original implication may cease, and new and distinct terms may be implied. Even express terms may sometimes be subsequently varied by implication. Our Civil Code of 1895 (section 3642) upon the subject of mutual temporary disregard of contract is an express recognition of this principle. So, although primarily the servant contracts to assume the risks of the character we have been discussing, still, pending the course of the employment, transactions may occur between the master and servant wherefrom the law will imply a quasi new agreement as to this matter, and will hold that the master has implicitly agreed to release the servant from his promise to assume the risk. To make the specific application, the servant, recognizing that the risk is on himself, says to the master: "This instrumentality furnished by you to me is unsafe." The master replies: "Use it. It is safe." Or: "Use it temporarily, and I will repair it and make it safe." The servant obeys the order and is injured. What effect will the law give to such transactions? In the first, where the master says, "It is safe," the law will construe these words as such a warranty that a breach of it will release the servant from the assumption of the risk. In the other case, where the master says, "Use it; I will repair it and make it safe"—the law implies an agreement on the master's part that the temporary use pending the time necessary to get the repairing done shall be at his risk, and not at that of the servant, who has complained of the instrumentality. Just here the quotation from Cooley on Torts (2d Ed.) § 559, reproduced with approval in the case of *Cheaney v. Ocean Steamship Co.*, 92 Ga. 731, 19 S. E. 35, 44 Am. St. Rep. 113, is directly in point: "If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that the parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." See, also, *Labatt, M. & S.* § 260.

3. Viewed from the standpoint of the servant's contributory negligence, the master's

direct command to use the instrumentality, and his assurance that it is safe, stand in this relation to the servant's right to recover. The law recognizes that, under normal circumstances, the knowledge and means of knowledge possessed by the servant are inferior to those possessed by the master; and the former is, as a general rule, justified in relying upon any express statement made by the latter in respect to the extent of the danger of the employment, and, in view of this disparity of information, an assurance of safety, or a specific order, may be regarded as having had the effect of lulling the servant into a feeling of security, and as having given him good reason for relaxing that vigilance for his own safety which he otherwise would have exercised, and it is therefore usually a question for the jury whether such command and such assurance do not operate to relieve the servant from the imputation of contributory negligence or failure to use due care, which otherwise would be imputed to him. *Labatt, M. & S.* §§ 407, 440, 451. "The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed." *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412. "A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment above that of his superior." See *Indiana Car Co. v. Parker*, 100 Ind. 181; *Shortel v. St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; *Harrison v. Denver, etc., R. Co.*, 7 Utah, 523, 27 Pac. 728; *Kain v. Smith*, 89 N. Y. 375; *Connolly v. Pollon*, 41 Barb. 366. The Supreme Court of Massachusetts, in the case of *McKee v. Tourtelotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542, expresses the idea thus: "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But, if against this judgment is set the judgment of a superior—one, too, who from the nature of the callings of the two men, and of the superior's duty, seems likely to make the more accurate forecast—and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified, as a prudent man, in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work all enter into consideration, and no universal rule can be laid down." In the footnote to the case just cited, as it is reproduced in 48 L. R. A. 543, is a lengthy citation of authorities supporting this proposition. This court, in the cases of *Southern*

Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 S. E. 249, and the Supreme Court in Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 S. E. 839, have recently discussed the effect of a direct order of the master as tending to relieve the servant from the exercise of that degree of caution which would lawfully be expected of him in the absence of such a command. Of course, the servant is only the more excusable for relying upon such an order when it is accompanied by an assurance of safety.

4. It is actionable negligence for the master to order his servant to work with an unsafe instrumentality. An assurance of safety, coupled with the order, not only aggravates the master's negligence, but also relieves the servant from the assumption of the risk. The assurance of safety likewise makes the question of the servant's contributory negligence one for solution by the jury, unless the danger be so obvious that to undertake to encounter it amounts to plain rashness. The master's command and assurance of safety to the servant prevents the former escaping liability on the theory that the latter has assumed the risk. It is for the jury to say whether the servant's conduct in continuing to work in the light of his knowledge of the danger, even after the assurance of safety is given due weight, was or was not negligence; for a person who has failed to exercise ordinary care to protect himself cannot recover. This is a maxim of the law applicable to all suits predicated upon negligence, and is wholly independent of the question as to who has assumed the risk as a matter of contract. This is a jury question which the court did not have the power to determine on demurrer.

Judgment reversed.

(2 Ga. App. 254)

#### CARTER v. STATE (No. 427.)

(Court of Appeals of Georgia. July 4, 1907.)

#### 1. CRIMINAL LAW—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of evidence offered to rebut the presumption of malice, in a trial for murder, is not cause for a new trial, where the defendant is only convicted of voluntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3153.]

#### 2. HOMICIDE—DYING DECLARATIONS.

That a witness may have made a different statement as to alleged dying declarations, on the examination by the court into their admissibility, from that thereafter made by him in the hearing of the jury, is not ground for excluding his evidence as to such declarations. The injunction that dying declarations are to be received with great caution is directed more especially to the jury than to the judge. The judge, in passing upon the admissibility of dying declarations, determines only whether a prima facie case is presented, conceding the testimony to be true. He does not pass upon the credibility of the witness delivering the testimony. If a witness makes different statements in any respect material to the proof of dying declarations, the jury may discredit him,

but the trial judge cannot for that reason withhold his testimony from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 458.]

#### 3. CRIMINAL LAW—CAPACITY TO COMMIT CRIME.

The ability to distinguish between right and wrong in relation to a particular act about to be committed is the general test of criminal responsibility in this state. The only exception so far recognized, as to one who has reason sufficient to distinguish between right and wrong as to the act about to be committed, is where such act is connected with a peculiar delusion under which the prisoner is laboring, and where, in consequence of such delusion and without criminal intent, the will is overmastered. Intermittent insanity, caused by physical weakness or nervous disorders, is no excuse or justification for crime, unless it appears that at the time of the act committed the defendant was incapable of adjudging the quality of the act and of knowing whether it was right or wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 56, 59.]

#### 4. SAME—INSANITY—INSTRUCTION.

Where evidence as to the insanity of a defendant is introduced under the general plea of not guilty in a criminal case, it is the duty of the trial judge to instruct the jury upon the subject of insanity as a defense. In the absence of evidence that the defendant acted under the influence of an overmastering delusion, there was no error in the charge complained of in this case. If fuller instructions were desired, they should have been requested in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1821, 2007.]

#### 5. SAME—TRIAL—CONDUCT OF JUDGE—APPEAL.

The conduct of the judge towards witnesses will not be controlled, except for such abuse of his authority as would manifestly tend to shape or unduly influence the finding of the jury. The refusal of a trial judge to allow a question to be answered by a witness cannot be reviewed, unless it appears that the answer expected to such question was stated at the time of the ruling complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2932.]

#### 6. SAME—ADMISSION OF EVIDENCE—HARMLESS ERROR.

While testimony that one of the defendant's witnesses or her husband had unlawfully sold whisky should have been repelled upon the objection offered, that such testimony was irrelevant and immaterial, still the error in admitting this testimony is not sufficiently grave to warrant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2209.]

#### 7. SAME—NEW TRIAL.

The remaining assignments of error are without merit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2328.]

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Will Carter was convicted of voluntary manslaughter, and brings error. Affirmed.

J. K. Davis, J. M. Hunt, and Bunn & Bunn, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

RUSSELL, J. The plaintiff in error was convicted of the offense of voluntary man-

slaughter. He excepts to the judgment refusing a new trial. The testimony in the case is extremely voluminous, but is substantially as follows: On the part of the state it was shown that after a trial in a justice's court, in which Carter (the plaintiff in error) was one of the parties and the deceased, Reed, was a witness, Reed, in company with several other persons, started from the courthouse toward home. The decision of the justice's court was adverse to Carter. Reed was a witness at the trial, in behalf of one Townsend, who was the opposite party in the suit against Carter. He was perhaps also somewhat interested in the result of the case, and concerned in favor of Townsend. The deceased was over 70 years of age and quite deaf. As he was proceeding homeward with his companions, the party was overtaken by Carter, who walked along with them about 200 yards, during which time Carter charged the deceased with being responsible for the lawsuit against him, and used some vile epithets about the deceased. Perhaps on account of his deafness, the deceased did not appear to have heard Carter's first remarks. A little later Carter and Reed became involved in an altercation, and Carter drew from his pocket a pistol and shot Reed, who was unarmed, except with a small walking cane, and who fell to the ground and screamed. Townsend seized Carter and the pistol, and held him until the pistol was taken from him. The evidence for the state does not disclose that Reed had any weapon of any kind other than the small walking cane; and it was proved that he habitually carried this to walk with. He was picked up, carried home, and undressed, and no weapon was found upon him. As a result of the wound, death supervened four days later. Before his death Reed stated that he was going to die. He made this statement on the night of the difficulty, as well as an hour or two before his death. And after each of these statements, showing consciousness of his condition, he gave his version of the difficulty. The testimony for the defendant, as to the material issues in the case, was squarely in conflict with that for the state. Witnesses on behalf of the defendant testified that Reed made the first advance upon Carter and struck him with his walking stick, and that Reed had a knife in his hand. Some of the witnesses testified that they did not know whether the deceased struck with the knife or not, while others testified that the deceased struck the defendant with the knife and cut his coat upon the shoulder, and that thereupon, while the deceased was still cutting at him with the knife, Carter stepped backward and fired. There was also testimony showing that there was a mutual intent to fight, and that Reed drew his knife and Carter his pistol about the same time. The defendant also attempted to show that he was insane; and testimony was permitted from several witnesses showing that he was

at times wild and irrational. He further offered evidence of partial or temporary insanity, of weakness of mind in connection with his weakened condition, and of a distortion of mind in connection with his disturbed nervous condition, and of his habit of taking liquor and narcotics impairing his capacity. The defendant moved for a new trial upon the general grounds, and upon grounds relating to the charge of the court and the failure to charge, as well as grounds relating to the exclusion and introduction of testimony, and to conduct of the court, which is claimed to have been prejudicial to the defendant, and upon the ground of newly discovered evidence.

1. The first ground of the amended motion assigns error in that the court ruled out certain evidence relating to the purported testimony of Carter, the defendant, at the justice's court immediately preceding the difficulty which resulted in Reed's death. The only error assigned is that the court should have admitted this testimony in order to permit the defendant to rebut the idea of malice on his part against Reed, and to meet the state's theory that Carter had ill will against Reed and was the aggressor in the fight. It is unnecessary to consider whether the exception would have been well taken if the verdict had been for murder; for, inasmuch as the defendant was only convicted of voluntary manslaughter, no harm resulted to him by reason of the court's ruling. The jury, by their verdict, found that the killing was done without malice, and the testimony repelled by the judge was only proper to be considered by the jury to induce the same result as occurred.

2. The second exception of the plaintiff in error is that the court erred in refusing to allow him to prove by one Mr. Reeves whether the witness had not heard him state from the stand that Mr. Evins had asked him to let Mr. Reed pasture in the pasture, and that he was going to do it. He contends that this evidence was material and would have been beneficial, and was offered for the purpose of showing that he had no malice or ill will against the deceased. He further insists that this evidence would have greatly assisted him in showing the jury that he acted in self-defense and without malice or ill will. The verdict being for voluntary manslaughter, the lack of evidence showing absence of malice was not injurious to the plaintiff in error. Furthermore, the offer to prove the facts stated was not properly made. Counsel should have stated what the witness of whom he wished to ask the questions would testify. It not being shown by such statement that the witness would have testified what the plaintiff's counsel offered to prove, this assignment of error cannot be considered.

3. The third ground of the motion assigns error upon the admission of certain purported dying declarations of the deceased. The

objections offered were that such declarations should be received with great caution, and that the evidence should be excluded because the witness J. H. Wilson, by whom the declarations were shown, had testified during the court's examination into the admissibility of the testimony, and, in the absence of the jury, "that such declarations were made by the deceased on Friday night prior to his death on the following Tuesday morning, and that deceased was conscious until a short time before he died and had been told that he would recover," and, after giving that evidence, testified: "That is all he said, and he never did make any other statement; and I stayed with him several nights, and had him by the hand when he died. \* \* \* That is all I heard him say." And, after delivering this testimony, the witness was present in court, heard the argument of counsel, and went upon the stand, and stated that upon Tuesday night, just before Reed's death, Reed stated that "he had done nothing to Mr. Carter to cause Mr. Carter to kill him." The complaint of the plaintiff in error is that the court should not have admitted the declarations alleged by the witness to have been made by Reed on Tuesday morning, shortly before his death, because the witness had changed and altered his evidence in the presence of the court; that the court violated the rule that dying declarations should be received with great caution, by permitting the witness to testify to the jury with relation to the statements made by Reed shortly before his death. We cannot see that the ruling of the court was, for the reason assigned, erroneous. In the first place, the instruction that dying declarations are to be received with great caution is more especially directed to the jury than to the judge. In the next place, the judge, in passing upon the admissibility of dying declarations, only determines whether a prima facie case has been established; and, so far as the credibility of the witness is concerned, a court of review cannot from the very nature of the case control his discretion. In the third place, the court permitted the discrepancy in the statement by the witness to be proved to the jury, so that it was within their power to pass upon the questions of fact involved, and, if the witness had really made contradictory statements, it was in their power to impeach and discredit him thereby. After all, we see no real conflict (after careful reading and re-reading Wilson's testimony)—at least, no necessary conflict—in his statement. After detailing to the court the statements made by Reed to him on Friday night, he proceeds to say "that is all he said, and he never did make any other statement; and I stayed with him several nights"; etc., "that is all I heard him say." The statements the witness related to the jury as having been made by Reed on Tuesday morning shortly before his death are in practically the identical lan-

guage of those he repeated to the court shortly before adjournment the evening before; and if he had replied, using the same language he did, with three very immaterial changes, his veracity could not have been questioned even by the plaintiff in error. As innocence is to be presumed instead of guilt, and as the language of both declarations detailed by the witness is identical, and as the ordinary witness is not so skilled in the art of speech as to aptly choose the very word suitable to convey the shade of thought he might seek to convey, we think that the trial judge properly understood the witness as intending to say: "That is all he said, and he never did make any different statement. \* \* \* That is what [all] I heard him say." Plainly, to our mind, the only idea the witness intended to convey was that the statements he had attributed to the deceased were truthfully repeated, and that the deceased had not at any time made any other or different statement in his hearing. If the witness had been asked the distinct question whether the deceased ever repeated these statements at any other time than Friday night, and had answered the question in the negative, the jury would have been authorized to discredit him; but the trial judge could not for that reason withhold his testimony from the jury. In the absence of evidence that the witness' attention was specifically called to the point, to discredit him because of the language used in the answer which we have heretofore quoted would be manifestly unfair.

4. In the fourth ground of the motion for new trial it is insisted that the court erred in charging the jury as follows: "The defendant sets up the further defense of insanity. A person shall be considered of sound mind who is neither an idiot, a lunatic, afflicted with insanity, or who has arrived at the age of 14 years, or before that day, if such person knows the distinction between right and wrong. The law presumes every defendant to be of sound mind, and the burden is on the defendant to satisfy the jury to a reasonable certainty that he was not of sound mind when the act was committed. The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates an individual from distinguishing between right and wrong as to the consequences of his conduct. If you find from the testimony submitted on the trial of this case, to a reasonable certainty, that the defendant at the time of the homicide was afflicted with insanity to that extent as to dethrone reason and to incapacitate him from distinguishing between right and wrong as to the consequences of his act or conduct, you should acquit the defendant of the offense charged. If you find from the testimony that the defendant at the time of the homicide had sufficient mind and understanding to distinguish between right and wrong as to the consequences of his

own act and conduct, he is responsible for his act. In other words, if he was not at the time of the homicide afflicted with insanity to such an extent as to dethrone reason and incapacitate him from distinguishing between right and wrong as to the consequences of his own act and conduct, it would be your duty to find against the plea of defendant of insanity. A lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor of which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity; but, if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency. So, gentlemen of the jury, if you find from the testimony that the defendant was afflicted with insanity at times, he would be responsible for his acts when not under the influence, or not in that state of mind. If he did the act, and was not in one of these conditions at the time—not in a condition of not distinguishing between right and wrong at the time—he would be responsible for his act as though he was not afflicted with insanity at all.” The complaint of the plaintiff in error is that the judge presented the law of total insanity, and not a theory on partial insanity or temporary insanity or distortion of mind growing out of a physical condition of the defendant, and its effect (by reason of the shattered nervous system of defendant and the use of stimulants and opiates) on his mental condition. Counsel for plaintiff in error insists that, under the evidence as to the physical condition of the defendant, excitement would unbalance him and cause him to lose his normal judgment and discretion and make him like a man wild or crazy, and that under these conditions, although the defendant did not set up full insanity, nor seek to prove it as a complete defense, in and of itself, defendant was not to be held to use the same normal judgment, discretion, and coolness that the ordinary man would be called on to use, and that the judge should have instructed the jury that the defendant should be judged, as he was, and not held to the standard required of the normal ordinary man unafflicted, as he was, with reference to his conduct at the time of the difficulty, and that the jury should have been instructed that they should consider the mental condition or distortion of mind of the defendant if they believed such was caused by his physical condition in determining whether the defendant acted in good faith, believing that there was a necessity for taking the life of his assailant to save his own life or to prevent a felony from being perpetrated upon him. The exact exception to the charge quoted above is thus set out by plaintiff in error in this motion for new trial: “The defendant did not set up as matter of defense such insanity at the time of the homicide

as would make him irresponsible for his acts under the general rules of law relating to pleas of insanity, but offered evidence of a partial or temporary insanity, or weakness of mind or distortion of mind, in connection with his weakened physical condition and his disturbed nervous system, and the habit of taking liquor and narcotics, as impairing his capacity, under circumstances of excitement or danger, to act with the same calmness and deliberation and discretion as the average or ordinary man would be held to act and judge, and the defendant, by his counsel, claimed that, owing to his mental and physical condition, he would not be held, and should not be held by the court and jury, to act with the same discretion and judgment as the ordinary physically and mentally sound man, and claimed that the court should submit that question in his charge to the jury; that in determining as to whether he acted in good faith, believing that his life was in danger and that it was necessary to shoot the deceased to save himself, the jury should have been allowed to consider this question. This theory of defense was not submitted at all by the court to the jury, but, in lieu thereof, the court gave to the jury the general law of insanity, and the movant insists that he erred therein, and further erred in not submitting the claim, as above set forth, which was urged by the defendant through his counsel.”

The objection is twofold: That the charge on insanity, being irrelevant, was hurtful to the defendant; and that the real contention of the defendant upon this subject was not presented. We find no error in the charge complained of, and, if fuller and more explicit instructions were desired, they should have been requested. It appears from the record that evidence was introduced for the purpose of showing that the defendant was insane at the time of the homicide, and therefore it was incumbent upon the court not to turn the jury loose upon that evidence without chart or compass to aid them in applying them. And the rule announced by the court has been uniformly recognized in this state, at least ever since the case of *Roberts v. State*, 3 Ga. 310. The rule there laid down by the Supreme Court is as follows: “If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible.” The only exception made to this general rule is where the act done is connected with a peculiar delusion, and is committed in consequence of such delusion without criminal intent, but by reason of the will being overmastered and overpowered by such delusion. The doctrine laid down in the *Roberts Case* has never been overruled or questioned by the Supreme Court. The case has frequently been cited with approval. See *Choice v. State*, 31 Ga. 424; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Flanagan*

v. State, 103 Ga. 625, 30 S. E. 550; Taylor v. State, 105 Ga. 775, 31 S. E. 764. The judge could not present the theory of partial or temporary insanity insisted upon by the plaintiff in error, because there was no evidence that the defendant was acting under the influence of any delusion and that the act was committed in connection with such delusion. There has never been any morbid sentimentality on the subject of insanity in the decisions in this state, and yet there has been always the exercise of the largest humanity in behalf of the actually insane. The question is not without difficulty. As said by Judge Nisbet in *Roberts v. State*, supra: "The laws of the sane mind are but little understood. Much less are the laws, if indeed such phraseology is predicable of it, of the unsound mind. We can judge of the one by external developments and by our own consciousness; but of the other only by external indicia. There are few men so balanced in intellect as not at some time and upon some subjects to approximate towards derangement. Intellectual enthusiasm not unfrequently approaches the line of insanity. The numerous cases of mania or delusion which leave the mind sound in general, but as to certain things shattered or wholly obliterated, have increased the difficulty of any specific general rule as to the responsibility of those generally classed as insane. \* \* \* The subject of insanity is not responsible—humanity, reason, the law so adjudge. In all definitions of murder of which I have knowledge the requirement is found that the slayer must be of sound mind. Our own statutory definition requires him to be 'a person of sound memory and discretion.' Accountability for crime presupposes a criminal intent, and that requires a power of reasoning upon the character and consequences of the act—a will subject to control. The difficulty is to determine who is 'a person of sound memory and discretion,' who is incapable of a criminal intent, who is incapable of reasoning upon the character and consequences of the act, and who is without control over his will. \* \* \* Mr. Chitty says: 'In criminal cases the question is whether at the time the act was committed the prisoner was incapable of judging between right and wrong, and did not then know that the act was an offense against the law of God and nature.' \* \* \* There are some exceptions to this rule, one certainly which was first established in the leading case of *The King v. Hadsfield*. The great speech of Mr. Erskine in defense of Hadsfield has shed new light upon the law of insanity. It is looked upon by the profession as authority. \* \* \* In that case he assumed the position that a man might have reason sufficient to distinguish between the right and wrong of an act about to be committed, and yet, by reason of some delusion overmastering the will, there might be no criminal intent. To apply this proposition, it was admitted by

Mr. Erskine that the act itself must be connected with the peculiar delusion under which the prisoner labored. \* \* \* To use the language of Mr. Erskine: 'Reason is not driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.' " Our courts have never gone to the full extent of Mr. Erskine's argument, and certainly never held the contention of the plaintiff in error upon this subject to be the law. No decision has come under our observation where temporary insanity or loss of self-control, caused by physical infirmity, has been held to justify a killing or even to reduce the offense from murder to manslaughter. In its last analysis the contention of the plaintiff in error is that, while ordinarily sane, his physical condition was such and his nerves were so unstrung that he was more easily excited than an ordinary man, and that, when thus excited, he became temporarily irresponsible. Similar defenses have been several times disapproved by our Supreme Court. In *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782, the Supreme Court held that there was no error in refusing to charge the jury that "If the defendant commit an assault, knowing it to be wrong, when driven to it by an uncontrollable and irresistible impulse, arising not from natural passion, but from an unsound condition of mind, he is not criminally responsible." In the case of *Patterson v. State*, 86 Ga. 70, 12 S. E. 174, while the court affirmed the judgment of the trial judge in excluding certain testimony for a different reason, Chief Justice Bleckley took occasion (while the language used by the trial judge is not stated) to say that what he said was pertinent, and the ruling upon the question in that case is authority for the statement that the citation of the learned counsel for plaintiff in error upon the subject of the appearance and general health, etc., of the person whose sanity is in question, are not in point in this case. In *Lee v. State*, 116 Ga. 569, 42 S. E. 759, and in *Rogers v. State* (Ga.) 57 S. E. 227, the doctrine announced in *Studstill v. State*, 7 Ga. 12, that there is no distinction as to partial or temporary insanity and that such insanity is not recognized as a defense, relieving from responsibility of crime, is reaffirmed. In *Lee's Case* the trial judge refused, upon request, to charge the jury that if they believed from the evidence that the defendant at the time of the homicide was afflicted with epilepsy to such an extent as to be insane, and that under the influence of such epilepsy he was incapable of controlling his action, but was impelled by the effect of such disease to the commission of the homicide in question, even he may have had knowledge as to the right or wrong of the action in question, that the defendant would not be guilty. The refusal to thus instruct the jury was expressly approved. The court then proceeded to reaffirm the former decision as to the general

rule and the exception in regard to delusional insanity. But, as to a very similar theory to that contended for by the plaintiff in error in this case, Chief Justice Simmons, delivering the opinion, says: "It seems to us that to uphold such a theory would be to put the public at the mercy of any person who fails to suppress his anger or jealousy, who is sane at one moment, insane at the next, and then immediately afterwards sane again. It is, however, useless to elaborate any further, as this court is bound by its former decisions upon this subject, which will be found cited in *Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764; *Minder v. State*, 113 Ga. 773, 39 S. E. 284. We therefore conclude that requests to charge which sought to substitute another test of sanity for the knowledge of right and wrong should not have been given. With regard to the exception to the general rule in case of delusional insanity, the charge was correct, and followed the cases of *Roberts v. State*, 3 Ga. 310; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550."

In this case no request was preferred; but, had the defendant obtained all he contended for in this ground of the motion, it certainly could not have reduced the offense lower than voluntary manslaughter, and, in view of the finding of the jury, no possible harm was done him. The evidence upon the subject of insanity was introduced by the defendant in the testimony of Dr. Chapman, his sister, and other witnesses, and as insanity at the time of the commission of the alleged crime need not be specially pleaded, but may be relied upon as a defense upon the plea of general issue, we think the trial judge should have charged upon the subject. As there was no evidence of delusion on the part of the defendant, or that he acted under the influence of such delusion in the commission of the act with which he was charged, there was no error in not extending the instructions given.

5. The fifth ground of the motion alleges that the court erred in rebuking one of defendant's witnesses in the presence of the jury, and thereby prejudicing defendant's case by discrediting his witness. This is specially insisted upon because plaintiff in error argues that the court was unfair in the trial to the defendant, and partial to the state, as shown by the difference of treatment given these witnesses by the court. It appears that the witnesses had been separated, and that the defendant's witness, not having been informed of the order of the court sequestering the witnesses, sat down for an instant in the courtroom before he came to the stand. Upon this fact being disclosed, although defendant's witness said he heard none of the evidence, the court said to said witness: "You knew the witnesses were separated yesterday, didn't you?" Upon the witness replying in the affirmative,

the court inquired: "Why did you come in the courthouse and sit down?" And when the witness answered that he sat down because he was expecting to take the witness chair, the court remarked: "We will see about this when we get through." Plaintiff in error contrasts this with the action of the court in connection with a witness sworn on the part of the state, who had been in the courthouse a portion of the day during the delivery of testimony, and to whom objection was made as a witness upon that ground, but whom the court allowed to testify. We do not fully approve the practice of threatening a witness in the hearing of the jury, but we cannot say that any threat was necessarily implied by the language of the court. The language of the court is just as susceptible of the idea that the court did not wish to consume time with a further examination into the matter at that time, and that he would not, if a hearing was had, punish the witness, as to the construction that, by his language, he threatened witness. But, even if he had fined the witness for disobedience of his order, we could not control his discretion, unless manifestly abused; nor would it necessarily follow that the credibility before the jury would be diminished because of the fact that the court might have adjudged him guilty of disobedience of the court's orders. So far as the treatment of the state's witness being improper, it is always discretionary with the trial court as to whether certain witnesses may, for any special reason, be allowed to remain in the courtroom, and the fact that the witness has heard the testimony is not sufficient reason to exclude his testimony. We cannot say that the treatment of the two witnesses shows partiality to the state or was prejudicial to the defendant, as contended by plaintiff in error, nor that the treatment of these two witnesses, as it appears in the record, is tantamount to an expression of opinion, on the evidence in the case, unfavorable to the accused.

6. The sixth ground of the motion contends that the court erred in allowing testimony from the witness Mrs. Gill, showing that her husband had sold liquor and trying to show that she herself had sold liquor. The objection to the evidence was that it was immaterial and irrelevant. And error is also assigned because such evidence was not proper to be used as a mode of impeachment. We readily concur in the opinion of counsel for plaintiff in error that the fact that the party may or may not have been guilty of unlawfully selling intoxicating liquor is not a proper mode of impeaching a witness, and the business followed by the witness's husband was immaterial. But, conceding that the court erred in his ruling in this matter, the error is not sufficiently grave to warrant a reversal.

7. There was no error on the part of the trial court in refusing to allow the witness

Reeves to show that the pasture in question in the lawsuit which preceded the difficulty was in the possession of Carter, and that he had the right to it. In any view of the case, this evidence was immaterial.

8. Nor was any harm done the defendant by the refusal of the court to allow the witness Jackson to testify what the defendant threw up early in the morning of the day of the difficulty. The court allowed testimony without limit as to the comparative size and strength of the defendant and the deceased at the time of the difficulty, and the witness Jackson was allowed to testify as to the health of the defendant early in the morning of that day, and that the defendant turned sick and threw up. If defendant was sick, and the sickness had not been relieved at the time of the difficulty, the weakness caused thereby might be considered by the jury, but could not be material as to what was thrown up, in the absence of any statement to the court by counsel as to what he expected to show.

9. The defendant also insisted in his motion that a new trial should be granted upon the ground of newly discovered evidence. The affidavit of W. M. Raper tended to show that, while the deceased was being undressed after the difficulty, his pants fell upon the floor and something heavy hit the floor (presumably a knife), and that deceased showed great anxiety about what was in his pocket, and called several times to his wife and family to see after it. This witness also testified that he asked the deceased what caused the trouble, and he said: "Oh, Lord, I couldn't take everything." This witness testified at the trial. The most that can be said as to the testimony of this witness in so far as being of advantage to the defendant is concerned is that it tends to show that the deceased might have had a knife in his pocket when he was carried home, and therefore might have had one at the time of the difficulty. As this evidence is merely cumulative of the testimony of several witnesses for the defendant, who testified on the trial more strongly to the same effect, it affords absolutely no reason for granting a new trial. The other affidavit made by Joseph Hendrix cannot be considered because it is not accompanied by the affidavits of counsel or of the defendant or of witnesses vouching for deponent's good character and associations, as required by law.

After a very painstaking investigation and consideration of the mass of testimony in this case, and careful examination into every contention urged by the plaintiff in error, we are firmly convinced that no error was committed requiring the grant of a new trial. The evidence was conflicting. We have no power to disturb the verdict of the jury thereon. And, if we had such power, the interest of society would not be subserved by its exercise in this case.

Judgment affirmed.

(3 Ga. App. 305)

# ATLANTIC COAST LINE R. CO. v. BUNN et al. (No. 441.)

(Court of Appeals of Georgia. July 10, 1907.)

## 1. JURY—COMPETENCY.

Each party in a civil case has the right to a panel of 24 impartial men from which to select the jury. To be entitled to sit on a case, a juror must be omni exceptione major, and where it appears, before beginning to strike the jury, that any juror is, for any reason, disqualified, such juror should be excused for cause.

## 2. NEW TRIAL—INCOMPETENT JURORS.

An employé is not a competent juror to try a case in which his employer is a party.

Failure to remove jurors thus disqualified and to fill the panel as provided by Act 1878, p. 145, is ground for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 420; vol. 37, New Trial, § 77.]

## 3. RAILROADS—ROAD CROSSINGS.

A road crossing, such as is referred to in section 2222, Civ. Code 1895, is the crossing by a railroad of a public highway, not only used, but maintained as such by the proper authorities having the same in charge. The evidence must show the road to be a public highway or street, and that such crosses the railroad, before there is proof of a road crossing. See *Johnson v. State*, 58 S. E. 265, Court of Appeals.

## 4. APPEAL—REVIEW.

No other error appears.

(Syllabus by the Court.)

Error from City Court of Waycross; J. T. Myers, Judge.

Action by J. R. and T. Bunn against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Bennet & Conyers and Jno. C. McDonald, for plaintiff in error. Wilson, Bennet & Lambdin, for defendants in error.

RUSSELL, J. This case comes to this court on exceptions taken to the refusal to grant a new trial. Several assignments of errors are presented, but in our view of the case it is only necessary to discuss one of them. The fourth ground of the amended motion for a new trial alleges that "the court erred in refusing the motion made by counsel of movant to excuse from service on the jury from the panel of jurors called to try said case W. A. Sweat, J. P. Lide, and Will Youmans, who were employes of the plaintiffs, and by reason thereof disqualified to serve as jurors in said case, said motion having been made before commencing to strike or select the jury in said case; the same being error because: (a) The employes of parties litigant are presumed to be prejudiced. (b) The jury trying a cause should be perfectly impartial between the parties. (c) Any cause which would prompt a juror to lean in favor of one side or the other should be excuse or cause for such juror from serving on the jury, and thereby not force the side against which he would lean to strike him therefrom, and thereby lose any right as to strikes." The employes of the plaintiff were disquali-



fied as jurors. It would not be questioned that under the express rule in the case of *Central Railroad v. Mitchell*, 83 Ga. 173, the employes of the defendant corporation should be held to be disqualified; and no reason appears to us why the employes of one party would be more likely to have a leaning or to have prejudged the case than the employes of another party to the cause. An employe, whether of an individual, a partnership, or a corporation, may be, in rare instances, an impartial juror in passing upon the rights of his employer. It is possible for a judge or juror to be so absolutely fair that he could try his own cause. But there must be a rule upon the subject, and the only rule that can be adopted with safety is one which recognizes the influence to which humanity is generally susceptible, and not a rule based upon rare exceptions. As said by Justice Jackson, in *Central Railroad v. Mitchell*, *supra*: "It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of employer over employes is that of him who clothes and feeds over him who is fed and clothed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered. A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer. See 3 Chit. Black. side p. 363; Bacon's Abridg. "Juries," 2, 347, 5, 353; Tidd's Prac. 852, 3." The employes of a plaintiff should be disqualified as jurors for the same reason that they would be if they were the employes of the defendant; and employes of a person or partnership should be disqualified for the reason that would disqualify them if they were the employes of a corporation. A juror must be *omni exceptione major*. If, then, these three jurors were in fact employes of the plaintiffs, they should have been excused for cause, if proper objection was made at the proper time. A jury trial is a travesty unless the jurors are impartial.

But it is insisted by learned counsel for the defendants in error that the assignment of error is not in such legal shape as to inform us what action was taken by the court below on the motion submitted by counsel for the defendant (now plaintiff in error); that the defendant was not entitled to have the jurors excused simply by calling the attention of the court to their disqualification; that this court is not informed by the assignment of error what action was taken in the court below on the question, and that the trial court may have found some evidence that the jurors were not disqualified to serve, for the reason alleged. For these reasons, it is insisted by the defendant in error that the assignment of error does not bring to the attention of this court sufficient facts to enable it to determine whether the lower court committed error in refusing to excuse the jurors from service in the cause. We disagree with

learned counsel as to this. The recitals of fact in the motion are fully approved and certified by the trial judge. We, of course, cannot tell whether evidence was heard by the court touching the disqualification or not; but it is certified that the jurors objected to were employes of the plaintiff. It is immaterial to this court how knowledge of this fact was obtained by the trial judge, because no point is made that he became possessed of the fact improperly. The trial judge, by approving, without qualification, the grounds of the motion for a new trial, states that it was a fact that the jurors were employes of the plaintiff, and that he knew that fact before passing upon the motion of defendant's counsel. It would have been proper for the trial judge, if the question as to whether the jurors were or were not employes of one of the parties had been in issue, to hear evidence upon that subject; but from the wording of the assignment of error (which is certified by the judge to contain a true statement of fact) it can easily be inferred either that the statement by counsel of the employment of the jurors was admitted by the opposite party, or rested in the court's own knowledge; and in either event evidence would be unnecessary for the information of the court. The language of the fourth ground is, "W. A. Sweat, J. P. Lide, and Will Youmans, who were employes of the plaintiffs"—not who movant insisted or alleged were employes of the plaintiffs. If the wording of this ground had been "W. A. Sweat, J. P. Lide, and Will Youmans, who movant contended were employes of the plaintiffs," the contention of learned counsel for the defendant in error would be sustained. It appears from the testimony of J. P. Lide, set forth in the record, that he was an employe of the plaintiffs, and it can reasonably be assumed that it was not insisted before the trial court that any one of the three jurors objected to was not an employe of the plaintiffs at the time that the defendant asked to have them excused for cause.

The jurors, then, were disqualified. Was the objection properly presented to the trial court? A party in a civil case is only required, where a juror is for any reason disqualified, to request the presiding judge to cause the panel to be filled. Pen. Code 1895, § 854. The counsel for the plaintiff in error properly requested that the disqualified jurors be excused, and we think the refusal of the court to comply was such an error as demands a new trial. "The defendant had the right to a panel of 24 from which to strike—all 24 impartial men. *Columbus, Mayor of, v. Goetchius*, 7 Ga. 139; *Justices v. Griffin & W. P. Plank Road Co.*, 15 Ga. 39; *Howell v. Howell*, 59 Ga. 145. He was denied this right. \* \* \* The denial was erroneous and hurtful. A big part of the battle is the selection of the jury, and an impartial jury is the cornerstone of the fairness of trial by jury." *Nelson v. Dickson*, 63 Ga. 686, 36 Am. Rep. 128.

As the cause will be remanded for another hearing, we do not deem it necessary to deal more fully with the other assignments of error than by reference to what is contained in the headnotes.

Judgment reversed.

(2 Ga. App. 377)

**STRICKLAND v. THORNTON & NASWORTHY.** (No. 344.)

(Court of Appeals of Georgia. July 25, 1907.)

**1. ERROR, WRIT OF—DISMISSAL—BILL OF EXCEPTIONS—DATE OF SERVICE.**

While service of a bill of exceptions, before it has been certified by the judge, is equivalent to no service, and an acknowledgment of service on a bill of exceptions cannot by aliunde proof be shown to bear the wrong date, yet other parts of the record outside of the bill of exceptions may be consulted to ascertain the true date of acknowledgment of service on the bill of exceptions. And, when it thus appears that the acknowledgment of service was erroneously dated, the writ of error will not be dismissed. *Harper v. Burke*, 74 Ga. 412. When a bill of exceptions is certified as of the date October 18, 1906, and the acknowledgment of service is dated October 17, 1906, and it appears from the certified bill of exceptions that the case was not heard until October 18th, it sufficiently appears that the bill of exceptions was not served prior to October 18, 1906, and that this ground of the motion to dismiss is not well taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2829.]

**2. COURTS—SUPREME COURT—JURISDICTION.**

The Supreme Court of this state had jurisdiction of a writ of error suit brought from the city court of Dawson on October 18, 1906.

**3. EXECUTORS AND ADMINISTRATORS—RIGHT OF ACTION—RECOVERY OF PERSONALTY.**

It is error to sustain a demurrer to a petition brought by an administratrix, alleging that her intestate at the time of his death was in possession of a tract of land which he had rented out for the year, during which he died, and that the rent due said intestate for said year, consisting of cotton, had been taken possession of by the defendants without right or authority, and with notice of plaintiff's right to the same, and sold by them, and asking judgment for the proceeds of said sale, upon the ground that the action could not be maintained, because plaintiff had not title in said rent cotton.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 132.]

**4. SAME—TITLE TO PERSONALTY.**

Under the provision of Civ. Code 1895, § 3353, the title to all personality, including choses in action, vests in the representative. "Rent is personality, and the right to collect and distribute it is in the personal representative of the decedent." *Autrey v. Autrey*, 94 Ga. 579, 20 S. E. 431. And that the rent was payable in cotton, and not money, does not change the rule. The petition alleging that the defendants had notice of plaintiff's right, this case is controlled by the decision in *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175. It differs from *Worrill v. Barnes*, 57 Ga. 404, especially in the fact that in the case last cited the purchaser was an innocent party and bought without notice, and the landlord was still in life; and the case therefore was not affected by section 3353 of the Civil Code of 1895.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 132.]

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Action by Sarah Strickland, administratrix, against Thornton & Nasworthy. Judgment for defendants, and plaintiff brings error. Reversed.

R. O. Lovett, for plaintiff in error. M. J. Yeomans and M. C. Edwards, for defendants in error.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 355)

**MAYOR, ETC., OF MACON v. DALEY et al.** (No. 399.)

(Court of Appeals of Georgia. July 18, 1907.)

**1. MUNICIPAL CORPORATIONS—CHANGE OF GRADE—DAMAGES.**

The fact that a change in the grade of a street is made in conformity to an ordinance of a municipality acting in its legislative capacity does not prevent an abutting property owner from recovering consequential damages to such property resulting from said public work.

**2. EMINENT DOMAIN—CONSEQUENTIAL DAMAGES.**

The Constitution of 1877 (paragraph 1, § 3, Bill of Rights) gives to the citizen the right to recover consequential damage to his property resulting from work of a public character, although such work may be authorized by legislative action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 237.]

**3. SAME.**

The constitutional provision referred to in the foregoing note limits the power of eminent domain in the state, and in counties and municipalities as the agents of the state. It is remedial in character, and for the purpose of giving property holders additional security, and should be liberally construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 174.]

**4. MUNICIPAL CORPORATIONS—CHANGE OF GRADE.**

The measure of damages to abutting property caused by raising the grade of a street is the difference between the market value of the property before and after the change of the grade. On the trial of an action for the recovery of such damages, it is competent to prove the cost of the filling in of the property and raising it to the level of the street as a fact or circumstance illustrating the general question of market value.

**5. TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.**

Where the court instructed the jury fully, clearly, and correctly as to the measure of damages, there was no material error in failing to charge specifically that, in arriving at market value, any enhanced value of the property caused by the street improvement should be set off against any damages proved. In determining the question of market value, the jury necessarily would have to consider consequential enhancement, as well as consequential damage.

**6. SAME—EVIDENCE.**

No error of law was committed, and the verdict is amply supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Janey Daley and others against the mayor and council of the city of Macon.

Judgment for plaintiffs, and defendant brings error. Affirmed.

Minter Wimberly and Jesse Harris, for plaintiffs in error. R. D. Feagin and Claud Estes, for defendant in error.

HILL, C. J. Plaintiffs in the court below brought suit against the mayor and council of the city of Macon for damages resulting to their property by the action of the city in raising the grade of the street on which said property was situated. The jury found a verdict for the plaintiffs, and the judgment of the court overruling the defendant's motion for a new trial brings the case to this court. It was admitted that the change of grade of the street in front of plaintiffs' property was in conformity to an ordinance of the mayor and council of the city of Macon in their legislative capacity; and it is therefore insisted that there is no liability for any consequential damages to said property caused by the change in the grade of the street. It is perfectly well settled that municipal corporations, acting under authority conferred by the Legislature, are not liable for consequential damages to abutting landowners arising from grading or changing the grade of streets, provided that in so doing they keep within the limits of the streets, and there is no physical invasion of the rights of private property, and reasonable care and skill are exercised in the performance of the work, unless there is some provision in the State Constitution, in the city charter, or in some statute creating such liability; and, even where the Constitution contained the provision that private property should not be "taken" for public use without just compensation, it was uniformly held by the courts of the state and the United States Supreme Court that municipalities were not liable for consequential damages caused by an authorized change in the grade of a public street, where private property was not actually taken or there was no physical invasion of the property. The theory upon which these decisions was based was that the state had duly delegated to the municipality the power to make public improvements, and as long as the work was carried on within the scope of the authority thus delegated, and without negligence in the performance of the work, there would be no liability whatever damage occurred. "A citizen was thus left without protection in all that large class of cases done for the public benefit, or for a use public or quasi public, although no part of his tangible property was physically taken, the use or value of the property was palpably impaired, or was stripped of incidents comprised within the conception of complete property rights which brought to those rights quite as much value as the mere possession of property." *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161. This was a mischief for which a remedy was sought; and a most complete

remedy was found in the constitutional provisions of many of the states. The state of Illinois was the pioneer in this measure of relief to the citizen. In 1870 that state inserted in its Constitution the provision that "private property shall not be taken or damaged for public use without just compensation." Many of the states followed the example thus set of a more liberal rule of protecting the citizen against public progress or improvement, and similar constitutional provisions were adopted. Where this special constitutional provision exists, the rule of municipal liability has been changed, and greatly enlarged. The courts have, without a single exception, held that although prior to these provisions a municipal corporation was under no liability to an adjoining abutting landowner for any damages sustained from the action of the city in grading or changing the grade of its streets, unless his property was actually invaded, under such provisions a city is liable to him for all direct and consequential damages resulting from changing the grade of the street, where the damage thus inflicted exceeded the benefit derived from the grading. Of course, the same rule applies to all improvements of a public character. The decisions of the courts announcing this rule of liability are numerous. Many of them can be found collated in *O'Brien v. Philadelphia*, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. Rep. 835-850, where the subject is ably and exhaustively considered by the learned editor. The Supreme Court of the United States, in the case of *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, construing the provision of the Illinois Constitution, *supra*, declares that, under such provision, "a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character, whether the damages be direct, as when caused by trespass or physical invasion of the property, or consequential, as in diminution of its market value."

As pertinent to the contention of the able and indefatigable attorney representing the city of Macon, now being considered, that the city is relieved from liability because the change in the grade of the street was in accordance with a profile or plan of improvement adopted by the mayor and council in pursuance of legislative action and under legislative authority, we quote from the opinion of Mr. Justice Harlan this statement: "The city did this work under the power conferred by its charter 'to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds,' and as directed by special ordinances of the city council." The question is not an open one in Georgia. The Constitution of 1877 and decisions of the Supreme Court settle it beyond all controversy. Paragraph 1, § 3, Bill of Rights, declares: "Private property

shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Under the express terms of this broad provision of the fundamental law, neither the state nor county nor city by legislation or otherwise can authorize or do any public work which damages private property without just and adequate compensation. In *City of Atlanta v. Green*, 87 Ga. 386, the Supreme Court held that the constitutional provision, *supra*, changed the rule of liability for consequential damages resulting to property owners from raising or lowering the grade of streets, and that such damages were recoverable. This ruling has been approved and followed in every case since. *Smith v. Floyd County*, 85 Ga. 420, 425, 11 S. E. 850; *Moore v. Atlanta*, 70 Ga. 611 (3); *City of Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146; *Atlantic Railway Company v. McKnight*, 125 Ga. 331, 54 S. E. 148; *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; *Mayor and Council of Macon v. Wing*, 113 Ga. 90, 33 S. E. 392; *Barfield v. Macon County*, 109 Ga. 386, 34 S. E. 596; *Campbell v. Met. St. R. Co.*, 82 Ga. 320, 9 S. E. 1078. Indeed, the language of the Constitution is so clear and free from doubt that no room is left for judicial interpretation. The inclination of the court to content itself with reference to its terms has yielded only to the earnest appeal of the learned counsel for the plaintiff in error to carefully consider his contention, and the authorities cited in support thereof. This has been done; but this court has found no reason for not willingly accepting the decisions of the Supreme Court of the state, the unanimous deliverances of other courts of last resort, including the Supreme Court of the United States, or from giving to the plain language of the Constitution its only rational construction. If the position of counsel were sound, the mandatory language of the Constitution would be wholly ineffective and meaningless, and the paramount law of the state would be powerless to protect the citizen wherever private property was taken or damaged for public use, provided such taking and damage was in pursuance of legislative action of the state, or of counties and municipalities by virtue of legislative power delegated to them by the state. Neither the state in its legislative capacity nor the subordinate agents of the state can thus render inoperative and void the supreme law of the land.

2. The first, second, third, fourth, and fifth grounds of the amended motion for a new trial assign error in the ruling of the court permitting testimony to be introduced as to the cost of filling in the lot to a level with the street, and in not instructing the jury as to the effect of such testimony. Plaintiffs are entitled only to recover the diminution in the market value of the property. It is urged that such evidence tended to confuse them as to the measure of damage. Any evidence that

will tend to show damage to the property would be admissible. Certainly the cost of filling up the lot to a level with the street was a proper factor to be considered in determining the question of damage. The court clearly and correctly instructed the jury that the measure of damages to abutting property, caused by raising the grade of a street, was the difference between the market value before and after the grade was changed. But this evidence of the cost of the filling in the lot to bring it up to the level of the street was competent, not as an independent item of special damage, but as a fact or circumstance throwing light upon the general question of the diminution of market value. *Campbell v. Metropolitan Street Railroad Company*, 82 Ga. 320, 9 S. E. 1078; *City of Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146; *Atlanta Railway Company v. McKnight*, 125 Ga. 329, 54 S. E. 148 (3).

The sixth and seventh grounds are fully covered by the first part of this opinion. These grounds embody requests to charge the principle of law as therein contended by the city.

3. The eighth ground assigns error in the failure of the court to charge the jury that any increased value resulting from the improvements should be set off against the damage proved. While the court did not expressly charge this well-established rule of law, yet the charge was so apt and clear as to the damage that plaintiffs were entitled to recover that we do not think the jury could have been at all confused, or have failed to understand the correct measure of damage. The jury could not arrive at the market value without taking into consideration both consequential damage and consequential enhancement, balancing the one against the other, thus determining if there was in fact any real damage. But there was no request made to charge more specifically on this subject.

In our opinion the law governing the facts of the case was fully, fairly, and aptly submitted to the jury. No error was committed during the trial, and the evidence amply supports the verdict.

Judgment affirmed.

(3 Ga. App. 294)

ATLANTIC & B. RY. CO. v. SMITH. (No. 376.)

(Court of Appeals of Georgia. Aug. 10, 1907.)

1. RAILROADS—KILLING STOCK—INSTRUCTIONS.

In a suit against a railroad company for killing stock, the court instructed the jury as follows: "If you believe from the evidence in the case, and from all the facts and surrounding circumstances, that the defendant did use all the means he possibly could, or such as the law requires, if you believe that he used all diligence in his power to keep from killing the mule, it would be your duty to find for the defendant." The court immediately corrected the error complained of in this charge, as fol-

lows: "Now, what I said about all diligence just now I correct that to this extent: Exercise all reasonable care and diligence (that is, the class of diligence required in the matter of stock), all ordinary and reasonable care and diligence (that is, the class required)." *Held*, that the error was sufficiently cured and rendered harmless. Especially is this true when in the body of the charge the court gave to the jury section 2321 of the Civil Code of 1895, and specifically instructed them that the diligence required of railroads to prevent the killing of stock was as laid down in said section. *Savannah Railway Co. v. Hatcher*, 45 S. E. 289, 118 Ga. 273; *Morrison v. Dickey*, 46 S. E. 863, 119 Ga. 701; *East Tenn. R. Co. v. Miller*, 22 S. E. 660, 95 Ga. 738.

## 2. TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.

In the absence of a written request for the court to define to the jury the meaning of the words "ordinary and reasonable care and diligence," there was no error in the omission to do so. It is doubtful if any specific definition would enlighten the jury, or make any clearer the plain meaning of these simple words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627, 628.]

## 3. ERROR, WRIT OF—REVIEW.

This court again emphasizes the fact that, where there is no error of law, it has no authority to disturb a verdict supported by any evidence. Neither has it any inclination to do so where such verdict is approved by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 8912-8953.]

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by J. P. Smith against the Atlantic & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rosser & Brandon and Crum & Jones for plaintiff in error. George & Woodward, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 420)

## KENNEDY v. STATE. (No. 622.)

(Court of Appeals of Georgia. July 25, 1907.)

## CRIMINAL LAW—REVIEW—EVIDENCE—NEW TRIAL.

The verdict finding defendant guilty, being wholly without evidence to support it, was contrary to law, and a new trial should have been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3226.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Rosa Kennedy was convicted of crime, and brings error. Reversed.

Edgar J. Oliver, Twiggs & Oliver, Jacob Gozan, and Walter C. Hartridge, for plaintiff in error. W. W. Osborne, Sol. Gen., for defendant in error.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 382)

## GARRICK v. JONES. (No. 402.)

(Court of Appeals of Georgia. July 25, 1907.)

## 1. ERROR, WRIT OF—QUESTIONS REVIEWABLE—QUESTIONS OF FACT.

In a court for the correction of errors of law, the verdict of the jury is conclusive as to issues of fact properly submitted to them. Three well-defined issues of fact were involved—contract, performance, advances—upon the determination of which depended the legal result of lien or no lien. The verdict established the plaintiff's evidence as the truth of the case, and is presumptively right. No reason appears why the verdict and the judgment in accordance therewith should be set aside, and the motion for new trial was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 8912.]

## 2. LANDLORD AND TENANT—RENTING ON SHARES—TITLE TO CROPS.

According to the facts found by the jury to be true, the plaintiff in error, as landlord, was to furnish the land, plow stock, etc., and the defendant in error was to furnish the labor, and the crop was to be equally divided. The relation of landlord and "cropper" existed, which is merely a mode of paying a laborer wages for his labor, and he has no title to any part of the crop until the rent and advances are paid. It was undisputed that the landlord was in control and had received all of the crop that had been gathered up to the foreclosure of the laborer's special lien; and the jury found, as authorized by the evidence, that the portion of the crop taken by the landlord was more than enough to pay the rent and all the advances, and that the cropper was entitled to foreclose his special lien on the remainder. The right of the jury to prefer this evidence cannot be questioned, and it is equally well settled that, after the payment of the rent and all advances, a cropper is entitled to foreclose his special laborer's lien for the balance due. *McElmurray v. Turner*, 12 S. E. 359, 86 Ga. 215.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1355.]

## 3. AGRICULTURE—LIENS ON CROPS.

If a landlord has no property upon which a laborer's general lien may be foreclosed, a cropper is not required to wait to foreclose his special laborer's lien until the entire crop has been delivered to the landlord and by him disposed of. Theoretical satisfaction is not the equivalent of actual relief. The rent and advances made to aid in making the crop must, from the nature of the case, be first paid, but the agreement to pay the cropper part of the crop as his wages is as much a part of the contract.

## 4. SAME.

Delivery of the landlord's share of the crop by the cropper, and payment by such cropper for all advances, is full performance of the contract upon his part, and will entitle such cropper to foreclose his lien as a laborer, either upon the remainder of the crop or upon the property of the landlord generally.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action between John Garrick and K. J. Jones. From the judgment, Garrick brings error. Affirmed.

A. M. Deal and Fred Lanier, for plaintiff in error. R. L. Moore, for defendant in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 437)

**COTHRAN v. STATE. (No. 585.)**

(Court of Appeals of Georgia. Aug. 8, 1907.)

**1. CRIMINAL LAW—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.**

The credibility of the witnesses is exclusively a matter for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1719-1721.]

**2. SAME.**

Although one witness for the state whose testimony supports the verdict may have been attacked by impeaching testimony, and several witnesses to the difficulty charged this one witness with being the actual perpetrator of the crime, yet the jury had the right to accept his testimony as the truth of the case; and this court will not disturb the verdict where no error of law was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3076, 3077.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Joe Cothran was convicted of crime, and brings error. Affirmed.

W. M. Henry, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 439)

**COOPER v. STATE. (No. 596.)**

(Court of Appeals of Georgia. Aug. 8, 1907.)

**CRIMINAL LAW—APPEAL—REVIEW.**

Although the evidence is weak and circumstantial only, yet there being some evidence to support the verdict, this court has no power to set it aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Felix Cooper was convicted of crime, and brings error. Affirmed.

L. R. Massengale, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 417)

**ROBBERSON v. STATE. (No. 609.)**

(Court of Appeals of Georgia. July 25, 1907.)

**CRIMINAL LAW—EVIDENCE—INSTRUCTIONS—REQUESTS.**

The evidence authorized the verdict, and, taken in its entirety, plainly shows that the crime was committed within the statute of limitations. There being no evidence other than defendant's statement upon which to base the assignment of error in regard to the failure of the court to charge certain principles, the judgment will not be reversed on account of such failure; it not appearing that any request so to charge was made in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Mary Robberson was convicted of crime, and brings error. Affirmed.

L. D. Passmore, for plaintiff in error. J. H. Tipton, Sol., for the State.

POWELL, J. Judgment affirmed.

(3 Ga. App. 401)

**McDUFFIE v. STATE. (No. 573.)**

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The granting of a new trial on the ground of newly discovered evidence is not favored by the courts, and it should clearly appear that the evidence newly discovered is of such a character as to probably change the result upon another trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2335.]

**2. SAME.**

Where the newly discovered evidence was that of a boy only seven years of age, whose father and others, in counter affidavits filed to the motion, stated he was immature intellectually and physically, and did not understand the nature of an oath, and where it also appeared in the counter showing that the said boy witness had stated on examination that he did not understand the nature and obligation of an oath, and where it was further made to appear by counter affidavits that the alleged newly discovered evidence of the boy witness was probably untrue, this court will not interfere with the judgment of the trial court in refusing to grant a new trial on this ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2335.]

**3. SAME—REVIEW.**

No error of law is complained of, and the verdict was fully warranted by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

J. D. McDuffie was convicted of crime, and brings error. Affirmed.

E. H. Williams, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 417)

**SUTTON v. STATE. (No. 614.)**

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—APPEAL—EVIDENCE.**

The evidence demanded the verdict.

**2. SAME—HARMLESS ERROR.**

While it would have been erroneous to ask the question, "Have you stated all you wish to say about selling the liquor?" had the case been on trial before the jury, the question, even as intimating an opinion, was not prejudicial to the defendant, who was on trial before the judge without a jury.

**3. SAME—STATEMENT BY ACCUSED.**

Where a defendant is making his statement in a criminal case in which the judge is presiding without the intervention of a jury, it is not error for the court to intervene and curtail a rambling statement as to matters irrelevant to the case, after the defendant has asserted that

he has said all he desires to say with reference to the offense he is alleged to have committed, and has fully denied all connection with the alleged offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1589.]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

George Sutton was convicted of the illegal sale of intoxicating liquors, and brings error. Affirmed.

C. C. Curry and E. H. Williams, for plaintiff in error. M. B. Cannon, Sol., for the State.

**RUSSELL, J.** Judgment affirmed.

(2 Ga. App. 418)

**BURRIS v. STATE.** (No. 620.)

(Court of Appeals of Georgia. July 25, 1907.)

**1. HOMICIDE—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.**

While it is necessary, in order to sustain a verdict of guilty of assault with intent to murder, that the evidence should show such a case that, if death had ensued from the assault, the defendant would be guilty of murder, yet it is error for the court to instruct the jury that, if the defendant made an assault with a weapon likely to produce death under such circumstances as would have made him guilty of murder had death ensued, he would be guilty of the offense of assault with intent to murder. *Smith v. State*, 52 Ga. 88; *Napper v. State*, 51 S. E. 592, 123 Ga. 571, and citations; *Adams v. State*, 53 S. E. 804, 125 Ga. 11; *Shockley v. State*, 54 S. E. 692, 125 Ga. 778; *Duncan v. State*, 58 S. E. 248, 1 Ga. App. 118, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 118.]

**2. SAME.**

It is error to charge the jury in a case where the defendant has cut the prosecutor with a knife that the defendant would be guilty of the statutory offense of stabbing if the cutting was done under such circumstances as that it would have been voluntary manslaughter if death had ensued.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Jerry Burris was convicted of assault with intent to murder, and brings error. Reversed.

E. L. Stephens, for plaintiff in error. Alfred Herrington, Sol. Gen., and W. W. Larsen, for the State.

**POWELL, J.** 1. The first headnote requires no elaboration. An examination of the authorities cited will show, not only the existence of the rule, but also the sound reasons upon which it is established.

2. While Chief Justice Jackson, in his dissenting opinion in *Baldwin v. State*, 75 Ga. 489, expresses it as his view of the law, in cases of cutting with a knife, that when, if the offender had killed, it would have been manslaughter, the offense is stabbing, yet the majority opinion in that case, declaring

that since the amendment to the stabbing act the circumstances of justification are for the jury in each case, has not been questioned by the Supreme Court in later rulings, and has been expressly followed by this court in *Edmundson v. State*, 1 Ga. App. 116, 57 S. E. 947. While such a cutting cannot be assault with intent to murder, and cannot be any offense higher than that of stabbing, it is not necessarily the latter offense. See *Napper v. State*, 123 Ga. 572, 51 S. E. 592. A knife is not necessarily a deadly weapon. *Paschal v. State*, 125 Ga. 279, 54 S. E. 172. The law infers no intention to kill from the fact of the cutting, unless death actually ensues. A distinction must be kept in mind between those cases in which the jury find that the purpose of the defendant was to take the life of the person assaulted and those in which this fact does not appear to their satisfaction. In cases where the defendant has cut with a knife, or other sharp instrument, if the cutting was done with the specific intention of killing the person cut, the offense is assault with intent to murder, if the cutting was done under such circumstances that, if death had ensued, the homicide would have been murder, and in that event only. Also where the cutting has been done by the defendant with the intention of killing the person cut, if the cutting was done under circumstances that, if death had resulted, the homicide would have been voluntary manslaughter, the defendant would not be guilty of assault with intent to murder, but would be guilty of the statutory offense of stabbing. Although the cutting may have been done by the defendant with the intention of killing the prosecutor, yet, if it was done under such circumstances that, if death had resulted, the homicide would have been justifiable by reason of being committed in self-defense or under circumstances of justification, the defendant would be guilty of no offense. These rules only apply in the event that the cutting was done with deadly intent, with the intent to kill; and this intent is a specific fact to be proved in each case, though it may be inferred by the jury from the facts and circumstances of the case. If the cutting by the defendant was not accompanied with any intention of killing the person cut, the defendant is not guilty of any higher offense than that of stabbing, and his guilt or innocence of that offense is to be determined by the question whether the cutting was done in self-defense or under other circumstances of justification. Whether the stabbing is justifiable or not is to be determined by the jury in each case in light of the nature and extent of the cutting, the character of the weapon used, the provocation, if any, offered by the person cut, and all the other circumstances. While opprobrious language alone will not justify a stabbing (see *Ward v. State*, 56 Ga. 409), yet a slight cutting not intended to be deadly

may be justified by an assault or other provocation offered by the person cut, too slight to justify a homicide or a deadly assault with a knife or similar weapon.

Judgment reversed.

(2 Ga. App. 400)

**YANCEY v. STATE. (No. 567.)**

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—APPEAL—REVIEW.**

There being some evidence to support the verdict, the same will not be set aside, though evidence may have been introduced tending to impeach the state's chief witness. *Plummer v. State*, 57 S. E. 969, 1 Ga. App. 507.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3076, 3077.]

**2. INTOXICATING LIQUORS—INSTRUCTIONS.**

In a county where the sale of intoxicating liquor is prohibited by law, it is not error for the court to state directly to the jury that such is the case, instead of reading them the statute.

**3. SAME.**

No reversible error is found in the record. (Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Lee Yancey was convicted of the sale of intoxicating liquors, and brings error. Affirmed.

J. J. Forehand and T. R. Perry, for plaintiff in error. J. H. Tipton, Sol., for the State.

**POWELL, J.** Judgment affirmed.

(3 Ga. App. 445)

**MCCONNELL v. STATE. (No. 618.)**

(Court of Appeals of Georgia. Aug. 8, 1907.)

**1. DISORDERLY HOUSE—EVIDENCE—REPUTATION.**

"Reputation of a house being kept and maintained as a lewd house is admissible evidence" on the trial of a person charged with said offense. Such evidence of itself, and wholly uncorroborated, is not sufficient evidence to support a conviction for said offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 22, 29.]

**2. SAME.**

There were other facts and circumstances in evidence in this case warranting the jury in concluding that the general reputation of the house for lewdness was in fact its real character; and, there being no material error of law, the judgment refusing a new trial is affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 28-29.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Lizzie McConnell was convicted of keeping a disorderly house, and brings error. Affirmed.

Jacob Gazan and O'Connor, O'Byrne & Hartridge, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

**HILL, C. J.** Lizzie McConnell was convicted of the offense of keeping a lewd house.

Her motion for a new trial was overruled, and she brings the case to this court. The principal ground of error assigned is that the verdict is without any evidence to support it, and therefore contrary to law. To determine this question, it is necessary to consider the evidence for the state, which, briefly stated, is as follows: The defendant was a negro woman living in a house containing nine rooms, mostly bedrooms, located in what might be called the "tenderloin" district of Savannah. Living in the house with her was her son and one negro girl attendant. It was proved by several police officers in the city that the general reputation of the house was that of an assignation or lewd house, and such had been its general reputation for several years. A short time prior to the arrest of the defendant for keeping a lewd house, it was shown that she had rented a room in her house to a young white woman, who was brought there at midnight in a hack by a white man, and that, while this woman was in the house, an abortion was performed upon her, from the effects of which she died. When the officers arrested the defendant, they found in her house a white woman locked in a room upstairs, in a street dress, with her hat off, who gave them a fictitious name and address. The defendant in her statement to the jury admitted that she had rented the house in question for the purposes of keeping it as a lewd house some three or four years before her indictment, but stated that she had not kept it for such unlawful purpose for three or four years; that she had discontinued keeping it since said time for improper purposes, and lived there with her son and his wife and child until the death of the wife and child, and had continued to live there with her son until the present time. She stated that she owned the house and would have sold it, but could not get any price for it; that she made her living in the summertime by selling watermelons, and in the wintertime selling wood from a wood-yard, and from operating public hacks. It was also shown by the evidence that white men and white women frequented said house. We will first consider the special assignments of error.

1. The court permitted Murphy, a witness for the state, to testify, over the objection of defendant, that he had, in his capacity as a policeman, visited the residence of the defendant about two months prior to the date of his testimony, while he was investigating "that abortion case," meaning the case in which it was alleged that the young white woman had had a criminal operation performed upon her in the house of the defendant, from the effects of which she had died. It was insisted that this testimony was irrelevant and inadmissible, for the reason that, if an abortion had been committed in the house of the defendant, such fact was no proof that she kept and maintained a lewd house, and that the purpose or motive of the witness in



visiting the house of the defendant was further irrelevant as not being in line with the alleged purpose for which the defendant kept and maintained the house, and that such testimony tended to confuse the minds of the jury, and mislead and prejudice them against the defendant. The court, in admitting this testimony, instructed the jury that they were not to consider the evidence in reference to any alleged abortion. We think the fact that a young white woman, presumptively of immoral character, had been an inmate of said house, was a circumstance, its weight to be determined by the jury, illustrating the character of the house.

2. It is insisted that the court erred in permitting this same witness to testify for the state, over the objection of the defendant, that defendant had stated to him that she had rented a room in her house to a white woman about two weeks prior to the visit of the police officer, it being urged that this testimony was irrelevant, unless the state could show also that the reputation of the woman to whom the room was rented was that of unchastity, or that the purpose of renting the room to her was for prostitution, or that the woman committed an act of prostitution in the house; it being contended that the mere renting of the room in the house to the woman, without proof of more, was not competent evidence on the charge of keeping and maintaining a lewd house. This admission of the defendant was relevant testimony in connection with the circumstances that the woman in question was a white woman who had been brought to the house at midnight by a white man, who was not her husband or related to her, and that while in the house this woman had performed upon her an abortion.

3. It was said that the court erred in permitting a police officer as a witness for the state to testify, over the objection of defendant, that the woman to whom the room had been rented, and upon whom the criminal abortion had been committed, was not then in life, it being insisted that this testimony was calculated to mislead the jury, and to prejudice their minds against the defendant. The court, in admitting the testimony, stated to the jury that he did so for the sole purpose of explaining why the state did not produce her as a witness, it having already been shown by the testimony that defendant had rented this white woman a room in the house. The further fact that the woman was dead could not have been hurtful to the defendant.

4. Counsel for the defendant offered to prove by two of the state's witnesses that, when they went to the defendant's house to make the arrest, they found a white woman in a bedroom upstairs, who stated to them the purpose of her visit to said house, and the reason for her presence therein; she stating then and there to these officers that she had entered the house for the purpose of finding a dress maker, thinking that a dress-

maker was located therein, and that, seeing the officers coming in, she had become frightened and fled upstairs; that she was a respectable lady, and was not in said house for the purpose of lewdness. In view of the fact that in the same conversation this woman had given to the officers a name and address which was found to be fictitious, which facts were allowed to be shown in behalf of the state, we think all of this conversation should have been admitted to the jury. We do not think, however, that the refusal to admit it was such harmful error as to demand a new trial.

5. But the main point relied upon by counsel for plaintiff in error, and presented to this court with much force, is that there was no legal evidence submitted to the jury upon which a verdict of guilty of the crime charged could have been based. It is urged that there is not in the testimony of any witness a single fact based upon his own knowledge to prove the offense charged, to wit, that of maintaining and keeping a lewd house. It is insisted that the testimony given by the police officers that the defendant maintained and kept a house having the reputation of being a lewd house furnishes no evidence to support a conviction, and was inadmissible. The Supreme Court, in *Hogan v. State*, 76 Ga. 82, held that the reputation of a house being kept and maintained as a lewd house was admissible evidence on the trial of a person charged with keeping and maintaining a lewd house. It is insisted by learned counsel that this ruling is unsound and contrary to decisions of many courts of last resort on the same subject; and we are asked to certify this question to the Supreme Court for the purpose of having this decision reviewed. It is said that this evidence is admissible only where the statute makes it an offense to keep and maintain a house of ill fame. We think the words "ill fame" are used in these statutes as synonymous with the word "lewd," both meaning a house kept for the purpose of permitting the practice of fornication and adultery therein. We cannot think that it was intended to create a substantive offense in keeping a house which, justly or unjustly, had the reputation of being a house of ill fame. The offense must be the keeping of a house which was in fact, and not merely in name, a house for the practice of immorality. But we do not think it necessary to extend this discussion. We do not think the Supreme Court in the decision supra intended to hold that general reputation of a house of itself alone and uncorroborated was sufficient evidence to prove the offense, but that it was admissible as a circumstance tending to prove the fact, and, in connection with other facts and circumstances, might be sufficient to prove the existence of the offense. Construing the decision with this limitation, we see no reason to doubt its soundness, or to certify the question to the Supreme Court for review.

Without going into a consideration of the evidence, we content ourselves with the statement that there were other facts and circumstances proved, along with the general reputation of the house, which warranted the verdict of the jury. What might be called the general complexion of the place had the appearance of lewdness, and there were several leprous spots in this complexion which strongly pointed to the existence of immorality. This court cannot say that there was no evidence to support the verdict, or that the trial court abused its discretion in refusing to grant a new trial.

Judgment affirmed.

(2 Ga. App. 414)

REEVES v. STATE. (No. 599.)

(Court of Appeals of Georgia. July 25, 1907.)

HOMICIDE — EVIDENCE — VOLUNTARY MANSLAUGHTER.

A verdict of voluntary manslaughter will not be sustained as against the exception that the same is without evidence to support it, when the testimony of the witness and the statement of the defendant present only the issue whether the defendant was guilty of murder or was justifiable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074, 3084.]

(Syllabus by the Court.)

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Jack Reeves was convicted of voluntary manslaughter, and brings error. Reversed.

W. R. Jones and Hill & Culpepper, for plaintiff in error. J. R. Terrell, Sol. Gen., for the State.

POWELL, J. This court is very slow to set aside the verdict of a jury, approved by the trial judge, on the ground that there is no evidence to support it; but in this case there is not the slightest scintilla of evidence upon which the verdict rendered can legally rest. The defendant was indicted for murder, and found guilty of voluntary manslaughter. If the jury had believed the testimony of the state's witness, and the dying declarations of the deceased as detailed by his wife, a verdict of guilty of murder would have been authorized; for, according to this version of the case, the defendant committed nothing less serious than a malicious, unjustifiable, unmitigated homicide. But by their verdict the jury found that the defendant was not guilty of this offense, and, for the purposes of the trial under review, acquitted him thereof. The testimony by which a conviction of murder would have been authorized having been eliminated, the remainder of the evidence in the case shows a perfect case of justifiable homicide. There was no evidence whatever of a homicide not justifiable, and not malicious, but provoked by an assault or other equivalent circumstances to justify the excitement of passion; that is to say, of a vol-

untary manslaughter. According to the state's testimony, the defendant and the deceased were walking along in the road quarrelling. Each had a gun, but, without any more provocation than mere words, the defendant stepped to one side of the road, deliberately raised his gun, and shot the deceased, who was making no assault whatever on him. After the deceased was shot and had fallen to the ground, he raised his gun, and shot the defendant. Of course, this subsequent shot by the deceased could not justify or mitigate the defendant's offense already committed. According to the defendant's statement, corroborated by his witnesses, the deceased and a companion made a joint quarrel with him, which he sought to decline until the deceased, with the statement that he was going to shoot the defendant, jumped back, cocked his gun, aimed it and fired, the load striking the defendant, who, to repel the attack, also fired his gun simultaneously, striking the deceased and mortally wounding him. If this be the truth of the case, the killing was justifiable homicide. There is no theory of mutual combat on which the verdict can be justified. If one draws a gun on me and threatens to shoot me, no mutual combat arises by reason of the fact that I take physical issue with him and shoot first, even though I may have used approbrious words to him. *Butler v. State*, 92 Ga. 601, 19 S. E. 51; *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21. If we segregate the testimony, and take so much of the defendant's statement as asserts that the deceased and his companion were provoking a difficulty with him, whether at the immediate scene of the difficulty or earlier in the day (for there was evidence of a previous quarrel), by words and by menaces, and likewise take so much of the state's testimony as asserts that the defendant shot the deceased before he had drawn any weapon, and that the latter made no effort to shoot until after the former had mortally wounded him, the homicide would not be manslaughter; for, while in some cases words, threats, and menaces may be so circumstanced as to operate to afford a justification for a homicide on the theory of reasonable fear, yet in no case are they sufficient to reduce the offense from murder to manslaughter. *Cumming v. State*, 99 Ga. 662, 27 S. E. 177. It is true, so we find from the record, that over a month before the homicide occurred the defendant and the deceased had had a difficulty, in which the deceased gave the defendant sufficient provocation to have reduced a homicide occurring on account thereof from murder to manslaughter; but there is not the slightest suggestion in the testimony or the statement of the defendant that the homicide was the result of or was in anywise connected with this previous difficulty. In fact, from the context, it seems manifest that this testimony was used for the sole purpose of showing the violent char-

acter of the deceased. In fact, after a close, careful scrutiny of the record, we find no evidence of a voluntary manslaughter. The verdict was manifestly a compromise. Such compromises, whereby the jurors give up their deliberate convictions and honest differences over the question of the defendant's guilt of the only crime in issue under the testimony, and compromise by convicting him of another offense of which he is manifestly not guilty, is unlawful, is unfair to the state and unfair to the accused. In this connection, note the typic case of *Reed v. State* (No. 459), 58 S. E. 312. It is true that the court gave the jury instructions on the law of voluntary manslaughter, and no exception is taken thereto. However, this does not prevent the verdict being as a matter of law without evidence to support it, and exception is duly taken on that ground.

Judgment reversed.

(2 Ga. App. 394)

**WILLIAMS v. STATE.** (No. 526.)

(Court of Appeals of Georgia. July 25, 1907.)

**1. BURGLARY—DWELLING HOUSE—EVIDENCE.**

In the absence of any proof to the contrary, the jury in a burglary case are authorized to infer that a building described as the "home" of the prosecutor is a dwelling house.

**2. SAME—EVIDENCE.**

The evidence amply warranted the verdict rendered, and no reversible error of law is assigned.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Charles Williams was convicted of burglary, and brings error. Affirmed.

Gordon & Charlton, for plaintiff in error.  
W. W. Osborne, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 417)

**BROWN v. STATE.** (No. 612.)

(Court of Appeals of Georgia. July 25, 1907.)

**1. WEAPONS—CONCEALED WEAPONS—EVIDENCE.**

A person who has a pistol in his pocket in such a manner that those standing in full view of the defendant's person cannot see it is not carrying it in that open manner and fully exposed to view contemplated by Pen. Code 1895, § 341.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, § 9.]

**2. CRIMINAL LAW—APPEAL—REVIEW.**

The errors of law assigned are not meritorious, and the evidence amply authorized the verdict.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Sim Brown was convicted of carrying a concealed weapon, and brings error. Affirmed.

M. C. Few, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and E. W. Butler, Sol., for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 413)

**SMITH v. STATE.** (No. 598.)

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—VENUE—EVIDENCE.**

The venue is a jurisdictional fact, and a conviction is unauthorized unless the venue be established clearly and beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1278.]

**2. SAME—EVIDENCE.**

The venue, as any other fact in a case, may be proved by circumstantial evidence, as well as by direct proof, but numerous decisions of the Supreme Court, by which the Court of Appeals is bound, compel a holding that the evidence in this case does not disclose sufficient circumstances to adequately establish that the crime charged was committed in the county alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1277.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Jim Smith was convicted of crime, and brings error. Reversed.

John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

RUSSELL, J. The only question in this case is whether the venue is sufficiently proved. It is insisted by plaintiff in error that it is not proved beyond a reasonable doubt, and by the state that it is established by circumstances. Venue can be proved by circumstantial evidence, just as any other fact may thus be established. Were the question a new one, and to be determined by us as an original proposition, we would perhaps hold that the circumstances in this case ought to satisfy a jury beyond any other reasonable conclusion that the car was broken into in the county of Bibb, and that the jurisdiction of the court was thus proved, because it appears that the car was left at the Southern yard in or near Macon, and this court would feel authorized to take judicial cognizance of the geographical extent of Bibb county, and of the location of the city of Macon therein. But in view of the holding in *Gosha's Case*, 56 Ga. 36, and *Moye's Case*, 65 Ga. 754, we are constrained to hold that the venue in this case was not sufficiently shown, and that for failure of proof of this jurisdictional fact the case must be remanded for another trial. In both of those cases it is held that the venue of the crime must be established clearly and beyond all reasonable doubts. In *Gosha's Case* the proof was that the crime was committed within 50 yards of a residence which was in Sumter county. And in view of the locality in which the crime was committed, and the nature of the crime, this would seem

to be sufficient. But the Supreme Court thought otherwise, Jackson, J., delivering the unanimous opinion of the court. In *Moye's Case* the proof showed that the crime was committed in the lumber yard of a Mr. Sloan in the city of Americus, and yet the Supreme Court again held that this was not sufficient to prove that the offense was committed in Sumter county. In *Cooper's Case*, 106 Ga. 120, 32 S. E. 23, the proof showed that the difficulty occurred in front of a certain store in Lawrenceville, the county town, and it was again held that the venue was not sufficiently proved.

The most that the evidence in this case shows, with reference to the venue, is that the car alleged to have been broken was left in the Southern yard in Macon, and may have been broken into there. Under the decisions above referred to there was no sufficient proof that the crime, if committed by the defendant, was committed in Bibb county. While we are constrained to make this ruling, we would suggest legislation to the effect that a new trial should not be required to be granted upon the ground that the venue has not been sufficiently proved, unless the point be insisted upon at the trial and before verdict.

Judgment reversed.

(2 Ga. App. 389)

McCAIN v. STATE. (No. 522.)

(Court of Appeals of Georgia. July 25, 1907.)

1. SUNDAY — VIOLATION OF SUNDAY LAW — BARBERS.

A barber who pursues the work of his ordinary calling on the Lord's Day by shaving the members of a club at a room in the clubhouse, and receives compensation therefor, violates Pen. Code 1895, § 422.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Sunday, § 6.]

2. SAME—EVIDENCE.

The criminal character of such act is not affected by the fact that the compensation for said work is not compulsory, but voluntary; nor by the fact that the work is confined to members of the club.

3. SAME—JUDICIAL NOTICE.

The courts will judicially recognize that shaving by a barber is not a work of necessity permitted by the statute to be done on the Sabbath Day.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 715.]

4. SAME—EVIDENCE.

The verdict having been demanded by the undisputed evidence, the errors of law complained of were immaterial and harmless.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Slaughter McCain was convicted of a violation of the Sunday law, and brings error. Affirmed.

W. J. Nunnally and Denny & Harris, for plaintiff in error. W. H. Ennis, Sol., and Seaborn & Barry Wright, for the State.

HILL, C. J. The plaintiff in error was convicted of the violation of Pen. Code 1895, § 422. The judgment overruling his motion for a new trial is brought to this court for review. The undisputed evidence, substantially stated, is as follows: He was a barber, pursuing his business and work of his ordinary calling during the week in a shop in the city of Rome. On Sundays he went to the house occupied by the Elks Club, and in a room set apart for the purpose he shaved members of the club, receiving therefor whatever the members saw fit to give him. No other persons except members were shaved, and no compulsory charge was made, but the amount paid by the members was 25 cents a shave. It was also shown that some of these members, on account of being engaged all day Saturday, could not conveniently get a shave on said day, and, in order to present a decent appearance in attendance at church, they thought it necessary to get a shave on Sundays. It is insisted by the plaintiff in error that under this evidence there was no violation of section 422 (1) because there was no consideration demanded for the work; (2) because the shaving of the members of the club, under the evidence, was a work of necessity; (3) because the plaintiff in error was not engaged in the work of his usual and ordinary calling at his usual place of business, but the shaving in question was occasional and performed at a private house and confined to the members of the club, who were not able, for reasons stated, to get a shave on Saturday. Error is also assigned to the ruling admitting as evidence a former indictment for the same offense against the plaintiff in error, and the plea of guilty thereon, and, also, that the court erred in not instructing the jury that the burden was on the state to show that the act charged was not a work of necessity or charity.

1. Since colonial days it has been the policy of the state of Georgia to prohibit all persons from using the Sabbath as a day of labor, or from pursuing their ordinary calling on said day. By an act of the colonial Legislature of March 4, 1762, it was provided: "No tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary calling on the Lord's Day or any part thereof (works of necessity or charity only, excepted)." Cobb's Digest of Laws, p. 853, § 2. This colonial act is in the exact language of the statute of 29 Charles II, c. 7. Section 422 of the Penal Code of 1895 is a substantial codification of this act. The terms of the statute are very broad. They not only forbid the pursuit of secular business, but forbid any work of ordinary calling on the Lord's Day, except works of necessity or charity. It makes no sort of difference that the secular business is not carried on on Sunday at the usual place of business. If the work is that of his ordinary

calling, and is occasionally performed by the defendant at a different place, he violates the statute. The law not only closes the business places of secular employment during the Sabbath, but stops on said day work of ordinary calling, whatever that work may be or wherever that work may be done. The purpose of the law is to require cessation from labor, and to set apart one day as a day of rest as essential to the physical and moral well-being, not only of the individual, but of society. It cannot be doubted that the plaintiff in error in shaving his customers at the rooms of the club did pursue the work of his ordinary calling. It was simply a change of location, but the work was the same as pursued on week days at his place of business. Neither can it be doubted that this work was done by him because of the compensation paid by the members. The fact that the work in question was confined to the members of the club, and was performed in the clubhouse, may reduce the flagrancy of the offense, but cannot alter the express terms of the law. The work on Sundays was possibly not so active and constant as the defendant's work on week days. Still, shaving was the work of his ordinary calling. "Those things that are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of the man exercising such trade or business." *Reed v. State*, 119 Ga. 563, 46 S. E. 837.

The contention of the plaintiff in error that the work of shaving the members of the club was a work of necessity, because such members, by reason of their occupation on Saturdays, could not get a shave, and cleanliness demanded a daily shave, cannot be reasonably upheld. While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still this fact does not make shaving necessary or the work of the barber one of necessity. The statute makes no exception in favor of a man who cannot shave himself, or who cannot conveniently procure some one to shave him on a week day. Many states have statutes expressly prohibiting the opening of barber shops on Sundays, and expressly declaring that shaving is not an act of necessity. But it needs no decision of the courts or the declaration of the statute to convince men of ordinary intelligence and experience that shaving is not a work of necessity within the meaning of that term as constituting the exception in the statute now under consideration.

2. We think the court committed an error in permitting the introduction of an indictment against the defendant, and his plea of guilty thereon, for a similar offense, and if there were any doubt, under the uncontradicted evidence in this case, of the defendant's guilt, such error would be reversible;

but, in view of the facts of this case, this error was immaterial and harmless.

3. It is a general rule that the state must affirmatively show that the act of the accused on which a criminal charge is based does not fall within an exception made by the statute. In this case, however, the business or work of the plaintiff in error was proved. The character of such work is peculiarly within the experience and knowledge of all men, and the jury knew as well as any witness could tell them whether this work was a work of necessity or charity. The court in the charge left it to the jury to say whether the work in question was one of necessity or not, and we think the jury could determine this fact without the opinion of any witness. Indeed it has been held, and we think correctly so, that the court will take judicial notice that the shaving of his customers by a barber is a worldly labor or work done by him in the course of his ordinary calling, and is not within the exceptions of the statute. *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555.

We are clear that under the undisputed facts of this case the plaintiff in error was guilty of violating Pen. Code 1895, § 422, and that the evidence demanded the verdict against him. His offense was not a very flagrant violation of the law, but it was a violation. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty, but, whether it is or not, it is certain that the Legislature of Georgia has prescribed it as a civil duty, and makes a violation of this duty a criminal offense.

Judgment affirmed.

(2 Ga. App. 361)

WOODRUFF et al. v. HUGHES. (No. 405.)  
(Court of Appeals of Georgia. July 18, 1907.)

# 1. CONSPIRACY—CIVIL LIABILITY—GIST OF OFFENSE.

Where civil liability for a conspiracy is sought to be imposed, the conspiracy of itself furnishes no cause of action. The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff and the damage thereby done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 4, 5.]

# 2. SAME—DEFINED.

A conspiracy is the combining of two or more persons for the purpose of doing something unlawful, oppressive, or immoral, as a means or an end. The allegation and proof of conspiracy is important to the action only because it will enable the plaintiff to recover his damages in case the conspiracy can be proved, not only from the actual participants engaged in committing the injury, but also from those defendants who conspired to accomplish it, although neither present nor participating. An averment that the acts alleged were done in pursuance of a conspiracy does not change the nature of the action, but it may be pleaded and proved as aggravating the wrong of which the plaintiff complained, and to enable him to recover against all the conspirators as joint tort-feasors, or (in case no conspiracy be shown) that the plaintiff may

still recover against such of the defendants as may be guilty of the tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 1, 2.]

### 3. SAME — ACTIONS — EVIDENCE — SUFFICIENCY.

In an action on the case for conspiracy, the allegation with reference to the combination, conspiring, and concert of action are mere matters of inducement leading up to the relation of the acts from which conspiracy may be inferred. To show conspiracy, it is not necessary to prove that the parties met together or entered into any specific or formal agreement, or that by words or writing they formulated their unlawful objects. Proof that two or more persons, either positively or tacitly, come to an understanding that they will accomplish an unlawful design, or a lawful design unlawfully, is sufficient.

### 4. PLEADING — CONCLUSIONS OF LAW FROM FACTS ALLEGED.

Possession of realty is presumed to be lawful until the contrary appears, and, where possession is alleged, that such possession is lawful is such a conclusion as can properly be pleaded.

### 5. SAME—MATTER OF EVIDENCE.

In neither petition nor answer is an exhaustive statement of the exact evidence upon which a party will rely in the establishment of his contentions required. On the contrary, so far as matters of inducement and other minor matters are concerned, a clear, brief statement of immaterial matters (the briefer the better) is to be commended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 31.]

### 6. SAME.

There was no error in overruling the demurrer.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. A. Hughes against G. W. Woodruff and others. G. W. Woodruff was dismissed for want of proper service, and from a judgment for plaintiff the other defendants bring error. Affirmed.

Payne, Jones & Jones, for plaintiffs in error. R. B. Blackburn and Westmoreland Bros., for defendant in error.

RUSSELL, J. J. A. Hughes brought suit in the city court of Atlanta against G. W. Woodruff, E. Woodruff, J. C. Gentry, Robert P. Jones, and Winfield Jones, to recover damages for an alleged conspiracy to oust the plaintiff from the lawful possession of certain premises. Some time after the institution of the suit, G. W. Woodruff was dismissed as a party defendant, on account of failure to properly serve him with copy process. To the original petition, the defendants, jointly and severally, demurred generally, as well as specially. The demurrer, on being heard before his honor, Judge Reid, was overruled. To the order overruling said general and special demurrers, the defendants except. The petition alleges, in substance, that on the 3d of February, 1906, the plaintiff was in lawful possession of a certain house and lot in the city of Atlanta, known as "No. 16 Railroad street," having been in lawful possession thereof from the 10th of

January, 1906, up to and including the 3d of February, 1906; that the defendants, conspiring and confederating for the purpose of evicting the plaintiff from said premises, undertook forcibly to eject him therefrom, failing in which, one of the defendants, acting for and on behalf of the others, caused a warrant to issue against the plaintiff charging him with the offense of criminal trespass; and that under said warrant the plaintiff was arrested and carried before a magistrate, where, upon securing his recognizance bond, he was released from custody. The petition thereupon proceeds to allege that, being released from custody, the plaintiff returned to the said premises, unlocked the door, he having the keys of said house in his custody, and went into the house, and found therein and on the premises agents and servants of the defendants; that immediately thereafter and on the same day the defendants, still further carrying out the conspiracy, caused a warrant to issue charging the plaintiff with the offense of forcible entry and detainer, under which warrant plaintiff was arrested, incarcerated in jail for four or five hours, and, upon giving his bond, was finally released from custody; that, after being released the second time, the plaintiff repaired to said premises and undertook to repossess himself thereof, but was by force and violence on the part of the defendants prevented from repossessing himself of said property, and that the defendants took possession thereof and retained the same over his objection and protest; that, the warrants coming on to be heard, the magistrate dismissed them, and plaintiff was discharged from custody; that both of the warrants were sued out maliciously and without probable cause, defendants well knowing that the plaintiff was in lawful possession of said premises and had not committed the crimes charged in said warrants; that said prosecutions were pressed against him maliciously and without probable cause, there being aggravating circumstances both in act and intention in the conduct of proceedings against him; and that the plaintiff, by reason of said conduct on the part of said defendants, was greatly wounded in his feelings, held up to contempt and ridicule, and humiliated in the extreme. It is alleged that both of the prosecutions alleged were a part of one and the same scheme, conspiracy, and confederation of the defendants to oust the plaintiff from the possession of said property and gain the physical possession thereof. The plaintiff seeks punitive as well as actual damages, and asks judgment against the defendants in the sum of \$10,000.

We will first consider the general demurrer of the defendants alleging that the petition sets forth no cause of action, because, if that contention is well taken, the special demurrers need not be considered. We think the petition sets forth such a cause of action as will withstand the general demurrer. It has

been frequently said that there is no legal term of which it is more difficult to give an exact definition than conspiracy, and yet its essentials are easily enumerated. "The elements of a conspiracy are: (a) The confederating: The combining together of two or more persons. (b) The intent: For the purpose. (c) The object: Of doing something unlawful or oppressive, or immoral, as a means of an end." Eddy on Combinations, § 365, p. 238. The law of civil conspiracy is only an extension of the law of criminal conspiracy, and, as far as rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies. In a criminal conspiracy, the conspiring together is the essence of the charge. It must be either to do an unlawful act or to do a lawful act by criminal or unlawful means, but proof of the conspiracy to do either will authorize a conviction. On the other hand, where civil liability for a conspiracy is sought to be imposed, the conspiracy of itself furnishes no cause of action. The gist of the action is the damage, and not the conspiracy. As said by Devens, J., in *Boston v. Simmons*, 150 Mass. 463, 23 N. E. 211, 6 L. R. A. 629, 15 Am. St. Rep. 230: "The averment of a conspiracy in the declaration does not ordinarily change the nature of the action, nor add to its legal force or effect. The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff and the damage thereby done wrongfully. Where damage results from an act which, if done by one alone, would not afford ground of action, the like act would not be rendered actionable because done by several in pursuance of a conspiracy. On the other hand, when the tort committed and the damage resulting therefrom proceed from a series of connected acts, the averment that they were done by several in pursuance of a conspiracy does not so change the nature of the action, that, if the wrongful acts are shown to have been done by one only, it cannot be maintained against him alone, and the other defendants exonerated." Whether a conspiracy be civil or criminal, if the person who is the object of such conspiracy is damaged, he has his remedy in an action on a case. As pointed out in 8 Cyc. 645, the statement that the conspiracy is not itself the cause of action has two meanings: (1) That the conspiracy is executed to the injury of another; and (2) that the conspiracy will not render an act unlawful which is lawful when committed by one. But all parties to a conspiracy are jointly and severally liable for damages occasioned by the unlawful combination and acts done by any one of the conspirators in furtherance of a common object become the acts of all. Conceding, then, that an averment that the acts alleged were done in pursuance of a conspiracy does not change the nature of the action or add anything to its legal effect, the allegation and proof of conspiracy is important to the action only because it will

enable the plaintiff to recover his damages against such of the defendants as may be shown to be guilty of the tort, even should he fail to prove a conspiracy or concerted design; and it may be pleaded and proved as aggravating the wrong of which the plaintiff complains and to enable him to recover against all the defendants as joint tort-feasors. If the conspiracy can be proved, the party wronged may look beyond the actual participants in committing the injury and join with them as defendants whoever conspired to accomplish it. "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but, if the party be damaged, the action will lie." *Savile v. Roberts*, 1 Ld. Raym. 874.

In passing upon the general demurrer, then, only two questions need be considered: Were sufficient facts alleged in the petition to set forth and constitute a conspiracy within the above definition? And does it appear that the plaintiff was damaged by reason thereof? If both of these questions be answered in the affirmative (as we think they should be), then there was no error in overruling the general demurrer. The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. It has even been held that, when it becomes necessary to prove a conspiracy in order to connect the defendant with the wrong complained of, no averment of the conspiracy need be made in the pleadings to entitle it to be proved. *Parker v. Huntington*, 2 Gray (Mass.) 124. Less certainty is required in setting out matters of inducement than in setting out the gist of the action. We think, therefore, that paragraph 3 of the plaintiff's petition sufficiently sets forth a conspiracy between the defendants to enable him, if he can, to hold all of them liable as joint tort-feasors, and to aggravate and increase his damages should he be found to be entitled to any. The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances. The rule is to allow great latitude in setting out in the complaint the particular act upon which the conspiracy is to be inferred, and even to allow individual acts of the conspirators to be averred. "To show conspiracy, it is not necessary to prove an express contract or agreement to the parties thereto. The essential element of the charge is the common design; but it need not appear that the parties met together either formally or informally, or entered into any explicit or formal agreement, nor is it essential that it should appear that either by words or by writings they formulated their unlawful objects. It is sufficient that two or more persons in any manner either positively or tacitly come to a mutual

understanding that they will accomplish the unlawful design. And any one, after a conspiracy is formed, who knows of its existence and purposes and joins therein, becomes as much a party thereto as if he had been an original member." 1 Eddy on Comb. § 368. The petition, then, sufficiently alleged "the combining together of two or more persons." It also alleged the intent (for the purpose) of evicting plaintiff from the premises described. Then was the object of their conspiracy, either in the means used or in the end sought to be attained, unlawful, oppressive, or immoral? According to the allegations of the petition, the means used to accomplish the eviction was the unlawful and malicious use of legal process. According to those allegations, two warrants without any foundation were sworn out against the plaintiff. He was twice arrested, was confined in jail, and subjected to humiliation without cause. If these allegations be true, even if the defendants had the right to the possession of the premises, they used unlawful and immoral means to obtain it. If this action was taken in pursuance of a common intent, understanding, or design, all who participated in the acts alleged would be liable. If the proof failed to show conspiracy, then any one guilty of either of the unlawful means by which petitioner was damaged (if he was damaged as alleged) should respond. In view of what has been said above, there was no error in overruling the general demurrer. The conspiracy was sufficiently alleged. It is immaterial whether the act which it is alleged the defendant intended to do was or was not unlawful, oppressive, or immoral. "Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, or immoral; or (b) something that is not unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means; or (c) something that is unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means." 1 Eddy on Comb. § 171. The means alleged, in either event, were unlawful and oppressive. The damages were such as were connected with and would naturally flow from the tortious acts alleged. The damages being the gravamen of the action, the act or acts causing such damages are required to be set forth with particularity; but no complaint is made upon this score by defendants, and, indeed, we think there is no room for such complaint.

The defendants demurred specially as follows:

(1) To the allegation in paragraph 2 of the petition, that plaintiff was in lawful possession of a certain house and lot in the city of Atlanta, etc., on the ground that the allegation is a mere conclusion of the pleader and not based upon any alleged facts to substantiate it; and to the allegation in the same paragraph with reference to the length of time which plaintiff's lawful possession is

stated to have existed, upon the same ground; and because it is not shown, by the allegation of said paragraph alone or in conjunction with other paragraphs of the petition, by virtue of what authority, right, interest, or title, or by consent or authority of what person holding title or right of possession of said premises the plaintiff was in lawful possession of said premises. We think that this demurrer was properly overruled, because, if it is specific enough to reach the word "lawful" as being the conclusion of the pleader, it would not be well taken, because possession is presumed to be lawful until the contrary appears, and the statement that the possession was lawful would be such a conclusion as naturally followed the statement of possession. For the same reason, it is not necessary for the petitioner to state by what authority or title he is in possession. Indeed, from our standpoint, the matter is entirely immaterial, because it is a statement made by the way of inducement leading up to the tort alleged later in the petition.

(2, 3) The second ground of demurrer complains specially to the allegation that "the defendants each and all confederated and conspired together for the purpose of evicting plaintiff from said premises," on the ground that said allegation neither by itself, nor with conjunction with other paragraphs of the petition, alleges any circumstances upon which the conspiracy can be based. As we have already stated, the conspiracy is not the cause of action, and the statement of conspiracy is only for the purpose of aggravating the damages and of joining defendants who may have conspired, and yet have not personally participated in the acts done. This demurrer is settled by the case of *Parker v. Huntington*, above cited. And, for the same reason, the statement in the petition in regard to defendants causing Winfield Jones to appear before a justice of the peace and make oath that the plaintiff had committed the offense of forcible entry and detainer is sufficiently ample.

(4, 5) Defendants demur specially to the allegation that plaintiff "sought to repossess himself thereof, but was by force and violence, menace, and threats made by defendants, their agents and servants, prevented from repossessing himself of said property," on the ground that it is not alleged by what authority or title the plaintiff sought to repossess himself, and because it is not alleged how the parties seeking to prevent the plaintiff from entering the premises were the agents of the defendants. They also demurred specially to the allegation that "the defendants, their agents and servants, took possession thereof and retained the same," on the ground that the allegation does not show that the defendants, their agents and servants, had no authority or right to take possession of said premises. We think this special demurrer was properly overruled, not



only because it fails "to put its finger on the point" by specifically stating what further allegation should have been made, but also because no amendment was necessary. It is impossible and impracticable for a pleader to do more than state the fact upon which he relies. He is not required to insert in his petition or plea a statement of the evidence upon which he expects to rely any more than to give the names of the witnesses by whom he hopes to establish his contentions. The same ruling applies to the fifth special ground of demurrer.

(6) The sixth special ground of demurrer complains that the plaintiff fails to show any facts constituting lawful possession on the part of the plaintiff, or how the defendants could have known of such alleged lawful possession. As already stated in ruling upon the first demurrer, the insertion of the word "lawful" was a conclusion properly to be derived from the other facts stated, and could be averred. And, in the absence of proof to the contrary, the defendants would be presumed to have notice and knowledge of the character and extent of the plaintiff's possession. Defendant also demurs to the statement of the petition contained in paragraph 11, "there being aggravating circumstances, both in act and intent, \* \* \* and said acts were wanton and willful and oppressive in the extreme," the demurrer being that the allegation fails to show how the act and intent of defendants were wanton and willful, and of what the aggravating circumstances consisted. We think it clear that the aggravating circumstances and the wanton, willful, and oppressive conduct of the defendants can well be derived from the allegation with reference to the issuance of the warrant and the arrest thereunder. If those allegations are proved, the jury would have the right to infer that the act and conduct of the defendants were willful and wanton and oppressive in the extreme.

(7) The seventh special ground of demurrer, that the allegations of the petition failed to show any facts or circumstances upon which the conspiracy to oust the plaintiff from possession is based, was without merit; for, as hereinbefore ruled, no averment is necessary on the subject of conspiracy further than that one was entered into between the defendants.

(8, 9, 10) The eighth, ninth, and tenth special grounds of demurrer were properly overruled, because, although the petition may have contained the statement of facts which might have constituted separate and distinct causes of action and alleged acts done at different times, and differing in character, still each of these acts, as clearly appears from the petition, are stated to have been done in pursuance of and with a sole view to effectuate the illegal conspiracy, unlawfully to deprive the plaintiff of his possession of the premises.

The allegations of plaintiff's petition are

consistent, and will entitle him, if proved as laid, to a recovery. A conspiracy to oust him by unlawful means from premises of which he was in possession is alleged. The unlawful acts used in carrying out the intent and purpose formed are fully detailed, and his damages, flowing from these acts, are set forth.

Judgment affirmed.

(2 Ga. App. 401)

#### DURHAM v. STATE. (No. 583.)

(Court of Appeals of Georgia. July 25, 1907.)

##### 1. CRIMINAL LAW—TRIAL—REMARKS OF JUDGE.

Where it clearly appears from the evidence that the guilt or innocence of the accused depended upon whether the jury would believe the prosecutrix, it was error for the court, either by questions having reference to another case which had been withdrawn from the jury or otherwise, to say or do anything amounting to an expression of an opinion as to what the court believed to be the truth of the transaction, or as to what evidence the court attached importance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1533.]

##### 2. SAME.

The questions asked by the court and the answers thereto were prejudicial to the defendant, and such an expression of opinion on the part of the court as demands a new trial.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

John Durham was convicted of crime, and brings error. Reversed.

Perry & Williamson, for plaintiff in error. J. H. Tipton, Sol., for the State.

RUSSELL, J. The defendant was prosecuted in the committal court for carrying a concealed pistol, for pointing a pistol at another, and for the offense of rape. On the committal trial he was discharged so far as the charge of rape was concerned, but bound over to the city court of Sylvester on the other two charges. Accusations were filed in the city court, charging him with carrying a pistol concealed and with the offense of pointing a pistol at another, and an accusation was also filed against him for the offense of assault and battery, all the offenses occurring at the same time, as alleged. By consent of counsel for both sides, the defendant was put on trial for all three offenses at once, and before the same jury, who were to render separate verdicts in each case. After the prosecutrix had delivered a considerable portion of her testimony, the court, without the consent of the defendant, withdrew the accusation and charge of assault and battery from further consideration by the jury. The testimony of the prosecutrix was that the defendant came to her house a certain Sunday in December, 1905, finding that her husband was away from home, requested sexual intercourse with her, and upon her refusal, and after she had run into a crib and closed the door, took from his pocket a

pistol which had been previously concealed, and pointed it at her. According to her testimony, this transaction involved three offenses—obscene and vulgar language in the presence of a female, carrying a pistol concealed, and pointing a pistol at another. The prosecutrix further testified that the defendant again came to her house on Tuesday, December 17, 1905, broke down the door to the house, seized her, and raped her. The defendant again disclosed his pistol, which was concealed before he took it out of his pocket. Both visits to the prosecutrix's house were in the daytime; the first visit, the sun was about an hour high in the afternoon, and the latter occasion was about 2 o'clock in the afternoon. The house of the prosecutrix is in plain view of other houses. The defendant introduced a number of witnesses to show that they could have seen the house and crib he was alleged to have visited, and would have heard the noise of breaking down the door; and also introduced the testimony of a number of witnesses to prove an alibi.

The turning point in the case was whether the defendant was at the house of the prosecutrix at all on either of the occasions named. If the jury believed he was, there could be but little question of his guilt, because the testimony of the prosecutrix alone must be relied upon to establish the defendant's presence at her home; and, if it were credible on this point of contest and conflict, belief of the remainder of her story would follow as a matter of course. If, on the other hand, the defendant did not go to her house and her testimony as to that be false, the entire structure of all the charges is without foundation. When the prosecutrix had concluded her testimony as to the rape, the judge of his own motion withdrew the case of assault from the jury, and shortly afterwards proceeded to question the prosecutrix, eliciting from her evidence that she was pregnant at the time of the rape, and other facts and circumstances which it is contended were not material to the other accusations still remaining before the jury for their consideration, and which were highly prejudicial to the defendant's defense as to the other charges. In the first grounds of the motion, it is insisted that the court erred in withdrawing from the consideration of the jury the charge of assault and battery, and in using the following language in the presence of the jury: "I will withdraw from this jury the case of assault." These words were used by the court when the prosecutrix, Lucy Williams, was on the stand, and after she had testified as follows: "The first transaction took place December 3, 1905, on Sunday—I don't know what time of the day it was. I didn't have a clock. I think it was about 2 o'clock. He came in there, and asked me under my clothes. The Court: Asked you what? A. Asked me a question under my clothes. The Court: Asked you a question under your

clothes? A. Yes, sir. I told him I wasn't going to do it, and I said to him that I was going to tell my husband; and he said he didn't care, he was going to take it, and he grabbed hold of me, and I snatched loose and ran in the crib, and he pointed his pistol in there and said he was going to kill me, and he said he would see me again. He pointed his pistol at me then, and said he believed he would kill me, he didn't care. The next time he come was on Tuesday, December 17, 1905. He come up there that time, and told me to open the door, and I wouldn't do it, and he broke it open and come in there, and snatched hold of me and said he was going to kill me. I couldn't do nothing. It was in the house then. He flung me across the bed, and took it, and said, if I owned it, he would kill me. He had a pistol then, and I reckon it was the same pistol. He had it concealed. The sun was about an hour high this time. The Sunday that John went there—after he left, I didn't do nothing but stay there until my husband came, and I told him about it." The plaintiff in error insists that the court had no legal right, after the issue had been joined and evidence submitted, to withdraw the case from the jury without the consent of the accused, and that the withdrawal of the case was prejudicial to the defendant in his trial on the two remaining cases, because it tended to create in the minds of the jury the impression that the court believed the testimony of the prosecutrix, and that the defendant was guilty of all the acts testified to by the prosecutrix. And these acts, of course, constituted the two offenses upon which the defendant was still on trial. The plaintiff in error, therefore, insists that the withdrawal of the case by the court amounted to an intimation of opinion on the part of the court as to the evidence. The court evidently intended to comply with that requirement of law which requires the judges of certain county and city courts, wherever the evidence developed on the trial of a criminal case shows the defendant, if guilty at all, to be guilty of a felony, to suspend the trial and commit or bind over the defendant to the superior court. This was the evident intention of the judge, and the jury might draw from his action the inference that he believed the defendant to be guilty of the graver offense of rape, of which his court had no jurisdiction. And, if they did so believe, the conclusion would be irresistible that the defendant was guilty of the remaining charges which were still on trial, for all of the offenses were included in one transaction, dependent solely on the credibility of the prosecutrix. The action of the court in withdrawing the case, even if proper, was accompanied by such questions and suggestions as did clearly amount to an expression of an opinion that the defendant was guilty of the other two offenses for which he was being tried, and therefore demand the grant of a new trial. The questions ask-

ed by the court appear to our mind to be the natural indications of the honest indignation of an upright magistrate, and yet they were wholly immaterial on the question of the defendant's guilt of the offense of carrying a concealed pistol, and of pointing that weapon at the prosecutrix; and likewise the fact elicited by the court that the injured female was at the time of the outrage pregnant could illustrate nothing in the pistol cases, but greatly tended to impress the jury with the idea that the court was deeply moved by the enormity of the outrage which had been committed without question upon the prosecutrix. And, of course, as the prosecutrix had been raped under the most aggravating circumstances, the more aggravating those circumstances appeared, the more odious the defendant became in the eyes of the jury, and the more strongly the truth of the prosecutrix's story was clinched in the minds of the jury. Without regard to any other error assigned, the intimation of opinion on the part of the court conveyed to the jury by these questions is controlled by section 4334 of the Civil Code of 1895, and requires a reversal of the judgment refusing a new trial.

As the complaints with reference to the charge of the court are dependent wholly upon the theory that the presentation to the jury of the prejudicial matters to which we have referred was erroneous, and as it is not possible for this view again to be presented, it is not necessary that they should be considered.

Judgment reversed.

(2 Ga. App. 401)

**DURHAM v. STATE** (No. 589.)

(Court of Appeals of Georgia. July 25, 1907.)

**CRIMINAL LAW—TRIAL—REMARKS OF JUDGE.**

This case is controlled by the decision in *Durham v. State* (this day decided) 58 S. E. 555.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

John Durham was convicted of crime, and brings error. Reversed.

Perry & Williamson, for plaintiff in error.  
J. H. Tipton, Sol., for the State.

**RUSSELL, J.** Judgment reversed.

(2 Ga. App. 440)

**GOLDEN et al. v. STATE** (No. 606.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

**1. RECEIVING STOLEN GOODS—ELEMENTS OF CRIME.**

"The doctrine seems to be established that in those states in which, by statute or at common law, it is larceny to bring into the state goods stolen in another state or a foreign country, one who there receives goods with knowledge that they have been stolen in another state or country is liable to indictment for receiving the goods. This does not apply, however, in those states in which it is held that bringing in-

to the state goods stolen in another state or foreign country does not constitute larceny; for the goods must have been stolen in the jurisdiction in which it is sought to punish for the receiving."

**2. SAME—EVIDENCE.**

"Though, after committing larceny in an adjoining state, the thief brings the stolen property into this state and here carries it from place to place in a county of Georgia, he does not commit larceny in this state." *Lee v. State*, 64 Ga. 203, 37 Am. Rep. 67. It is, therefore, not a crime for one to receive in this state goods stolen in a foreign jurisdiction. Legislation making such receiving criminal is suggested.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Simon Golden and others were convicted of receiving stolen goods, and bring error. Reversed.

E. H. Abrahams and Robt. L. Colding, for plaintiffs in error. W. W. Osborne, Sol. Gen., for the State.

**POWELL, J.** The defendants were accused of the offense of receiving stolen goods, knowing them to be stolen. It was alleged that the principal thief committed a burglary in Charleston, S. C., stole the goods there, and brought them to the county of Chatham, in this state, where the defendants received them with guilty knowledge. The case comes to us on demurrer to the indictment. "The doctrine seems to be established that in those states in which, by statute or at common law, it is larceny to bring into the state goods stolen in another state or a foreign country, one who there receives goods with knowledge that they have been stolen in another state or country is liable to indictment for receiving the goods. This does not apply, however, in those states in which it is held that bringing into the state goods stolen in another state or foreign country does not constitute larceny; for the goods must have been stolen in the jurisdiction in which it is sought to punish for the receiving." 12 Cyc. 210. By express statutory provisions in some states the offense includes a receiving in one state of property stolen in another. But, in the absence of such provision, proof of a foreign larceny, it is held, will not be sufficient to establish the offense. In a jurisdiction, however, where the bringing by the thief of goods stolen in another jurisdiction is regarded as new larceny in the former, a receiver in that jurisdiction will be liable to indictment. 24 Am. & Eng. Enc. Law (2d Ed.) 46. See, also, Rorer on Interstate Law (2d Ed.) 309-320. By the decision of the Supreme Court in *Lee v. State*, 64 Ga. 203, 37 Am. Rep. 67, it is well settled that the bringing into this state of goods stolen in a sister state does not constitute a crime under the laws of this state. It follows, therefore, that a foreign larceny or burglary will not support a conviction of receiving stolen goods, although under the statutes of this state the latter of-

fense is a distinct crime from the larceny. By our Penal Code of 1895 (section 171), "if any person shall buy or receive any goods, chattels, money, or other effects, that shall have been stolen or feloniously taken from another, knowing the same to be stolen or feloniously taken, such person shall be an accessory after the fact, and shall receive the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the property." The portion of this section which relates to the punishment strengthens the argument that only larcenies and felonious takings that occur in this state are contemplated as respects the principal offender. The courts of this state could not inflict any punishment against the principal felon for his crime committed beyond her borders; and the same punishment as to the accessory after the fact in this view would be no punishment at all. See *Edwards v. State*, 80 Ga. 127, 4 S. E. 268. We think that the law should be otherwise; but, upon a careful review of the authorities in this country and in England, we are sure that it is not. Many states, recognizing this rule as existing in the absence of express statute to the contrary, have enacted laws making criminal the receiving of goods stolen in another jurisdiction. Georgia should have such a statute, but, until such a law is passed, we must enforce the rule as we find it.

Judgment reversed.

(2 Ga. App. 437)

**HALL v. STATE.** (No. 590.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

**CERTIORARI—APPEAL—RECORD.**

In order for this court to review a refusal to sanction an application for certiorari, the petition must be incorporated in the bill of exceptions or otherwise verified as a part thereof by the trial judge. An unsanctioned petition cannot be specified as a part of the record. *Lenney v. Finley*, 45 S. E. 593, 118 Ga. 719 (1); *Wood v. Tattall*, 42 S. E. 403, 115 Ga. 1000; *Tompkins v. Newman*, 47 S. E. 557, 120 Ga. 173; *Anthony v. State*, 38 S. E. 79, 112 Ga. 751; *Evang v. Bloodworth*, 31 S. E. 778, 105 Ga. 835; *Central Ry. Co. v. Whitehead*, 30 S. E. 814, 105 Ga. 492, and cases cited.

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Sam Hall was convicted of crime, and from order refusing a certiorari he brings error. Dismissed.

A. S. Way and Donald Fraser, for plaintiff in error. N. J. Norman, Sol. Gen., for the State.

**POWELL, J.** Writ of error dismissed.

(2 Ga. App. 438)

**GOODMAN v. STATE.** (No. 591.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

**1. LARCENY — AFTER TRUST — EVIDENCE — PLEADING.**

In a prosecution for larceny after trust, based on Pen. Code 1895, § 194, it is not neces-

sary to allege or prove that any demand was made for the property alleged to have been fraudulently converted before the indictment was found. Under this section, it is only necessary to allege and prove the bailment, the purpose of the trust, and the fraudulent conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 39-42.]

**2. SAME.**

No error of law was committed, and the evidence fully warranted the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164-169.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Conn, Judge.

J. B. Goodman was convicted of larceny, and brings error. Affirmed.

Robt. L. Colding and Ralford Falligant, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

**HILL, C. J.** The plaintiff in error was convicted of the offense of larceny after trust. The indictment was based on Pen. Code 1895, § 194, and charges that the defendant, "having been intrusted" by one Louise W. Brinkman as administratrix of the estate of C. J. Brinkman, deceased, with certain money, to wit, the sum of \$310.97, of the value of \$310.97, the property of said administratrix, for the purpose of applying the same for the use and benefit of said owner by safely keeping the same and delivering same over to said owner, did then and there fraudulently convert same to his own use." Other counts in the indictment charge the fraudulent conversion of separate sums of the aggregate amount embraced in the first count. The evidence clearly and fully sustained the allegations of the indictment. The bailment and the purpose of the trust were not denied. The plaintiff in error relied upon two grounds of defense: (1) That no legal demand was made upon him for the money; (2) that the money was intrusted by the prosecutor to the Commercial Collecting Agency, a corporation for whom he was acting in receiving it; and that, if any larceny was committed, it was from said corporation.

1. This indictment was probably based upon section 194 of the Penal Code. It does not allege that any demand was made, and, for a violation of this section, no demand is necessary. The offense is complete when the bailment and the fraudulent conversion are shown. *Birt v. State*, 1 Ga. App. 150, 57 S. E. 965; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63. The charge of the court that a demand was necessary was more favorable to the defendant than he was entitled to under the statute. Even if a demand as a condition precedent to prosecution was required to be proved, the evidence clearly showed that it was repeatedly made.

2. The undisputed evidence showed that the defendant was carrying on a collection agency. He operated it under the name of

the "Commercial Collection Agency." The entire business of the "Agency" was conducted by the defendant and his stenographer. While the receipts for the money were signed by the defendant and his stenographer in the name of the "Com. Col. Agency," the money was all paid to the defendant. There was no proof of any such corporation, nor does the name import corporate existence. Under the evidence, the jury were warranted in the conclusion that there was no such corporation, but that the defendant was, in fact, operating as an individual, under the term "Agency," for some occult purpose. He was intrusted with the money as an individual, he received every dollar of it into his personal possession, and he converted every dollar of it to his own use. It would be a failure of justice to allow him to escape responsibility for his individual fraudulent conversion because he perpetrated his criminal fraud in the name of a mythical corporation. The court properly excluded the oral statement of the stenographer that the "Commercial Collection Agency" was a corporation.

Judgment affirmed.

(2 Ga. App. 438)

JONES et al. v. STATE. (No. 511.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

1. INDICTMENT—JOINDER OF OFFENSES.

Offenses of the same nature may be joined in one indictment in separate counts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 420.]

2. SAME.

The offense of "keeping and maintaining a lewd house," and the offense of "keeping a common, ill governed, and disorderly house," may be joined in the same indictment in different counts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 414-418.]

3. DISORDERLY HOUSE—INDICTMENT.

A count in the indictment charging that the defendants "did keep and maintain a common, ill governed, and disorderly house, to the encouragement of idleness, drinking, and other misbehavior," is sufficiently specific, and is not demurrable because it does not definitely set out the acts constituting the "other misbehavior."

4. CRIMINAL LAW—CONFESSIONS.

The law does not favor convictions based upon confessions, and least of all upon implied confessions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1222-1226.]

5. SAME—ADMISSIONS.

Before testimony tending to show an inference of guilt is admitted to the jury as an implied confession arising from silence when an incriminating statement is made, it should affirmatively appear that such statement was addressed to the defendant, or that he was physically near enough to hear and understand the statement, and that, at the time and place when and where made, it required from him an answer or denial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 898, 899.]

6. SAME.

The verbal statement of the witness alleged to have been made in presence of the de-

fendants did not measure up to the requirements of the law necessary to show an implied confession by silence or acquiescence, and it was error to admit such statement in evidence.

7. DISORDERLY HOUSE—EVIDENCE.

"Reputation of a house being kept and maintained as a lewd house is admissible evidence." Such evidence alone, wholly uncorroborated, is not sufficient to establish the offense of keeping and maintaining a lewd house.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, § 29.]

8. SAME.

The evidence in this case as to the general reputation of the house for lewdness was fully met by proof of the good character of the only two inmates of the house, and the further fact that for 15 years no act or circumstance indicating lewdness or immorality was shown in connection with said house.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 28-29.]

(Syllabus by the Court.)

Error from Superior Court, Franklin County; J. J. Kimsey, Judge.

Annie Jones and others were convicted of keeping a disorderly house, and bring error. Reversed.

Jos. N. Worley, for plaintiff in error. S. J. Tribble, Sol. Gen., H. H. Chandler, Sol., and J. B. Jones, for the State.

HILL, C. J. 1. The indictment on which the defendants were tried contains two counts—one under Pen. Code 1895, § 391, "for keeping and maintaining a lewd house," and one under section 393, for "keeping a common, ill governed, and disorderly house." A demurrer was filed to the indictment, on the ground that it contained two separate and distinct counts charging separate and distinct crimes, not kindred in nature, and not committed in the same act and at the same time. It is well settled that different counts charging offenses of the same character may be joined in one indictment in separate counts. *Williams v. State*, 72 Ga. 180; *Hoskins v. State*, 11 Ga. 92. We think the two offenses of keeping and maintaining a lewd house, and keeping a common, ill governed, and disorderly house, are offenses of the same nature, and are properly joined in the same indictment under separate counts.

2. The demurrer to the second count on the ground that it charged the defendant with keeping said house for "the encouragement of drinking, idleness, and other misbehavior," without stating what the "other misbehavior" consisted in, was properly overruled. The words "other misbehavior" were surplusage. *Brand v. State*, 112 Ga. 25, 37 S. E. 100; *Hubbard v. State*, 123 Ga. 17, 51 S. E. 11. It would be sufficient to support a conviction under this count if the evidence showed that the defendant kept a common, ill governed, and disorderly house, to the encouragement of idleness or drinking.

3. It was shown by the evidence that the two defendants, who were sisters owning and living at said house, had on one occasion during the 15 years of their residence there-

in fled to a neighbor's for protection from the disorderly conduct of a drunken man who in that condition had entered their house. This witness was allowed to testify, over the objection of defendant's counsel, that this intoxicated man had made in their presence certain incriminating statements which they did not deny. It was shown that this man was very drunk and maudlin, and that the women were greatly frightened by his conduct. The maxim, "*Qui tacet, consentire videtur*," as held in *Rolfe v. Rolfe*, 10 Ga. 146, "is to be applied with careful discrimination," and admissions inferred from acquiescence in the verbal statements of others "should always be received with caution, and never ought to be received at all unless the evidence is of direct declarations of that kind which naturally calls for contradiction." We do not think that such testimony is admissible, unless it affirmatively appears that the incriminating statement or declaration was addressed to the defendants and they heard and understood such statement, or were physically near enough to the speaker to hear it, and that under the circumstances a denial was required and none was made. All of these essential facts were not shown; and, in any event, it would be carrying the rule very far to hold that the silence of a frightened woman to the maudlin statement of a drunken man was an implied admission of the truth of such statement. We think the admission of this verbal statement incriminating the defendants, and their failure to contradict it, was erroneous under the circumstances of the case.

4. The defendants were two sisters, living together in a house which they were charged with keeping and maintaining as a lewd house and a disorderly house. They had lived in this house for 15 years. The only testimony against them was as to the general reputation of the house. Several witnesses testified that the house had a bad reputation, and was generally reputed to be a lewd house. To meet this evidence, it was clearly shown that the defendants were women of some means, owned the house in which they lived, and had, besides, other property. It was also shown that the authorities of the town in which the house was located had had this house watched for 10 years, and not one act of lewdness or disorder was discovered in connection therewith, except that during this time on one occasion a woman was seen to kiss a man in the house. It was not shown who this man was, and it was further shown that the women had a brother and other relatives who visited them at their home. During the 15 years in which these women had lived in this house no act of immorality or improper conduct was shown against either one of them, or as taking place in said house. No evidence was offered to prove that the

two women were themselves of lewd reputation; and during the entire 15 years only three men were seen to go to said house. The Solicitor General abandoned the count for keeping a disorderly house, but relied upon the count for keeping and maintaining a lewd house; and upon this count the defendants were convicted. The conviction rests alone upon the testimony as to the general reputation of the house for lewdness. There is not one circumstance or fact in corroboration of the testimony as to the general reputation of the house, and every specific fact and circumstance tends to prove that this general reputation was not justified by the real character of the house or of the conduct and character of the two inmates. The Supreme Court, in *Hogan v. State*, 76 Ga. 82, has held that the reputation of a house being kept and maintained as a lewd house is admissible evidence in the trial of a case for this offense. The Supreme Court did not hold in that case that such evidence alone and uncorroborated was sufficient to support a verdict of guilty; and in that particular case there was other corroborative evidence, such as the lewd character of the women who lived in the house, and that men visited the house for immoral purposes. Many courts in other states have held that evidence of general reputation of the house is inadmissible in support of the charge of keeping a lewd house. *Henson v. State*, 62 Md. 231, 50 Am. Rep. 204; *United States v. Jouridine*, 4 Cranch, 338, Fed. Cas. No. 15,499; *Handy v. State*, 63 Miss. 207, 56 Am. Rep. 803; *State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821; *Nelson v. Territory*, 49 Pac. 920, 5 Okl. 512; *Wooster v. State*, 55 Ala. 217. But, as before stated, the Supreme Court of Georgia in *Hogan v. State*, supra, only decided that such testimony was admissible, but did not decide that such testimony, without any corroboration, was itself sufficient to prove the charge of keeping and maintaining a lewd house, and of supporting a conviction therefor. The testimony in this case even as to the general reputation of the house was by no means satisfactory as proving such general reputation. Such testimony seems to have been founded upon mere rumors, and not the opinion of character generally entertained by the community. "Mere rumors are, of course, not reputation. Reputation involves a notion of the general estimate of the community as a whole; not what a few persons say or what many say, but what the community generally believes." 1 Gr. Ev. (16th Ed.) 586.

After a careful analysis of the evidence in this record, we are clearly of the opinion that this verdict was without legal evidence to support it, and that a new trial should be granted.

Judgment reversed.

(107 Va. 368)

## VIRGINIA POCAHONTAS COAL CO. v. LAMBERT.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

## 1. PRINCIPAL AND AGENT—ACTS CAPABLE OF RATIFICATION.

A grantee obtained a conveyance by falsely representing to the grantor that he was the agent of a third person. The conveyance was made to the grantee in his own name, for his own benefit, and the purchase price was paid by his own money. *Held*, that the third person was not entitled to the benefit of the conveyance on the ground that he had the right to, and did, ratify the purchase:

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 622.]

## 2. TRUSTS—CONSTRUCTIVE TRUSTS—FRAUD IN PROCURING CONVEYANCE OF REAL ESTATE.

A grantee obtained a conveyance in his own name by falsely representing to the grantor that the conveyance was made for the benefit of a third person, who was in possession of the premises, and the grantor was induced to make the conveyance because of his belief that he was thereby curing defects in former conveyances to the third person. The grantee paid the purchase money out of his own funds. *Held*, that the grantee was a trustee ex maleficio for the benefit of the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 144-147.]

Appeal from Circuit Court, Roanoke County.

Suit by the Virginia Pocahontas Coal Company against George W. Lambert. From a decree for defendant, complainant appeals. Reversed and remanded.

A. A. Phlegar, for appellant. Robertson, Hall & Woods, for appellee.

BUCHANAN, J. This suit was instituted by the appellant for the purpose of compelling the appellee to convey to it the interests which he had acquired in two parcels of land lying in McDowell county, in the state of West Virginia, one containing 93 and the other 34 acres, by a conveyance from Susan J. Beavers and John Cline and wife, upon the ground that appellee had obtained said conveyance by falsely representing himself as the agent of the appellant.

The record shows that Samuel Lambert died in the year 1851, seised of several parcels of land and leaving seven children. In the partition of his real estate the 93 and 34 acre parcels involved in this suit were allotted to the decedent's daughters, Susan J. Beavers and Martha J. Cline, and his son, Thomas A. Lambert. The latter conveyed his interest to Bartley Rose, from whom by mesne conveyances the same passed to the appellant. In the year 1869 the interest of John Cline in these lands by virtue of his rights as the husband of Martha J. Cline was sold in a creditors' suit to Peter Cline. Afterwards Cline and wife, as they testify, executed a deed for her interest in the land to Alexander Beavers and Bartley Rose, who had acquired the interest sold in the creditors' suit; but this deed was not recorded and

has never been found. The interest of Alexander Beavers and Bartley Rose passed by mesne conveyances to, and is now owned by, the appellant. In the year 1867 Susan J. Beavers and her husband, Andrew J. Beavers, undertook to convey their interest in the lands to Alexander Beavers; but, the acknowledgment of the wife being insufficient, as is claimed, her interest did not pass by the deed.

By deeds dated, respectively, February 3, 1902, and March 13, 1902, a tract of 1,969 acres, and by a deed dated October 1st of the same year a tract of a little over 200 acres, were conveyed to the appellant. These parcels of land adjoined each other, and embraced the 93 and the 34 acre parcels of land involved in this suit; but it appears that the appellant did not know that they were so embraced until in March, 1903, and was not informed as to the sources of title to the 93 and 34 acre parcels until August of that year, as the appellant's agents, in examining the title to the 1,969 and the 208 acre parcels, seem to have overlooked the interest of Mrs. Cline, and the defect, or alleged defect, in the deed by which Mrs. Beavers attempted to convey her interest.

By deed dated September 29, 1902, Mrs. Cline and her husband and Mrs. Beavers conveyed to the appellee all their interest in the lands of Samuel Lambert, deceased, consisting of the 93 and the 34 acre parcels and another small tract of land, which latter is not embraced in this litigation. In May, 1903, the appellee gave the appellant a 20-day option to purchase these lands at the price of \$200 per acre, and after the option had expired the appellant sought without success to have the same extended. In August of that year the general counsel of the appellant interviewed Mrs. Beavers and Cline and wife, who informed him of their interest in and dealings with the land, and the circumstances under which they had conveyed to the appellee.

The question involved in the first error assigned is whether or not the conveyance made by Cline and wife and Mrs. Beavers was obtained under such circumstances as entitles the appellant to the benefit of the interests thus acquired by the appellee.

The appellant bases its contention that they were so acquired upon two grounds: First, that the appellee made the purchase as the avowed agent of the appellant; and, second, that he became a trustee ex maleficio because of the misrepresentations made to his grantors.

As to the first ground: The evidence satisfactorily shows that the appellee, in obtaining the conveyance of their interests from Mrs. Beavers and Cline and wife, represented that he was the agent of the appellant. This statement was false, and the purchase was made in the appellee's own name, for his own benefit, and the consideration was paid with his own money.

It is settled law that where a stranger holds himself out as the agent of another, and makes a contract or does an act for that other's use or for his benefit, the latter may ratify. But it is equally clear, we think, that where the contract made or the act done was not in that other's name, and was not intended for his use or benefit, there can be no ratification. This would seem to be necessarily so from the meaning of the word "ratify."

"Ratification," says Bouvier, in his Law Dictionary, "is an agreement to adopt an act performed by another for us."

"A ratification," says a recent text-book, "by a principal of the acts of an agent can only be effectual between the parties when the act was done by the agent on account of the principal, not on his own account or on account of a third person. Where one buys in his own name for himself, another cannot adopt the act as a principal." 1 Am. & Eng. Ency. L. (2d Ed.) 1188, 1189. It is said in a note to that work, where numerous authorities are cited, that the rule as stated in the text is that laid down in Year Book 7 Hen. IV, fol. 35, where it was held that if a bailiff take a heriot, claiming property in it himself, the subsequent assent of the lord would not amount to a ratification; but, if he take it as bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act.

In the case of *Forbes v. Hagman*, 75 Va. 168, 178, Judge Burks, who delivered the opinion of the court, in discussing the question of ratification, after stating what had been done in that case (tort), says: "This was a virtual ratification and adoption of what had been done by the agent, on the principle '*omnis ratihabilitio retrotrahitur et mandato priori æquiparatur*,' which applies as well to a tort, when done to the use or for the benefit of him who subsequently adopts it, as to a matter of contract. It was said by Lord Coke that 'he that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment.' 4 Inst. 317. So that the test of liability in such a case is said to be the consideration whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. *Broom's Leg. Max.* 873 (marg.)."

"Chief Justice Tindall," continues Judge Burks, "in *Wilson v. Tumman*, 6 Man. & G. (46 Eng. C. L. R.) 236, states the rule more fully thus: 'That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law.'"

In the case of *Garvey v. Jervis*, 46 N. Y. 310, 318, 7 Am. Rep. 335, Chief Judge Church, in discussing this question, said:

"It is a familiar rule that the ratification of an unauthorized act of an agent is equal to an original authority. *Dunlop's Paley's Agency*, 171, note 'a.' But in this case the essential element is wanting, that the act must be done for another. Here it was not so done. The most that can be claimed is that the defendant said he was acting for the plaintiff, which was false. He paid his own money, and in fact acted for himself. He was a stranger to the plaintiff, and of course under no obligation to act for him, and, as we have seen, he deprived the plaintiff of nothing to which he was entitled. No authority has been cited, and I think it is safe to say that none exists, in which any court has ever held that a false declaration of agency for another enables the latter, as against the alleged agent, to receive the benefit of an act actually performed for the latter, unless it was performed under such circumstances as to create an estoppel, or unless the assumed principal has been deprived of some legal right, or otherwise injured." See, also, *Phil., W. & B. R. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128, 130.

It is clear, as it seems to us, under the authorities and upon principle, that the appellant is not entitled to the benefit of the conveyance to the appellee upon the ground that it had the right to, and did, ratify the purchase of the lands acquired by him.

This brings us to the consideration of the question whether the purchase was made under such circumstances as to constitute the appellee a trustee *ex maleficio* for the benefit of the appellant.

While the evidence is conflicting as to the representations made by the appellee in obtaining the conveyance from Mrs. Beavers and Cline and wife, it clearly appears, from the whole testimony and from the circumstances surrounding the transaction, that he made the impression upon the grantors that he was not purchasing for himself, but for the coal company, which claimed to be the owner of the land and was in possession thereof, and that they were induced to make the conveyance because of their belief that in so conveying they were curing defects in former conveyances of the same land made by them. In other words, the record establishes the fact that the appellee secured the conveyance by causing his vendors to believe that it was made to cure defects in their former conveyances. Where a conveyance is procured under these circumstances, the grantee under settled equitable principles is held to be a mere trustee for the party really intended to be benefited by the grantor.

"In general," says Pomeroy on Eq. Jur. § 1053, "whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances,



which rendered it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein. \* \* \*

Perry on Trusts, § 181, says that "if a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him."

In 15 Am. & Eng. Ency. L. (2d Ed.) p. 1188, it is said: "So, also, if one, though not in fact the agent of another, pretends to act as his agent and thereby secures title in his own name to property in which such other has an interest, he cannot deny that he was acting as agent and claim the benefit of the purchase, but will hold the title so acquired in trust."

In the case of *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519, it was held (Mitchell, J., delivering the opinion of the court) that one who obtains a conveyance of land from a former owner by fraudulently giving him to understand that it is for the purpose of supporting an earlier defective conveyance, and thus validating the title of one who claimed thereunder, is a trustee *ex maleficio* for the latter, and that in such case the rights of the cestui que trust do not depend upon the existence of a fiduciary relation in regard to the title between him and the fraudulent grantee, nor upon the fact that he has some legal claim to the land which he could have enforced against the original owner thereof.

In the case of *Harold v. Bacon*, 36 Mich. 1, it was held that a deed fraudulently obtained from one who had before conveyed to another by a deed not of record, by false representations that it was being procured by and for the protection of the party holding under such prior unrecorded deed, did not vest in the grantee any title as against the real party for whose benefit the grantor undertook and designed to make the grant, and that such fraudulent grantee was a mere trustee for the party really intended by the grantor to be benefited.

We are of opinion that the appellee holds the property or interests acquired from Mrs. Beavers and Oline and wife in trust for the benefit of the appellant, and that the circuit court erred in not so decreeing.

The decree complained of must therefore be reversed, and the cause remanded to the circuit court for further proceedings in accordance with the views expressed in this opinion.

**Reversed.**

(107 Va. 275)

## CHILDRESS v. JORDAN.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

### SET-OFF—EQUITABLE SET-OFF.

W., having purchased his partner's interest and given his note therefor, with a deed of trust on the property, and assumed payment of a partnership liability to a third person, thereafter sold to such former partner horses and mules included in the deed of trust at an aggregate sum sufficient to have satisfied the secured debt, if all of it had been applied to its payment. W. having failed to pay the debt due the third person, and being admittedly insolvent, his former partner paid the same by applying a sufficient amount of his indebtedness to W. arising from the purchase of the horses and mules. Defendant in the meantime purchased of W. certain of the trust property, and, having refused to pay the trustee the purchase money, the latter brought suit to recover the property or its value. *Held*, that W.'s partner was entitled to set off in equity the firm debt, which, because of the insolvency of W., he was compelled to pay, against his indebtedness to W., leaving the property purchased by defendant subject to the trust deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 9-11.]

Error to Circuit Court, Montgomery County.

Action by Robert L. Jordan, trustee, against James S. Childress. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Phlegar, for appellant. Longley & Jordan, for appellee.

WHITTLE, J. The narrow question presented by this record for decision involves the correctness of the ruling of the circuit court in sustaining the application by Cowan of a certain payment in discharge of what we shall term the "Carper debt." The essential facts are as follows:

Wilson and Cowan were partners as liverymen, and the former purchased the latter's interest in the business for \$800, giving his note therefor, with a deed of trust on the property as security, and also assuming payment (among other partnership liabilities) of the Carper debt, which amounted to \$315. In February, 1906, Cowan purchased of Wilson horses and mules included in the deed of trust at the aggregate price of \$870, a sum sufficient to have satisfied the secured debt, if all of it had been applied to its payment. Wilson, who was admittedly insolvent, failed to pay the Carper debt, and the firm note was protested, and subsequently paid by Cowan June 22, 1906. In April, 1906, the plaintiff in error, Childress, bought from Wilson the trust property described in the declaration, and, having refused to pay the defendant in error, Jordan, trustee, the purchase money, the latter brought suit to recover the property, or its alternate value.

Though the action was in *detinue*, the parties waived a jury and submitted their rights to the court to be determined, as if the proceeding had been a suit in equity. Thereupon

the court sanctioned the dedication by Cowan of a sufficient amount of the money due on his indebtedness to Wilson to discharge the Carper debt, leaving a balance due from Wilson to Cowan of \$403.59. The court also fixed the value of the property bought by Childress at \$350, and rendered judgment in behalf of the plaintiff against him for that sum, to which judgment Childress brings error.

We are of opinion that, upon the foregoing facts, Cowan was entitled in equity to protection against the Carper debt out of his indebtedness to Wilson. Courts of equity always recognize the influence of insolvency on the rights of parties touching the matter of set-offs, and in adjusting transactions between them will regard the equities of the solvent party, and so accommodate their affairs as to minimize, as far as consistent with the rights of third persons, loss from that cause.

The principle is illustrated by text-writers and numerous adjudged cases. The decisions of this court on the subject will be found in notes to the case of Feazle v. Dillard, 5 Leigh (Va. Rep. Ann.) 21. In the principal case Feazle was permitted, in equity, to set off the amount of a bond on which he was surety for Dillard, who was insolvent, against his own bond to Dillard in the hands of an assignee, though not due, he having become surety before notice of the assignment.

So, in this case, Cowan's liability to pay the Carper debt having attached before the rights of Childress accrued, his superior equity must prevail.

We are of opinion that the judgment of the circuit court should be affirmed.

(107 Va. 331)

#### MORGAN v. HALEY.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

#### 1. PARTITION—ACTIONS FOR PARTITION—NATURE OF REMEDY.

Though a suit for partition, under Code 1887, § 2562 [Va. Code 1904, p. 1310], cannot be made a substitute for an action of ejectment, yet a court of equity has jurisdiction to partition land, though defendant claims title to the whole tract, where he or those under whom he claims title had joint ownership with complainant or those under whom he claims title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 53.]

#### 2. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED—COLLATERAL ATTACK.

A court of equity having the power to determine whether the case made by a bill for partition as authorized by Code 1887, § 2562 [Va. Code 1904, p. 1310], is within its jurisdiction or was in reality an action of ejectment, and having determined that question in favor of its right to exercise the jurisdiction invoked, its decree, even though erroneous, is not void, and hence cannot be collaterally attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 939.]

#### 3. COVENANTS—BREACH—EVICTION.

Where, in an action of partition against a covenantor, it was decreed that complainant

therein had a paramount title to an undivided one-sixth, that it was impracticable to partition the land, and that the same be sold, thereby compelling the covenantor to become the purchaser, as she did, or surrender the premises to another, who should become a purchaser, there was such an eviction as to constitute a breach of covenant of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 157.]

#### 4. SAME—NOTICE TO MAINTAIN OR DEFEND TITLE.

Notice alone by a covenantor to a covenantor of a suit brought against said covenantor to recover the land is insufficient to make such suit conclusive on the covenantor when sued on his covenant of warranty, but said covenantor must also be requested to appear and defend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 222, 223.]

#### 5. SAME—ACTION FOR BREACH—DAMAGES—COUNSEL FEES.

Counsel fees incurred by a covenantor in defense of the suit for her eviction cannot be recovered in an action for breach of the covenant of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 261.]

Error from Circuit Court, Lee County.

Action by Frances Haley against John D. Morgan. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

Pennington Bros., for plaintiff in error. Orr & Noel and Duncan & Oridin, for defendant in error.

BUCHANAN, J. John D. Morgan, the plaintiff in error, sold and conveyed a tract of land to Sanders Spurlock, with covenants of general warranty; and Spurlock sold and conveyed the same to Frances Haley, the defendant in error, who instituted this her action of covenant against Morgan to recover damages for the loss of a portion of the land by title paramount, as alleged in her declaration.

The first error assigned in the petition, and which raised the question as to the proper method of declaring on a lost deed, was waived in oral argument.

The second assignment of error is to the action of the court in admitting in evidence a copy of a deed, because it was not properly certified by the clerk of the court in whose office it was recorded.

The copy was attested as follows: "A copy. Teste: R. C. T. Ewing, Clerk."

If the certificate had stated that the person making it was clerk of the court in whose office the deed was recorded, or had used initials to show that fact, under the decisions of Gibson v. Commonwealth, 2 Va. Cas. 111, 120, Wynn v. Harman, 5 Grat. (Va.) 157, 165, 166, and Usher v. Pride, 15 Grat. 190, 195, 196, it would clearly have been prima facie sufficient. But whether in its present form it was admissible in evidence it is unnecessary to decide, as the judgment complained of will have to be reversed on other grounds and the case remanded for a new trial, when this question

is not likely to arise again, as the defect in the certificate, if it be one, can easily be cured.

The trial court permitted the record in the chancery cause of *Lula M. Postlewaite* against the defendant in error to be introduced in evidence for the purpose of showing the latter's eviction from that portion of the land for the loss of which she seeks to recover damages in this case. That action of the court is assigned as error, upon the ground, first, that the court which tried that cause was without jurisdiction; and, second, that the record does not show such eviction.

The ground relied on to show that the court was without jurisdiction to hear and determine that cause (which was a suit for partition) is that the defendant in error, who was the defendant in that suit, claimed title to the whole tract of land sought to be partitioned, not as joint owner with the plaintiff in that suit, but by an independent adversary title.

It is quite true, as argued, that a suit for partition under the provisions of section 2562, Code 1887 [Va. Code 1904, p. 1310], cannot be made a substitute for an action of ejectment (*Pillow v. Southwest, etc., Imp. Co.*, 92 Va. 144, 148, 23 S. E. 32, 53 Am. St. Rep. 804); but it is equally true that a court of equity has jurisdiction to partition land under some circumstances, although the defendant claims title to the whole tract, where he (or those under whom he claims title) was a joint owner with the complainant or those under whom he claims title. See *Pillow v. Southwest, etc., Imp. Co.*, supra.

Whether or not such facts and circumstances were alleged and proved in the partition suit of *Postlewaite v. Haley* as gave the court the right to try the question of title in that suit, under section 2562 of the Code, was a question to be decided in that cause. The court which heard and decided it had the power to determine whether or not the case made by the bill was within the jurisdiction of a court of equity, and, having proceeded in the case to a final decree, must of necessity have determined that question in favor of its right to exercise the jurisdiction invoked. It may have erred in its decision, but such error would not make its action void. The decree would only be erroneous at most, but conclusive until reversed or vacated. In this case neither the circuit court nor this court could determine whether or not that case was one of equitable jurisdiction without an inquiry into the facts, and, where inquiry is necessary, the decree, however erroneous, is not void, and cannot, therefore, be collaterally assailed. *Lemmon v. Herbert*, 92 Va. 653, 655-658, 24 S. E. 249, and authorities cited.

The other ground of objection to the introduction of that record in evidence is that

it did not show the eviction of the defendant in error from the land to which the court held that the complainant in that cause had the paramount title.

It appears from the record in that cause that the court decreed that the complainant had a paramount title to an undivided sixth interest in the land sought to be partitioned, that it was impracticable to partition the land in kind and lay off that interest, that the same was directed to be sold, that it was sold by a special commissioner to the defendant in error at public auction, and that the sale was reported to the court and confirmed. While there was no actual eviction of the defendant in error, she was compelled under the decree of the court to purchase that interest or surrender the possession thereof to such other person as might become the purchaser.

It is always necessary, in order to maintain an action for the breach of covenant of warranty, that there shall be an eviction, and generally there must be an actual eviction; but sometimes a constructive eviction is sufficient. One class of cases where constructive eviction is sufficient is where the premises are in the actual possession of a third party under a paramount title at the date of the conveyance. In such a case the covenantee can maintain his action, although he has never been in possession of and actually evicted from the land. *Sheffey v. Gardiner*, 79 Va. 313, and authorities cited.

Another class of cases, under "the head of constructive eviction," says *Rawle on Covenants for Title* (5th Ed.) § 142, "is that which holds that an eviction will be caused by the covenantee having compulsorily purchased or taken a lease under the paramount title, without any actual change of possession, both in cases where the validity of such title has been established by judgment or decree of a court of competent jurisdiction and under certain circumstances where it has not been established."

While the cases are not in accord on this question, the weight of modern authority and the better reason is in favor of the rule as stated by *Rawle* at least to the extent that a covenantee may maintain an action for breach of covenant of warranty where he has been compelled to purchase the paramount title, when the validity of such title has been established by the judgment or decree of a court of competent jurisdiction and ordered to be sold at public auction; for in such a case the covenantee has the right to presume that if he does not become the purchaser he will be evicted by or for the benefit of the person who does purchase at such sale. *Whitney v. Dinsmore*, 6 Cush. (Mass.) 124; *Rawle on Covenants for Title*, § 143; 11 Cyc. 1128, 1129; 8 Am. & Eng. Ency. L. (2d Ed.) 108; *Hafey's Heirs v. Birchett*, 11 Leigh (Va.) 83, 88, 89.

The next assignment of error is to the

action of the court in instructing the jury as to the character of the notice required to be given to the covenantor when suit is brought against his covenantee to recover the land, in order that the proceedings in that suit shall be conclusive upon the covenantor when sued upon his covenant of warranty.

The trial court was of opinion, and so instructed the jury, that notice given to the plaintiff in error by the defendant in error, or her agent or attorney, of the pendency of the suit and of the claim asserted therein, in time to defend the same, was sufficient to render the proceedings in that case conclusive upon the plaintiff in error.

The question involved in this assignment of error has not been passed upon by this court in any reported case. In some jurisdictions it is held that where suit is brought on a paramount claim against one who is entitled to the benefit of any of the covenants for title, and especially, it would seem, of the covenant of warranty, he can, by giving proper notice of the action to the party bound by the covenants and requesting him to defend it, relieve himself from the burden of being compelled afterwards to prove, in an action on the covenants, the validity of the title of the adverse claimant. In other jurisdictions, in order to relieve himself of that burden, it is only necessary for the party sued to give proper notice of the pendency of such action, without calling upon the party bound to defend the suit.

Mr. Rawle, in his work on Covenants for Title (5th Ed., §§ 117 to 125), upon a review of the cases, reaches the conclusion that the weight of authority is in favor of the view that there must not only be a distinct and unequivocal notice of the suit given to the party bound by the covenants, but he must also be requested to appear and defend it. And this would seem to be the better doctrine, upon reason as well as upon authority. No one, it would seem, on familiar principles, ought to be bound by a proceeding to which he is not a party actually or constructively. The covenantor is not actually a party. If upon mere notice of the suit he would be authorized to come in and assume the conduct of the defense, so far as proof of his own title was concerned, there might be, as was said in *Brown v. Taylor*, 13 Vt. 631, 37 Am. Dec. 618, "some reason for holding him bound by such knowledge. But without the assent of the defendant in the suit he has no such authority. It is *res inter alios acta*, and, if he should apply to the court for permission to defend, the defendant not having voluntarily offered it, the answer would be that he had no occasion to do so, since his rights could not be affected by the judgment." If he appears and is permitted to make defense, he is, of course, bound by the proceedings, or if properly notified and requested by the defendant to make defense, and he fails to do so, there is no hardship

in holding him bound by the proceedings in the suit. He had notice, and the right to appear and defend his title, and if he did not do so it was manifestly his own fault. 7 Rob. Pr. 150, 151.

The action of the court in holding that the defendant in error had the right to recover as part of her damages the fee (\$50) she paid her attorneys in the partition suit is assigned as error.

Neither has this question been passed upon by this court, so far as the reported cases show. In other jurisdictions the decisions of the courts are not in accord. In some, it is held that counsel fees cannot be recovered as part of the damages for breach of covenant of warranty; in others, that they may, provided the covenantor has been required to defend and has failed to do so; and in still others, that they are recoverable whenever the covenantor does not employ counsel to defend, the fact of notice or want of notice to defend being immaterial. *Rawle on Cov. for Title*, §§ 197 to 200, and cases cited.

Since the decision in the case of *Threlkeld v. Fitzhugh*, 2 Leigh, 451, the settled doctrine in this state has been that the purchaser of land upon eviction is only entitled to the purchase price paid, with interest from the date of eviction and the costs expended by him in the action in which he was evicted. *Click v. Green*, 77 Va. 827, 835; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646. The term "costs" has a well-defined legal meaning, and means those expenses incurred by parties in prosecuting or defending a suit, action, or other proceeding at law or in equity, recognized and allowed by law, and taxed against the losing party. 5 Ency. Pl. & Pr. 106, and cases cited.

The law, as a general rule, measures the expenses incurred in the management of a suit by the taxable costs. The taxable costs are the costs contemplated by those decisions, as we understand them, and not the other expenses incurred in defending the action in which the covenantee was evicted, however great they may have been. There would seem to be no more reason for allowing expenses incurred in the employment of counsel as a part of the covenantee's damages for breach of covenant of warranty than expenses incurred in visiting and conferring with counsel, finding and interviewing witnesses, and in performing all the other duties necessary in preparing the case for trial.

In the case of *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56, it was held that in an action on an injunction bond, with condition "to pay all such costs as may be awarded against the plaintiff and all such damages as shall be incurred in case said injunction be dissolved," fees paid to counsel in the injunction suit could not be recovered as damages, although the bill was a pure bill of injunction. One of the reasons given for refusing to allow the fee as damages in

that case was (quoting from the Supreme Court of the United States in the case of *Oelrichs v. Spain*, 15 Wall. [U. S.] 211, 21 L. Ed. 43) that "there is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

That reasoning applies with equal force against the allowance of attorney's fees in this case. We are of opinion that the sound, simple, and more satisfactory rule is to deny the right to recover counsel fees as part of the damages and to confine the right of recovery to the fees allowed by statute and taxed in the costs of the action in which the covenantee is evicted.

It follows, from what has been said, that the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

(107 Va. 347)

**UNITED STATES FIDELITY & GUARANTY CO. v. JORDAN et al.**

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

**1. COUNTIES—COUNTY TREASURER—BOND—LIABILITY OF SURETY—CONCLUSIVENESS OF SETTLEMENT OF ACCOUNT.**

A settlement made by a county treasurer under Code 1887, § 862 [Va. Code 1904, p. 408], requiring the treasurer at the July meeting of the board of supervisors, or as soon thereafter as may be, to settle with the board his accounts, is only prima facie evidence of the balance in his hands at the date of such settlement against a surety on his bond, conditioned that he should faithfully discharge the duties of his office, but not containing any contract of indemnity.

**2. INJUNCTION—JURISDICTION—SUMMARY PROCEEDINGS—INADEQUATE REMEDY AT LAW.**

Proceedings by notice and motion by a county treasurer to recover money alleged to be due the county from his predecessor may be enjoined by the surety of such predecessor, and the surety permitted to make his defense in a court of equity; the case being a proper one for equitable cognizance, though the surety might be able to make its defense at law.

Appeal from Circuit Court, Pulaski County.  
Bill by the United States Fidelity & Guaranty Company against E. O. Jordan, treasur-

er, and others. Decree for defendants, and complainant appeals. Reversed and remanded.

T. L. Massie, for appellant. Jno. S. Draper, S. W. Williams, D. S. Pollock, and Selden Longley, for appellees.

BUCHANAN, J. H. L. Stone was treasurer of Pulaski county from the year 1890 until the year 1900, during which time he executed six bonds, with different sets of sureties. The last of these bonds was executed July 5, 1899, with the appellant as his surety, for the remainder of the term commencing July 1st of that year, in lieu of a bond executed on the 5th day of June, 1899.

By section 862 of the Code of 1887 [Va. Code 1904, p. 408] it is provided that the treasurer shall receive the county levy in the manner required for the receipt of state revenues, and shall at the July meeting of the board of supervisors, or as soon thereafter as may be, settle with the board his accounts for that year.

Stone made settlements each year he was treasurer until November 3, 1899, when he made his last settlement with the supervisors. For the year beginning July 1, 1899, and ending June 30, 1900, and from July 1, 1900, until October of that year, when he resigned, being a defaulter, no settlement was made by him with the supervisors. These various settlements showed balances in his hands due the county on account of roads, schools, and county levies. According to the settlement of November 3, 1899, there was a large balance due on these several accounts.

To recover the moneys due the county from Stone when he resigned as treasurer, the appellee, Jordan, who succeeded him in office, was proceeding by notices and motions when the appellant instituted this suit, in which Jordan was enjoined from prosecuting the said motions. Upon a hearing of the cause the circuit court held that the settlement of November 3, 1899, showed the amount due from Stone to the county and in his hands as treasurer as of that date, and that such settlement was conclusive upon the appellant, his surety, at the time that settlement was made, and so decreed. That action of the court is assigned as error.

It is conceded that the settlement was prima facie evidence against the appellant, and it is further conceded, as we understand the argument of the appellant's counsel, that the ruling complained of is in accord with the decision of the Special Court of Appeals in *Baker v. Preston*, reported in *Gilmer*, 235. But it is insisted that that decision was wrong in principle and has been repeatedly discredited, and in fact overruled, by this court.

That case has been criticised by members of this court, but it has never been directly overruled, and the circuit court no doubt, as is argued, felt that it was its duty to follow it.

In that case, which was a motion by the Treasurer of the state against a former Treasurer who had defaulted and the sureties on his bond, it was held that the books kept by the Treasurer were conclusive evidence of the balance actually in the treasury at any time, both against the Treasurer and his sureties, so as to charge them with balances carried forward from year to year, as if those balances were actually in hand. The conclusion in that case was based upon the assumption that a judgment against the principal concludes his sureties, and for that reason the evidence on which such judgment was rendered ought also to conclude them.

In the case of *Munford v. Overseers of Poor*, 2 Rand. 313, Judge Green said that the question how far sureties are bound by a judgment or other evidence against their principal which estops or concludes him had never, so far as he was informed, been settled in this court, except in the case of *Baker v. Preston* and *His Sureties*, and that neither of the cases relied on in that case to show that a judgment against the principal was conclusive upon his sureties sustain that conclusion.

In the case of *Jacobs v. Hill*, 2 Leigh, 393, it was held that a judgment confessed by the sheriff with the assent of his deputy against the sheriff for the deputy's default, but without the knowledge of the latter's sureties, was ample evidence of the fact of the deputy's default, and charged his sureties, unless disproved by them. That decision was understood by Judge Tucker as holding that the judgment was only prima facie correct, and not conclusive against the sureties (*Henrico Justices v. Turner*, 6 Leigh, 116); but Judge Moncure, in *Crawford v. Turk*, 24 Grat. 176, 184, in construing what was decided in *Jacobs v. Hill*, said: "The proceeding was upon the official bond of a deputy sheriff, which was to some extent an indemnifying bond, and somewhat, though not precisely, like the bond in this case. It was not necessary to decide, and was not decided in that case, that the judgment against the sheriff was not conclusive against the sureties of the deputy; but it was sufficient to decide, as it was decided, that said judgment was prima facie evidence against them. The remark of Judge Carr, in delivering the opinion of the court, that 'this we think was ample evidence of the fact and charged his sureties, unless disproved by them,' was extrajudicial as to the concluding words 'unless disproved by them,' and seems in that respect to have been made without adverting to the distinction noticed by Judge Green as before mentioned" (in the case of *Munford v. Overseers*, etc., supra).

In the case of *Henrico Justices v. Turner*, supra, it was held that a verdict and judgment against an executor or administrator were not conclusive evidence against his surety. President Tucker, who dissented in

part in that case, said, in discussing the decision in *Baker v. Preston*, that it turned upon the conclusiveness of the books of the treasurer, and not upon any previous verdict or judgment against the principal, though Judge Roane relied on the two cases just cited (*Braxton v. Winslow*, 1 Wash. 31, and *Green-sides v. Benson*, 3 Atk. 248) to sustain his opinion. "That opinion," he continues, "has not been very acceptable to the profession. It was most ably combated at the time by one of the most distinguished judges of the General Court, then sitting as a member of the Special Court of Appeals which decided the cause." Judge Tucker's conclusion was that it was doubtful whether the decision in *Baker v. Preston* could be sustained upon any ground.

We have been cited to no other decision of this court, nor have we found one in our investigation, which refers to *Baker v. Preston*.

In *Cox v. Thomas*, 9 Grat. 312, 322, *Board of Supervisors v. Dunn*, 27 Grat. 608, and *Carr v. Meade*, 77 Va. 142, records showing the liability of the principal to which the sureties were not parties were held to be prima facie evidence against the sureties.

In the case of *Crawford v. Turk*, 24 Grat. 176, which was an action by a sheriff against his deputy and the latter's sureties for his default, a judgment rendered against the sheriff in an action for the deputy's default, at the trial of which the deputy was present and took part in the defense, was held conclusive, not only against the deputy, but his sureties, who had no notice of the proceeding in which the judgment was rendered. But the bond in that case provided, not only that the deputy should faithfully discharge the duties of his office, but should also indemnify and save harmless the sheriff and all other persons from all loss and damage arising from his conduct as deputy; and upon this latter provision or condition the conclusion reached in that case was largely, if not entirely, based.

A settlement made under the provisions of section 862 of the Code of 1887, ascertaining what balances due the county are in the hands of the treasurer at the date of the settlement, may be of equal, but is of no higher, dignity than a judgment rendered against the treasurer in a proceeding against him for the same indebtedness. The general rule is that judgments bind conclusively parties and privies, because privies, whether in blood, in estate, or in law, claim under the person against whom the judgment is so rendered, and, as they claim his rights, they are, of course, bound as he is. But as a general rule a judgment is not conclusive upon other persons, because it would be unjust to bind one by a proceeding in which he had no opportunity to make defense, and in which he could not appeal if dissatisfied with the judgment rendered therein. See *Munford v. Overseers*, etc., of Nottoway Co., 2 Rand.

313, 318; *Stinchcomb v. Marsh*, 15 Grat. 202, 204; *Downer v. Morrison*, 2 Grat. 250; note 2 *Smith's Lead Cas.* (5th Ed.) 683.

The true view of the law would seem to be, and the older decisions so hold, that sureties are not regarded in any sense as in privity with their principal. *Munford v. Overseers*, etc., supra; 2 *Smith's Lead. Cas.* 685; 7 Rob. Pr. 142 et seq. But in the later cases (our own, as well as those of other jurisdictions) it is held that an engagement by one man to be responsible for another creates such privity between them as to render a recovery against the latter prima facie evidence against the former. 2 *Smith's Lead. Cas.* 685, and cases cited; *Cox v. Thomas*, supra; *Board of Sup. v. Dunn*, supra; *Carr v. Meade*, supra.

While the general rule is, as stated, that none are conclusively bound by a judgment except those who were parties or standing in privity with those who were, there are exceptions to the rule as well settled as the rule itself. *Baylor v. De Jarnette*, 13 Grat. 152, 164.

Among the well-settled exceptions to the general rule, in which parties are conclusively bound by judgments in proceedings to which they are not parties, are cases of contracts of indemnity, or in the nature of contracts of indemnity, or in those cases in which a person, although not in form a party to the suit, is bound to assist in the prosecution or defense, and either does so in fact or, when called upon to prosecute or defend, as the case may be, fails to do so. See *Munford v. Overseers*, etc., supra; *Crawford v. Turk*, supra; 2 *Smith's Lead Cas.* 685, 686; 7 Rob. Pr. 150-152; *Morgan v. Haley* (decided at this term of the court) 58 S. E. 564.

None of the bonds executed by Stone were bonds of indemnity, nor in the nature of contracts of indemnity. The condition in each was that he should faithfully discharge the duties of his office or trust. We are of opinion, therefore, that the settlements made by Stone, treasurer, with the board of supervisors, were not conclusive, but only prima facie, evidence of the balance in his hands at the date of said settlements, respectively.

Having reached the conclusion that the settlements made by Stone, treasurer, under the provisions of section 862 of the Code, were only prima facie evidence against the sureties on his bonds at the date of such settlements, respectively, we are of opinion that the appellant, under the allegations of its bill, had the right to have the proceedings at law enjoined, in order that it might make its defense in a court of equity.

It may be that the appellant might have been able to make its defense at law; but it seems plain that its remedy there would have been far less adequate and complete than in equity, where all necessary accounts could be taken and the rights of all concerned ascertained and determined in a single

suit. See *National L. Ass'n v. Hopkins*, 97 Va. 167, 171, 33 S. E. 539; *Va. Min. Co. v. Wilkinson*, 92 Va. 98, 100, 22 S. E. 839.

Most of the questions raised in this case were not passed upon by the circuit court, because, in the view it took of the conclusiveness of the treasurer's settlements as to his sureties, it was unnecessary to do so. This court having reached a different conclusion as to the effect of his settlements, those questions become material; and as the oral and the written arguments here were, for the most part, devoted to the discussion of the effect of said settlements, and but comparatively little attention paid to the other questions, this court is of opinion that it would be better for all parties in interest for it not to pass upon any of the questions involved in this appeal, except the effect of such settlements and the jurisdiction of the court, but to leave all other questions open and remand the cause to the circuit court for further proceedings, where all the other questions, most of which depend largely upon matters of fact, can be carefully considered after full argument, and where, if error has been or be committed, there will be a better opportunity to have it corrected than there is in this court, whose decisions are final unless the error is discovered within the time allowed for a rehearing.

We are of opinion, therefore, to reverse the decree appealed from and remand the cause for further proceedings, to be had not in conflict with the views expressed in this opinion.

(107 Va. 323)

LIQUID CARBONIC CO. v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

CARRIERS—LIMITING LIABILITY—CLAIMS FOR DAMAGES—NOTICE.

A stipulation in a bill of lading of a carrier that, unless claims for damages are made within 30 days, the carrier shall not be liable in any event, does not exonerate the carrier from negligence, in violation of Va. Code 1904, § 1294, providing that no contract shall exempt any carrier from liability, and is a reasonable regulation, and the failure to present a claim for damages within the time prescribed relieves the carrier from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 670.]

Error to Circuit Court, Wise County.

Action by the Liquid Carbonic Company against the Norfolk & Western Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Vicars & Peery, for appellant. E. M. Fulton and C. T. Duncan, for appellee.

KEITH, P. This was an action brought in the circuit court of Wise county by the Liquid Carbonic Company, a corporation, to recover from the Norfolk & Western Railway Company for damage to certain goods which the

defendant railway company, as a common carrier, undertook to transport from Pittsburgh, Pa., and to deliver to the plaintiff at Coeburn, one of its stations in Wise county, Va.

The bill of lading contained among other provisions the following condition: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

Claim was not made in accordance with this stipulation, nor do we find in the record any evidence of waiver, or other cause why the defendant should not have relied upon it. The question fairly presented, then, is: Does it present a defense to this action?

There was a verdict for the defendant, and the plaintiff in the court below obtained a writ of error from this court; and its petition contains several assignments of error, but also states that "It is unnecessary to discuss in detail all of the foregoing assignments of error, because if the fourth assignment be well taken the judgment complained of must be reversed, and if it is not well taken the other assignments of error are immaterial." We shall, therefore, confine our consideration to this assignment, which brings up for review instruction A, given on behalf of defendant in error, as follows: "The court instructs the jury that unless they believe from the evidence that the plaintiff, or some one for it, did within 30 days after the delivery of the goods in question to Dingus & Kelly make claim for its (plaintiff's) alleged damages, and deliver such claim in writing to the agent of the defendant railroad company at Coeburn, Va., they shall find for the defendant."

By section 12941 of the Code of 1904 it is provided: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall itself be prima facie evidence of negligence, and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage or injury it may be required to pay to the owner of such property from the common

carrier, railroad or transportation company aforesaid through whose negligence the loss, damage or injury may be sustained. No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

There is a class of cases which holds that such a provision as that under consideration, while generally valid in those states not having a statute or statutes prohibiting the limitation of the common-law liability, is of no avail as against a statute which prohibits any limitation of the common-law liability.

In 6 Cyc. pp. 505, 506, it is said: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified time, such as 30 or 90 days, and that unless such notice is given there will be no liability on the part of the carrier, and such stipulations are generally upheld so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common-law liability is prohibited by statute." Cases are cited from several states in support of the text.

On the other hand, *Hutchinson on Carriers* (3d Ed.) § 442, says: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable the owner will be precluded from the right to maintain an action against the carrier unless he has presented the notice within the time stated and in the manner provided. The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible, for him to ascertain their truth. It is just, therefore, that the owner, when a loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim



according to the reasonable conditions of the contract."

A great number of cases hold that a provision identical in terms, or in some cases less favorable to the shipper than the one under consideration, is reasonable and should be enforced—among them *Simons v. Great Western Ry.*, 86 E. C. L. 804, where it was held by the Court of Common Pleas that a condition in a bill of lading was just and reasonable which provided that "no claim for damages will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered"; and *Lewis v. Railway Co.*, 5 Hurl. & N. 867, where a stipulation was held to be reasonable to the effect that "no claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered."

*Express Company v. Harris*, 51 Ind. 127, *Capehart v. S. & R. R. Co.*, 77 N. C. 355, and *Texas Cent. R. Co. v. Morris*, 16 Am. & Eng. R. Cas. 259, are to the same effect.

In *Black v. Wabash R. Co.*, 111 Ill. 351, 53 Am. Rep. 628, a bill of lading requiring notice of claim in writing within five days was held valid; the court saying: "The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants." See, also, *Sprague v. M. P. R. Co.*, 34 Kan. 347, 8 Pac. 465.

In *Pavitt v. L. V. R. Co.*, 153 Pa. 302, 25 Atl. 1107, the court sustained as valid a stipulation, in a bill of lading for the transportation of horses, providing that the shipper must make claim in writing within five days from date of unloading; the court saying: "It is settled from all the authorities that such a provision as this, inserted in a contract by a common carrier, is reasonable and will be enforced. It is proper, because the demand promptly made gives warning and enables the carrier, while evidence is attainable and recollection clear, to institute inquiry into the merits of the claim, and thus guard against fraud or overvaluation." See, also, *Armstrong v. Chicago, M. & St. P. Ry. Co.*, 53 Minn. 183, 54 N. W. 1059; *Selby v. Railroad*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *C. C. C. & St. L. Ry. Co. v. Newlin*, 74 Ill. App. 638; *American Grocery Co. v. Staten Island R. T. Co.*, 51 N. Y. Supp. 307, 23 Misc. Rep. 356; *St. Louis & San Francisco R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

Let us consider for a moment the authorities bearing upon the effect of the statute heretofore quoted upon this provision.

In *Gulf & Santa Fé R. Co. v. Trawick*, 68

Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, treating of the effect of a statute of the state of Texas upon such a stipulation, it is said: "The statutes of this state only forbidding such contracts as would limit or restrict the common-law liability of carriers, we see no reason why contracts executed upon sufficient consideration and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts."

In *Goggin v. Kansas Pac. Ry. Co.*, 12 Kan. 416, Chief Justice Kingman said: "It is undoubtedly settled that the common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract; but it seems that he cannot relieve himself from liability for his own negligence. The contract pleaded does not pretend to relieve the defendant from the consequences of his own negligence. It only stipulates that the shipper shall on his part perform certain duties."

See, also, *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385, and *Sprague v. M. P. R. Co.*, supra, where the court said: "The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages, by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

On this point see, also, *Pavitt v. L. V. R. Co.*, supra; *Case v. C. C. C. & St. L. Ry. Co.*, 11 Ind. App. 517, 39 N. E. 426; *B. & O. S. W. Ry. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

The Supreme Court of the United States, in *Southern Ex. Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, treats of this subject as follows:

"The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within 90 days, in season to enable the carrier to ascertain what the facts are, and, having made this claim, he may delay his suit.

"It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. \* \* \* A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by

the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. \* \* \* If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation, within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons, such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

We are of opinion that there was no error in the instruction complained of, that it is decisive of this controversy, and that the judgment should be affirmed.

(107 Va. 359)

**VIRGINIA & S. W. RY. CO. v. HOLLINGSWORTH.**

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

**1. APPEAL AND ERROR—REVIEW.**

Va. Code 1904, § 3271, provides the form of demurrer, and declares that in civil cases the court on motion of any party shall, or of its own motion may, require the grounds of demurrer relied on to be stated, and that no grounds shall be considered other than those so stated. A demurrer to a plea by a railroad company in abatement to the jurisdiction of the court stated as a ground therefor that, the cause of action being a transitory one, it could be brought anywhere in the state where defendant could be found. *Held* that, that ground having been stated and relied on, plaintiff was limited thereto under section 3271, and a further ground that the plea was insufficient because, though denying that the residence of defendant's president or other chief officer was in the county where suit was brought, it failed to state the residence of such president or chief officer, could not be considered.

**2. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS—JURISDICTION.**

Va. Code 1904, § 3214, provides that any action, except where otherwise especially provided, may be brought in any county or corporation wherein defendant may reside, or, if a corporation be a defendant, wherein its principal office is, or its president or other chief officer resides. Section 3215 provides that an action may be brought in any county or corporation wherein the cause of action arose, though none

of the defendants reside therein. Section 3220 provides that process against a defendant to answer in any action brought under section 3215 shall not be directed to any county or corporation than that wherein the action is brought, unless it be an action against a railroad, express, etc., company. *Held*, in an action for injuries by a passenger, that a railroad company could not be sued in a county in which the cause of action did not arise, and in which it did not have its principal office, and in which its president or other chief officer did not reside, though such cause of action was transitory.

**Error from Circuit Court, Scott County.**

Action by Maggie Hollingsworth against the Virginia & Southwestern Railway Company for personal injuries sustained while a passenger. Judgment for plaintiff, and defendant brings error. Reversed, and action dismissed.

Bullitt & Kelly and D. D. Hull, Jr., for plaintiff in error. Duncan, Mathews & Maynor and Richmond & Bond, for defendant in error.

KEITH, P. Maggie Hollingsworth filed her declaration in an action of trespass on the case in the circuit court of Scott county against the Virginia & Southwestern Railway Company, from which it appears that the defendant is a corporation organized and doing business under the laws of the state of Virginia. At the same rules to which the suit was brought the defendant filed a plea to the jurisdiction, which states that the circuit court of Scott county "ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because the defendant says that the supposed cause of the said action did not, nor did any part thereof, arise in the said Scott county, but that the supposed cause of said action, and every part thereof, did arise, if at all, within the county of Washington, and that at the time of the issuing of the said writ in this case the said defendant did not have its principal office in said county of Scott, and that it had no president or other chief officer residing in said county of Scott, and that its principal office then was, and has ever since been, in the city of Bristol, in the state of Virginia," and concludes with a verification.

The plaintiff demurred to this plea, and said "that the said plea to the jurisdiction is not sufficient in law, and for grounds for said demurrer says that this action is a transitory one, and can be brought anywhere in the state the defendant may be found."

The circuit court, being of opinion that the cause of action sued upon is a transitory one and that the defendant might be sued wherever found, sustained the demurrer and rejected the plea; and thereupon the defendant pleaded the general issue, and upon a trial before a jury there was a verdict for the defendant. This verdict was, upon motion of the plaintiff, set aside, and at a

subsequent trial there was a verdict and judgment for the plaintiff; and the case is before us upon a writ of error awarded the defendant.

So much of section 3214 of the Code of 1904 as is pertinent to this case declares that:

"Any action at law or suit in equity, except where it is otherwise especially provided, may be brought in any county or corporation—

"First. Wherein any of the defendants may reside.

"Second. If a corporation be a defendant, wherein its principal office is, or wherein its mayor, rector, president, or other chief officer resides."

Section 3215 provides that "an action may be brought in any county or corporation wherein the cause of action, or any part thereof arose, although none of the defendants reside therein." But the effect of this latter section is qualified by section 3220, which declares that process against a defendant to answer in any action brought under section 3215 "shall not be directed to an officer of any other county or corporation than that wherein the action is brought, unless it be an action against a railroad, express, canal, navigation, turnpike, telegraph, or telephone company."

The plea in abatement to the jurisdiction in this case avers "that the supposed cause of the said action did not, nor did any part thereof, arise in the said Scott county, but that the supposed cause of said action, and every part thereof, did arise, if at all, within the county of Washington." It avers that the defendant did not have its principal office in said county of Scott, and that it had no president or other chief officer residing in said county, and that its principal office then was and ever since has been in the city of Bristol, in the state of Virginia. The plea is a complete negation of the jurisdiction of the circuit court of the county of Scott with respect to the residence of the defendant, as provided in the first subdivision of section 3214, and it is equally as complete with respect to the second subdivision which refers especially to corporations; for it appears that it had no president or other chief officer residing in Scott county, and that its principal office then was and ever since has been in the city of Bristol, Va. The denial of jurisdiction under section 3215 is equally complete; for it avers that the supposed cause of action did not arise in Scott county, but that it, and every part thereof, arose, if at all, within the county of Washington. There is no room for dispute that the plea denies the existence of every fact upon which the jurisdiction of the county of Scott could be asserted. It gives to the plaintiff a better writ with respect to the cause of action, which is averred to have arisen, if at all, within the county

of Washington. It gives to the plaintiff a better writ with respect to the location of the principal office of the defendant company, which is averred to be in the city of Bristol, in the state of Virginia.

It is contended, however, upon the part of the defendant in error, that the plea is insufficient, in that, while it denies that the company had a president or other chief officer residing in the county of Scott, it does not show the place of residence of the president or other chief officer, and in that respect fails to give to the plaintiff a better writ. In reply to this contention it is pointed out by plaintiff in error that the terms of the rule upon this subject with respect to a plea in abatement is that the plea must give the plaintiff a better writ; that the plea does give the plaintiff a better writ—indeed, two better writs; and that therefore the letter of the rule invoked has been complied with. While defendant in error insists that the plea must inform the plaintiff with respect to every court within whose jurisdiction his suit might have been properly brought.

Conceding, for the sake of the argument, that such is the law, it would avail the defendant in error nothing in this case. In section 3271 of the Code it is provided that "the form of demurrer or joinder in demurrer may be as follows: 'The defendant says that the declaration is not sufficient in law:'" Provided that all demurrers shall be in writing, except in criminal cases, and in civil cases the court, on motion of any party thereto, shall, or of its own motion may, require the grounds of demurrer relied on to be stated specifically in the demurrer; and no grounds shall be considered other than those so stated, but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial."

The plaintiff, as we have seen, filed her demurrer in writing, in which she says that "the said plea to the jurisdiction is not sufficient in law, and for grounds for said demurrer says that this action is a transitory one, and can be brought anywhere in the state the defendant may be found." The only ground here stated—the only ground which the circuit court was called upon to consider, and, as appears from its order, the only ground which it in point of fact considered—is that the cause of action, being a transitory one, could be brought anywhere in the state where the defendant could be found. That ground having been stated and relied upon, the statute expressly declares that none other shall be considered.

To meet this contention the defendant in error insists that she was not required by the court to state her grounds of demurrer, but that she did so voluntarily, and that therefore the statute does not apply; but to this contention we are unable to give our sanction. By coming forward and stat-

ing in writing her grounds of demurrer, the court and the opposite party were disarmed. It would have been a superfluous and idle thing to require the plaintiff to do that which she had already done of her own accord, and counsel and the opposing party could safely rely upon the written statement of the plaintiff as constituting the sole ground of demurrer with respect to the defendant's plea in abatement.

Defendant in error relies upon sections 7424, 7425, of Thompson's Commentaries on the Law of Corporations, from which it appears that in some of the states a corporation is held to reside wherever it exercises its franchise, and upon section 7426, from which it appears that in some of the states a corporation, for the purposes of jurisdiction, is deemed to reside throughout the entire limits of the state, and especially in those counties where it carries on its business and exercises its franchises, and is hence suable in any county where it has an agent upon whom process against it may lawfully be served. "But," says the author, "It should be carefully kept in mind that this rule is not so much a theory of the courts as to the legal situs of a corporation for the purposes of jurisdiction as it is a rule in particular states, founded on the express language of statutes, and that, in so far as the states have the same rule, it is rather a rule depending upon a concurrence of judicial decisions."

Section 7427 of the same work says: "In the absence of special statutory provisions relating to the venue of civil actions by and against corporations, it is a sound conclusion that the same rules prevail which have been established by general statutes; in other words, that the same rules prevail in the case of corporations as in the case of natural persons. It has been so held in respect of actions by corporations. So a constitutional provision requiring all civil cases to be tried in the county in which the defendant resides is held to apply to corporations as well as to natural persons."

Section 7428 states the law very nearly in accordance with our statute. "Another rule, founded entirely, it may be assumed, on constitutional and statutory provisions, is to the effect that, a corporation being a resident of the state for jurisdictional purposes, an action against it may be brought in the county where the injury, which is the special matter of the action, was done, or where the contract, which is the subject of the action, was broken, or (at the pleasure of the plaintiff) in the county where the chief office or place of business of the corporation is situated."

1. Barton's Law Practice (2d Ed.) § 9, states the general rule to be that transitory actions "may be brought against a party wherever he may be found and served with process, no matter where he may reside, or

where the cause of action arose. The statute declaratory of the jurisdiction, territorially, of the courts, provides that actions or suits, unless it be otherwise specially provided, shall be brought in any county or corporation wherein any of the defendants may reside; against a corporation wherein its principal office is, or chief officer resides; if upon a policy of insurance, wherein the property insured was situated, or the person whose life was insured resided at the date of the policy of insurance; if to recover land, or subject it to a debt, or be against a defendant who resides without, but has estate or debts due him within, this state; or be against a foreign corporation, in the county or corporation wherein such land, estate, or debts, or any part thereof, may be. \* \* \* An action may also be brought in any county or corporation wherein the cause of action, or any part thereof, may arise, although none of the defendants reside therein. But this last provision is subject to the qualification, contained in section 3220 of the Code, that process issued against a defendant under section 3215, unless the defendant be a railroad, express, canal, navigation, turnpike, telegraph, or telephone company, and in certain other cases, to answer in any action, shall not be directed to an officer of any county or corporation other than that wherein the action is brought." Further on in this same section the author remarks that "by reading sections 3214, 3215, and 3220 together, we find that an action may be maintained against a railroad, canal, turnpike, express, navigation, telephone, or telegraph company in any county or corporation in which the cause of action or any part thereof, arose, whether said corporation was incorporated by the laws of this state, or any other state or county, provided it is transacting business in this state."

In section 84, speaking of "Direction and Service of the Writ," the learned author says: "Where the defendant resides or happens to be in the same county or city where the cause of action arose, there is no difficulty about the writ, nor is there any trouble in suing a defendant in a transitory action wherever he resides. Confusion has arisen, however, where suits have been brought in a county or city where the cause of action did not arise or the defendant reside, but where he happened to be at the time of the service of the writ. In such a case the action may be defeated by a plea in abatement. But, even if the suit be instituted in the county or city where the cause of action arose, the writ cannot, except in the cases hereafter mentioned, be sent to another county or city to be served. If it be so sent the action may be defeated without plea in abatement; for the service of such a writ is simply void, and an appearance to contest it will not be regarded as

an appearance on the merits, or as a waiver of the question of jurisdiction."

We have no decision upon our statutes affecting this subject as they now stand in the Code, and we have therefore gone more fully into the subject than might otherwise have been necessary.

We are of opinion that the circuit court erred in sustaining the demurrer to the plea, and that for this error its judgment should be reversed, the plea to the jurisdiction sustained, and the suit of the plaintiff in the circuit court of Scott county dismissed.

(107 Va. 256)

#### ALBERT v. TIDEWATER RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

#### 1. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY—VARYING TERMS OF CONTRACT.

In a suit for the specific performance of a contract binding an owner to convey to a railway company a right of way 50 feet wide on each side of the center line thereof as finally located at \$100 per acre, evidence that the line of the railway had been located prior to the execution of the contract, that the owner knew thereof, and that a portion of the right of way included a part of a right of way previously conveyed by the owner to the company, was admissible to explain the ambiguity in the contract arising from the fact that the two rights of way covered part of the same land, and to show that the company should pay only for the land not previously conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2083.]

#### 2. RAILROADS—RIGHT OF WAY—CONTRACTS—CONSTRUCTION.

A railway company purchased a right of way and obtained a deed therefor. Subsequently the grantor and the company entered into a contract binding the owner to convey to the company a right of way 50 feet wide on each side of the center line thereof as finally located in consideration of \$100 per acre, and binding the company to reconvey the right of way previously conveyed to it, and providing that it should receive a specified credit for such reconveyance. The parties knew at the time of the execution of the contract that the location of the right of way therein referred to covered about half of the right of way conveyed by the deed, and that the company would acquire about 10 acres of new land and would abandon about 8 acres of the right of way conveyed by the deed. *Held*, that the company was required to pay \$100 per acre for the new land and reconvey that portion of the old right of way not used, for which it was entitled to the specified credit.

Appeal from Circuit Court, Montgomery County.

Suit by the Tidewater Railway Company against one Albert. From a decree for compulsory defendant appeals. Affirmed.

J. C. Wysor, for appellant. Robertson, Hall & Woods, A. A. Phlegar, and Jno. R. Johnson, for appellee.

**HARRISON, J.** This suit was brought for the construction and specific performance of a contract for the sale of a strip of land, bought by the appellee railway company from

the appellant as a right of way for its railroad.

It appears that in March, 1905, appellee bought and paid for a right of way for its railroad through the lands of appellant and received a deed therefor. This deed contains a provision that the appellee shall have the right thereunder to shift or change the center line of the right of way to either side a distance of not more than 20 feet at any point, and that, if any such change is made in the location of the center line, the railroad company shall, if the additional land taken be on the north side of the right of way, pay therefor at the rate of \$25 per acre, and if on the south side, at the rate of \$100 per acre. This provision shows that at the time the deed of March, 1905, was made some change in the location of the right of way therein provided for was regarded by the parties as probable.

The contract we are now asked to construe and enforce was an option contract, in writing, dated December 27, 1905, which provides that, in consideration of the appellee company adopting as a location for its railway a line crossing the lands of the appellant, he would convey to the company, upon demand, a right of way 100 feet wide—that is to say, 50 feet wide on each side of the center line of the right of way, as finally located—together with such additional land as should be required for slopes, etc.; and as an additional consideration the appellee agreed to pay the appellant \$100 per acre for each acre, to reconvey the land theretofore conveyed to the company, and to receive a credit of \$200 therefor. Under this contract the appellee had 80 days in which to elect and give notice that it would take the land, and a reasonable time thereafter to make the necessary surveys and examination of the title for an apt and proper deed, which the appellant was to execute and deliver on demand. It further appears that the appellee company, immediately after the execution of this option contract, entered upon the strip of land in question, and began the construction of its railroad, and gave notice that it required a deed therefor. The strip of land thus taken and now occupied by the appellee contains 18.76 acres, of which 8.46 acres is part of the original right of way which was conveyed to the appellee.

The contention of the appellant is that under the terms of the option contract of December, 1905, he is entitled to compensation at the rate of \$100 per acre for the whole of the 18.76 acres contained in the finally established right of way, or \$1,876, less the \$200 which the contract provides he shall pay for a reconveyance of the right of way originally adopted; that according to the strict letter of the contract he might have the right to require the appellee to establish its right of way over altogether new land and reconvey to him the whole of the old right of way, but that, inasmuch as the company has retained for its right of way a portion of the land for

which it already has a deed, he is willing to permit appellee to remain in undisturbed possession of the right of way it has taken upon the terms that it pay to him \$100 per acre for the entire strip now covered by the right of way, notwithstanding the fact that appellee had bought and paid for and already had a deed to a large portion of such strip—the theory being that, when the railroad company closed the option contract of December, 1905, the old line became, in equity, the property of appellant, and that when the new line was located, which included part of the original line, it was in its entirety a taking of appellant's land, for which it was agreed that \$100 per acre should be paid. The result of this contention would be that the railroad company would have to pay appellant \$100 per acre for land it had already bought from appellant and paid for at the agreed price of \$28 per acre.

This construction of the contract is vigorously contested by the appellee; it being insisted on its behalf that the correct interpretation of the contract and the understanding of the parties, as shown by the surrounding facts and circumstances, was that the railroad company was liable to the appellant for the 10.3 acres of new land taken by it at the rate of \$100 per acre, or \$1,030, less \$200 which the appellant must pay for the 8.46 acres of the original strip not used by appellee, which it is ready and offers to reconvey to the appellant—in other words, that, in addition to the \$448 paid for the original strip, appellant owes for the right of way last established \$830 in money and a reconveyance to appellant of 8.46 acres of the land taken in the first instance.

It appears from the record that when the contract of December 27, 1905, was made, the line of the right of way contemplated by it had been finally located for nearly four months. It further satisfactorily appears that this location was known to the appellant when the contract was made. He saw a considerable portion of each line run. He saw that the stakes, put in the ground to mark out the line, crossed at various places the two locations; and he had made a deed for the first location, which described it with minuteness. With the agent of the company, who went to his house to get the contract of December 27, 1905, he went over a large part of the last line, and at the agent's request showed him the first line, which had been somewhat obscured by the removal of stakes. Under these circumstances it cannot be doubted that when the contract of December, 1905, was executed, appellant knew that the new location occupied a large portion of the old.

It is, however, earnestly urged that the testimony taken by the appellee was for the purpose of varying a plain and unambiguous written contract, and that the objection thereto of the appellant should have been sustained.

It is undoubtedly true that parol evidence is not admissible to alter or vary the terms of a plain, unambiguous contract. But it is equally true that the light enjoyed by the parties when the contract was made can be shed upon the transaction in aid of a proper construction, where the language of the contract is ambiguous and leaves its interpreter in doubt as to the meaning and purpose of the parties. *Lowrey v. Hawaii*, 206 U. S. 206, 27 Sup. Ct. 622, 51 L. Ed. 1026; *Talbot v. R. & D. R. Co.*, 31 Grat. 685, 689.

In the case last cited Judge Burks says: "To ascertain the intent of the parties is said to be the fundamental rule in the construction of agreements (*Canal Co. v. Hill*, 15 Wall. U. S. 94, 21 L. Ed. 64); and in such construction courts look to the language employed, the subject-matter, and surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described"—citing *Nash v. Towne*, 5 Wall. (U. S.) 689, 699, 18 L. Ed. 527; *Maryland v. Railroad Co.*, 22 Wall. (U. S.) 105, 22 L. Ed. 713; *Moran v. Prather*, 23 Wall. (U. S.) 492, 501, 23 L. Ed. 121.

In the case of *Southern R. Co. v. Franklin*, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297, Judge Riely says: "It is proper to observe that a court, in construing an agreement whose language leaves in doubt its meaning as to the particular matter in controversy, in order to ascertain the intention of the parties, should have regard to the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained, as well as the language of the instrument itself, and give the agreement that construction which will effectuate the real intent and meaning of the parties as thus ascertained from the entire instrument and by reference to the circumstances attending the making of it."

In the case at bar it does not appear on the face of the contract that the old and new locations touch at any point, and if they did not touch there would be no ambiguity or dispute about the contract. But, when it appears that the two lines cover much of the same land, an ambiguity arises at once, and the question must be answered: What land did the parties intend, by the language used, should be paid for at the rate of \$100 per acre? When the court knows what the parties knew at the time the contract was made, the difficulty is easily solved. As already seen, the parties knew that the location of the new right of way covered about one-half of the old, and that the company would acquire about 10 acres of new land and abandon about 8 acres of the old, which at

\$200 in gross was less than the appellant had received for it.

We are of opinion that, when the contract is read in the light of the facts disclosed by the pleadings and the evidence adduced, it is very clear that the parties never contemplated that the railroad company was to be required to pay appellant \$100 per acre for such of its own land as it might see fit to retain and use in locating the new right of way agreed upon; the only reasonable construction of the contract of December, 1907, being that the company should pay appellant \$100 per acre for the 10.3 acres of new land acquired by it and embraced in the final location, and should reconvey to appellant that portion of the old line not used as part of the new right of way, for which reconveyance the railroad company was to have a credit of \$200.

The circuit court having reached this conclusion, its decree must be affirmed.

(107 Va. 308)

EMERSON et al. v. STRATTON et al.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

**1. VENDOR AND PURCHASER—SALE IN GROSS.**

A sale of real estate, where the quantity is referred to in the contract and the language does not plainly indicate that the parties intend a sale in gross, will be presumed, until the contrary is shown, to be a sale by the acre.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 95, 132.]

**2. EVIDENCE — PAROL EVIDENCE VARYING WRITING—DEEDS.**

Evidence to rebut the presumption on a sale of real estate, where the quantity is referred to in the contract and the language does not plainly indicate that the parties intended a sale in gross, that such sale is by the acre, and to show that the same was in gross, does not contradict or vary the deed in any particular, but merely establishes an understanding collateral to the written contract, to be governed at all events by the estimated quantity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2032.]

**3. VENDOR AND PURCHASER—SALE IN GROSS.**

That the purchase money for land is not an equimultiple of the number of acres is at least persuasive evidence that the contract was not by the acre.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 95, 132-135.]

**4. SAME—EVIDENCE—SUFFICIENCY.**

In an action to recover for an excess of land conveyed, founded on a claim of mutual mistake as to the quantity thereof, the uncontradicted evidence of the grantee held sufficient to overcome the presumption that the sale was by the acre, and to show that the quantity did not influence the price paid for the land.

**5. SAME—RECOVERY.**

Where, on a sale of land by the acre, by mutual mistake in the estimated quantity more land is included than supposed, vendor's recovery must be, in the first instance, against his immediate vendee.

Appeal from Circuit Court, Wise County.

Bill by F. A. Stratton against Albert E. Emerson and others. Judgment for complainant, and certain defendants appeal. Reversed and rendered.

Ayers & Fulton and T. E. Ellison, for appellants. Bond & Bruce and Vicars & Peery, for appellees.

HARRISON, J. This record shows that in April, 1887, J. F. Johnson and wife sold and conveyed to F. A. Stratton 83.50 acres of land, more or less, in Wise county, at \$2 per acre. It further appears that in the same month and year E. M. Fulton, as commissioner of the circuit court of Wise county, conveyed to F. A. Stratton, at the request of Mrs. Johnson, the grantor in the deed first mentioned, two tracts of land in the same county, containing 1,064.50 acres, which she had purchased for \$599.65 under a decree of the court in a chancery suit then pending. This conveyance described the land conveyed as 1,064.50 acres, more or less, and by metes and bounds, as shown by a survey thereof which Mrs. Johnson had caused to be made.

In July, 1888, F. A. Stratton and wife conveyed, by one deed, these lands to H. M. Herbert. In this deed the two tracts are described separately by the same metes and bounds already mentioned, and as containing 83.50 acres, more or less, in the one case, and 1,064.50 acres, more or less, in the other. The consideration stated on the face of this deed is the lump sum of \$5,400 for the two tracts, aggregating 1,148 acres. In December, 1894, H. M. Herbert and wife conveyed the same two tracts of land by the same description to Albert E. Emerson; the consideration stated on the face of this deed being the lump sum of \$5100, or \$300 less than the grantor had given. In December, 1898, Albert E. Emerson and others sold and conveyed the same boundary of land to N. B. Dotson, the present owner.

The bill in this case was filed in August, 1903, by F. A. Stratton, the grantor in the deed made in 1888 to H. M. Herbert, against the appellant Albert E. Emerson and others, alleging that he had recently and within the preceding year learned that the lands conveyed by him to H. M. Herbert as 1,148 acres had since been accurately surveyed and found to contain 1,267.69 acres, or 119.69 acres more than he and his grantee supposed at the time he sold and conveyed the same; that he had sold the land at  $\$4.70^{110/287}$  per acre, making the aggregate of \$5,400, which was the lump sum stated on the face of the deed to be the consideration; that at the time of the execution of the deed both he and his grantee believed that the land conveyed was only 1,148 acres, and that the true acreage and consideration was omitted from the deed by the mutual mistake of both; that the excess of land at  $\$4.70^{110/287}$  per acre would amount to \$563, with interest thereon from the date of the deed—and the prayer is that the complainant may have a decree for \$563 and interest thereon from July 2, 1888, and that the land, or so much thereof as may be necessary, shall be sold to satisfy the same.

The record shows that 20.37 acres of this land belonged by paramount title to O. M. Vicars and others, so that, if the complainant was entitled to recover at all, it could only be for an excess of 99.32 acres, instead of 119.69 acres.

The appellants, Albert E. Emerson and others, filed their answer to this bill, specifically denying that the lands were sold by the complainant, Stratton, to H. M. Herbert at the price of \$4.70<sup>110</sup>/<sub>287</sub> per acre, that such sale was by the acre, that there was any mistake by which the true acreage and consideration were omitted from the deed, and that there was any mistake whatsoever in the deed for which the same should be reformed or corrected. They further aver that they are innocent purchasers of the land, without notice of the pretended claim of F. A. Stratton to a lien thereon, which neither of them ever heard of until the institution of this suit, long after they had purchased the land, paid in full therefor, and received and recorded a deed for the same from their vendor, H. M. Herbert.

At the December term of the circuit court Ellender M. Johnson, the vendor of the land to the complainant, F. A. Stratton, was allowed to file her petition in the cause, in which she alleges that her sale to the complainant, Stratton, was by the acre; that she sold the several tracts, described as containing 1,148 acres, to Stratton at \$2 per acre—and alleging a mistake and recent discovery thereof substantially as claimed in the bill of Stratton, and claiming that by reason of the excess now shown to exist she is entitled to recover the value thereof at \$2 per acre, with interest.

The appellants filed an answer to this petition, in which they admit that petitioner sold the 83.5 acres of land, described in the deed of April, 1887, to F. A. Stratton by the acre, but they deny that the 1,064.50 acres, which was conveyed to Stratton by the commissioner at the request of petitioner, was a sale by the acre, and insist that it was a sale by the boundary. They deny generally all equities alleged in the petition, and insist that they are innocent purchasers of the land in question for a valuable consideration, without notice or knowledge of the petitioner's pretended claim.

At the November term, 1906, the circuit court decreed that the sale by Stratton to Herbert was a sale by the acre, and not in gross; that the sale by Mrs. Johnson to Stratton was also a sale by the acre, and not in gross; that the excess in acreage was 119.69 acres, less 20.37 acres; that F. A. Stratton was entitled to compensation from H. M. Herbert at \$4.70<sup>110</sup>/<sub>287</sub> per acre for such excess, and Ellender M. Johnson was entitled to compensation for the same at the rate of \$2 per acre; that Stratton had a lien on the land, except the 20.37 acres, for \$487.20, with interest thereon from July 2, 1888; and that

Mrs. Johnson was entitled to \$198.64, with interest from April 8, 1887, to be paid out of the recovery in favor of her vendee, Stratton. The decree then appointed a commissioner to sell the lands, except the 20.37 acres, or so much thereof as should be necessary unless the lien thereby established should be paid within 30 days. From this decree the present appeal was allowed.

While contracts of hazard are not invalid, they are not regarded with favor by courts of equity. Every sale, therefore, of real estate, where the quantity is referred to in the contract, and when the language of the contract does not plainly indicate that the parties intended a sale in gross, must be presumed to be a sale by the acre. *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Hull v. Watts*, 95 Va. 10, 27 S. E. 829. This presumption, however, may be met and overcome by proof that the parties agreed to be governed at all events by the estimated quantity. Such proof does not contradict or vary the deed in any particular. It merely establishes an understanding collateral to the written contract, and makes it clear that no such mistake was made as furnishes ground for relief in equity. *Blessing v. Beatty*, 1 Rob. 287; *Caldwell v. Craig*, 21 Grat. 182; *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. 390.

In the case of *Blessing v. Beatty*, supra, Judge Baldwin says: "The principle upon which equity gives relief in such cases of deficiency or excess in the estimated quantity upon the sale of land I understand to be that of mistake—whether the mutual mistake of the parties, or the mistake of one of them occasioned by the fraud or culpable negligence of the other."

The mistake must be clearly proved, especially in a case like this, where there has been so great a lapse of time and such frequent alienations of the property, founded on the assumption that there was no mistake. *Jones v. Tatum*, 19 Grat. 736.

In the case at bar no fraud is alleged or proven. The complainant founds his case upon the ground that both he and his grantee were mistaken as to the number of acres the land contained. We are of opinion that the facts established satisfactorily show that the deed of July, 1888, from F. A. Stratton to H. M. Herbert, was not intended by the parties as a consummation of a sale by the acre of the land thereby conveyed. Under the case made by the bill, Stratton sold the land to Herbert at \$4.70<sup>110</sup>/<sub>287</sub> per acre. To say the least, this is a most unusual, if not remarkable, price per acre to have been agreed upon for land. The price by the acre is not stated in the deed, but the round sum of \$5,400 is given as the consideration for the land conveyed. When the purchase money for land is not an equimultiple of the number of acres, it is at least persuasive evidence that the contract was not by the



acre. *Keytons v. Brawfords*, 5 Leigh, 41, 50; *Jones v. Tatum*, supra; *Farrier v. Reynolds*, 88 Va. 141, 147, 13 S. E. 393.

Every material allegation of the bill is denied by the answer. There is no proof to sustain the allegation of mutual mistake, upon which the complainant grounds his right to recover. On the contrary, the testimony of H. M. Herbert distinctly disproves such allegation, and shows clearly that the real transaction between the parties was an exchange of the land conveyed for Indiana property, consisting of land, town lots, and houses, in which exchange Herbert paid Stratton a difference of about \$1,400 in money, and further shows that no mistake occurred between Stratton and Herbert as to the true acreage, that the sale was by the boundary, and that Stratton stated at the time that he did not know the correct acreage, but thought the land would run out more than 1,148 acres on an accurate survey. This evidence stands uncontradicted by any one. After more than 15 years of silent acquiescence in the sale that he made, Stratton is not put on the stand to question the truth of the statements made by his immediate grantee.

Without considering other strong corroborative circumstances, we think the uncontradicted testimony of Herbert alone is sufficiently clear and explicit to overcome the presumption that the sale in question was by the acre, and to show that the quantity did not influence the price paid for the land. The record justifies the conclusion that Stratton was willing to take in the Indiana property at about \$4,000; that he wanted about \$1,400 in money, and to get the matter closed was willing to reduce the price of his land from \$5,500, the sum originally asked, to \$5,400, the sum finally agreed upon as the value in gross of the tract of land he was selling.

If Mrs. Ellender M. Johnson, the vendor of F. A. Stratton, is entitled to recover anything, as to which we express no opinion, her recovery must be, in the first instance, against her vendee.

Having reached the conclusion that there can be no recovery in favor of the complainant, F. A. Stratton, the decree appealed from must be reversed, and this court will enter such decree as the circuit court should have entered, dismissing his bill, with costs.

(107 Va. 340)

NORFOLK & W. RY. CO. v. BELCHER'S ADM'X.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

In an action for injuries to a section hand in a railroad yard, *held*, that the employees in charge of a switching train were not negligent in failing to keep a lookout.

2. SAME.

In an action for injuries to a section hand by a switch engine, *held* that, irrespective of the question of the failure of the employees in charge of the switching train to keep a lookout, the evidence failed to show actionable negligence on their part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 978-980.]

Error from Circuit Court, Wise County.

Action by the administratrix of O. E. Belcher, deceased, against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Ayers & Fulton and C. T. Duncan, for plaintiff in error. Bond & Bruce, J. F. Bullitt, and R. T. Irvine, for defendant in error.

HARRISON, J. This action was brought by the administratrix of O. E. Belcher against the Norfolk & Western Railway Company to recover damages for the alleged negligent killing of the plaintiff's intestate. The trial resulted in a verdict and judgment for \$2,000 in favor of the plaintiff, which we are asked by the defendant company to review.

The petition assigns as error the action of the circuit court in overruling the demurrer to the declaration, its action in refusing to strike out certain words in the declaration alleged to be objectionable, its action in giving and refusing certain instructions, and its action in overruling the motion of the defendant company to set the verdict aside as contrary to the law and the evidence. Each of these assignments of error involve but one proposition of law, which, in our view of the case, can be best considered in connection with the facts applicable thereto.

The plaintiff's intestate was an employé of the defendant railroad company, about 17 years of age, engaged as a section hand in the railroad yards at Norton, in Wise county. An approaching train made it necessary for the deceased and a co-laborer to leave the track upon which they were working for the train to pass. They stepped to a place of safety, clear of all tracks; but the deceased, for some unexplained reason, immediately left his position of safety, against the remonstrance of his fellow workman, crossed the track which he had just left in front of the approaching train, and took his stand in the center of a parallel track, with his back to an approaching switching engine, which was pushing six cars toward him and within 60 feet of the nearest car. The fireman on the passing local train saw the dangerous position of the deceased and called to him; but he paid no attention, seeming to be oblivious of his peril. The engineer of the backing switching train did not see the deceased, and his brakeman did not see him until within 15 feet of him, too late to save him, though he immediately notified the engineer, who stopped the train as promptly as possible.

The contention of the plaintiff is that it was the duty of those in charge of the backing switching train to keep a lookout to discover persons on the track at the place where the accident happened. In other words, the negligence of the deceased, in leaving his position of safety and putting himself in a place of danger, is, as it must be, conceded; but the doctrine of the last clear chance is invoked in order to fix liability upon the defendant. This theory of negligence on the part of the servants of the defendant, after they discovered, or by keeping a lookout might have discovered, the peril of the deceased, was maintained by the circuit court throughout its rulings on the trial. The fact is established in this case that the engineer in charge of the switching train did not see the plaintiff's intestate at all, and his brakeman did not see him until the car was within a few feet of him.

It is undoubtedly a well-settled general rule that it is the duty of a railroad company to keep a lookout at all places where passengers and strangers are to be expected upon the track, and that it is liable for injuries which by the use of ordinary care might have been averted, after the peril of the person injured was discovered, or by the use of ordinary care might have been discovered. But there is no sufficient reason for enforcing this rule without limitation in a railroad yard, where all of the employes have equal knowledge of the constant shifting of cars in making up trains, and equal facilities for looking out and protecting themselves from the dangers naturally incident to such work. If those in charge of a switching train see an employé in danger from which there is reason to believe he will not remove himself, they must do all that can be reasonably done to protect him. They cannot willfully injure him. But they are justified in presuming that the employés in a railroad yard, who are familiar with the constant movements of such trains, will look out for themselves, and will not fail to leave a place of danger in time to avoid injury, and especially that they will not leave a place of safety and take one of imminent danger without the slightest attention to their surroundings. In a railroad yard there are other things to engage the attention of those in charge of a switching train besides watching the track to see if another employé is going, contrary to the dictates of prudence and reason, to get on the track and stand with his back to cars moving toward him and in 60 feet of him.

At the time of the accident the engineer was backing the cars for the purpose of placing them upon the "house track." The brakeman had to give him a signal when that track was reached, and his attention was fixed upon the brakeman, watching for that signal. Under these circumstances, it would have been difficult for either the engineer or

the brakeman to have had their eyes upon the track when the deceased placed himself upon it.

In the very similar case of *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, Mr. Justice Brewer, resting the opinion of the court upon the ground that, under the circumstances, there was no negligence on the part of the defendant, says: "The plaintiff was an employé, and therefore the measure of duty to him was not such as to a passenger or a stranger. As an employé of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employé, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars and enabled him to step to one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés, who had all the time knowledge of what was

to be expected. We see in the facts disclosed no negligence on the part of the defendants, and, if by any means negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury." See, also, *Wabash R. Co. v. Skiles*, 60 N. E. 576, 64 Ohio, 133, 83 Am. St. Rep. 739; *Pittard's Adm'r v. Southern Ry. Co.*, 107 Va. —, 57 S. E. 561, 1 Va. App. 281.

In the case last cited, Judge Keith, in discussing the correlative duties from employes to the railroad company, says:

"The yard of a railroad company is the scene of ceaseless activity, the shifting of cars, and the movement of engines; and in order to carry on their work, and promptly to discharge their duties, there must be a careful economy of time, and as far as possible every moment must be utilized. Under such conditions, those engaged within yard limits are exposed to more than ordinary peril, and should be on the alert and vigilant to guard against injury from the movement of engines and cars always to be expected. The sounding of whistles and ringing of bells, under such conditions, would not add to the safety of employes, but serve only to confound them by adding to the confusion.

"It is therefore said, in section 1253 of *Elliott on Railroads*, that 'as to employes the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yard, for the purpose of notifying such employes, who are familiar with the operation of the yard.' *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758.

"As was said by this court in *Darracott v. C. & O. Ry. Co.*, 83 Va. 294, 295, 2 S. E. 511, 514, 5 Am. St. Rep. 266: 'There are certain correlative duties on the part of the employe to the company. One of those is to use ordinary care to avoid injuries to himself; for the company is under no greater obligation to care for his safety than he is himself, and he must inform himself, so far as he reasonably can, respecting the dangers as well as the duties incident to the service. And, in general, any negligence of an employe amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company.'

Under the facts and circumstances of this case, and in the light of the authorities cited, we are of opinion that the servants of the defendant company were not negligent in failing to keep a constant lookout in anticipation that the deceased would be guilty of the reckless act which alone cost him his life. It may be added that, if those in charge of the switching train had been under obligation to keep such a lookout and had discovered the deceased as soon as he stepped on the track, the theory that the accident might have been avoided is a matter of the merest conjecture and speculation. When the deceased left his place of safety and stepped on the track where he met his death,

he was not more than 60 feet from the nearest car of the switching train that was backing toward him. At the rate of speed the train was moving, that distance would have been covered in seven seconds. The evidence shows that the train could not be stopped in less than 51 feet. So that, to stop the train before it struck the deceased, the engineer would have had about one second in which to discover the danger, and to determine that, contrary to the dictates of reason, the deceased was going to remain in his position of peril without making the slightest effort to protect himself.

We are of opinion that, upon the facts disclosed by the record, the defendant company was guilty of no negligence, and that the accident occurred solely from a lack of proper attention on the part of the deceased. The judgment must therefore be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

(107 Va. 233)

DAVIS et al. v. OWEN.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

#### 1. ADVERSE POSSESSION—HOSTILE CHARACTER.

An owner of land conveyed to certain school trustees a portion thereof, definitely described by metes and bounds, to be used for the erection of a public school for colored people. Before the schoolhouse was built the colored people of the community offered to contribute to its erection if they could hold religious services therein, which was agreed to. After the erection of the schoolhouse a rail fence was built on the remainder of the land, which cut it off from not only the schoolhouse lot, but also a piece of land, containing  $1\frac{1}{4}$  acres, between it and the fence. Subsequently such religious organization, with the consent of the school district trustees, erected a church building and located a graveyard, part of each of which was on the  $1\frac{1}{4}$  acres; the trustees of both the school district and the religious organization believing that the same were entirely on the schoolhouse lot. *Held*, in an action by the trustees of the religious organization to quiet title, that such encroachment on the  $1\frac{1}{4}$  acres could not ripen into a title by adverse possession, since, their right being subordinate to the right of the school trustees, who claimed nothing except the schoolhouse lot, they could not obtain a greater right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 282-286.]

#### 2. SAME—ENTRY AND POSSESSION BY MISTAKE.

The erection of a part of a church building and the location of a graveyard on another's land under the mistaken belief that the same was part of land of one who had authorized such erection and location, and without any claim of right by those performing such acts or by those authorizing the same, cannot ripen into title by adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 365.]

#### 3. ESTOPPEL—KNOWLEDGE OF FACTS.

Where the owner of land made no objection to the erection of a part of a church and the location of a part of a graveyard on his land, under the mistaken belief that they were entirely on the land of an adjoining owner, he is not thereby estopped from asserting his title on discovery that the same are on his land.

Appeal from Circuit Court, Bedford County.

Bill by Alex Davis and others against C. H. Owen. Decree for defendant, and complainants appeal. Affirmed.

N. T. Goldsberry, for appellants. Lowry & Lowry, for appellee.

CARDWELL, J. The facts out of which this appeal arises are as follows:

In the year 1873, Thomas T. Munford was seised and possessed of a boundary of real estate in the county of Bedford, Va., near Forest, containing several hundred acres, and on the 3d day of June of that year Munford and wife executed a deed conveying to Edward S. Hutter and two others, as school trustees of Forest district, a portion of said tract of land for the purpose of building a public free school for the benefit of the colored people of that district. The deed conveyed to the trustees named a specified piece of ground definitely described by metes and bounds, beginning at a definite point and running thence in certain directions, and as containing 3 roods 35 poles.

After that deed was made and recorded, Munford and wife conveyed to one Murrell all the residue of the tract of land from which the "schoolhouse lot" had been cut off. Subsequently C. H. Owen became the successor in title to the land conveyed to Murrell, containing 224 acres 3 roods 12 poles, by virtue of a deed dated August 2, 1898, from a commissioner of the circuit court of Bedford county in a chancery cause therein pending. This 224 acres 3 roods 12 poles, thus conveyed to Owen, is described as lying contiguous to and adjoining the schoolhouse lot, which had theretofore been conveyed to the school trustees of Forest district.

The deed to the trustees for the schoolhouse lot, after setting out that the conveyance was for the purpose of building on the lot a public free schoolhouse for the benefit of the colored children of the district, under the supervision and control of the school trustees, contains this clause: "Provided, however, and the condition of the foregoing deed is, that if said granted premises are occupied for any purpose, excepting for a school or church for the improvement and free education of the colored people of said school district, then this deed shall become void, and said premises revert to said parties of the first part, their heirs and assigns."

The school trustees took possession of the lot of land conveyed to them, and built thereon a house to be used for a school for colored children in Forest district. Before the schoolhouse was built, however, the colored people in the community approached the school board and offered to contribute to the erection and maintenance of the house,

provided the school board would permit the colored people to hold religious services therein, which was agreed to, and the organization under the name of "Altha Grove Baptist Church" apparently controlled the religious services conducted thereafter on these premises.

It further appears that, after the erection of the schoolhouse, a rail fence was built on the residue of the Munford farm, which cut off from the remainder of the farm not only this schoolhouse property of 3 roods 35 poles, but in addition thereto and adjoining the schoolhouse lot, and between it and the rail fence, a piece of land containing  $1\frac{1}{4}$  acres. At the time Owen acquired title to the Munford farm he employed a surveyor to survey its boundaries and locate the line between it and the schoolhouse lot, and when making the survey, instead of running around the schoolhouse lot according to the metes and bounds in the Munford deed, the surveyor "faced" the schoolhouse lot and deducted the acreage of the lot (3 roods 35 poles) from the land he surveyed for Owen. Subsequently, a controversy having arisen between Owen and the trustees of Altha Grove Baptist Church (not the trustees of Forest school district) as to the boundary line between the school property and that of Owen, the latter employed a surveyor to ascertain exactly the location of the line. This survey was made in May, 1904, and shortly thereafter Alex. Davis and others, appellants here, styling themselves "trustees of Altha Grove Baptist Church and colored school of Bedford county," filed their original bill, enjoining Owen from interfering with or trespassing upon the schoolhouse property, or the parcel of land lying between it and the rail fence—in other words, to quiet the title claimed by appellants to the land lying outside the rail fence and including the schoolhouse lot—alleging that Owen was threatening to cut and remove all the standing timber upon this land, claimed by appellants by virtue of the deed from Munford and wife to the trustees of Forest school district, and by adverse possession. Thereafter, they filed an amended bill, and still later an amended and supplemental bill, to which they made not only Owen, but F. W. Nelson and two others, the then school trustees of Forest district under the general free school system of the state of Virginia, parties defendant, and repeating the charges of the original bill that Owen was trespassing or threatening to trespass on the disputed property, whereby it would be irreparably injured, etc.

To each of these bills Owen filed his demurrer and answer, and Nelson and others, school trustees of Forest school district, also demurred and answered. In his answer Owen disclaims any right, title, or interest in the schoolhouse lot, and denies having trespassed thereon or interfered with its peaceful and quiet enjoyment for the purposes for which the lot was originally conveyed to the school

trustees of Forest school district, but does claim the  $1\frac{1}{4}$  acres of land between the schoolhouse lot and the rail fence. Nelson and others in their answer, while claiming title to the schoolhouse lot, the schoolhouse thereon, and the possession thereof, by virtue of the deed from Munford and wife to their predecessors in office, particularly disclaim any right to the parcel of land lying between the schoolhouse lot and the rail fence, or to the possession thereof, and deny that Owen has in any way trespassed upon or injured the schoolhouse lot, or has ever threatened to do so, as charged in appellants' bills. They further deny that the schoolhouse lot was conveyed for any purpose other than for erecting a schoolhouse thereon for educating the colored children, and deny the right of appellants to any control whatsoever over the property.

The demurrers to the several bills having been overruled, the cause was heard upon the bills, the answers thereto, and the evidence taken on behalf of both parties. Whereupon the circuit court dissolved the injunction theretofore awarded in the cause, and dismissed the bills, and from that decree the case is brought here on appeal.

It is needless to review the numerous assignments of error in the petition for the appeal, elaborately argued, as appellants utterly fail to show that they are entitled to the relief they ask.

They claim, not only the schoolhouse lot of 3 roods 85 poles, but the parcel of land lying between that lot and the rail fence, containing  $1\frac{1}{4}$  acres. They claim title to the schoolhouse lot by virtue of the deed from Munford and wife to the school trustees of Forest school district, that the paramount object of the conveyance was for religious purposes, and that they have had possession of the whole property—not only the part conveyed, but the  $1\frac{1}{4}$  acres between it and the rail fence—for a period of over 30 years, which possession has been exclusive, open, notorious, and hostile, and under color of title.

In the first place, the appellants' right, if any, to this schoolhouse property, or the possession thereof, is, and has all along been, dependent upon and subordinate to the rights of the school trustees. The legal title to the property is in the school trustees, the right to the possession of the property is in them, and this was recognized by all parties in interest, as shown conclusively by the admitted fact that when the colored people desired to hold religious services upon the property they sought and obtained permission of the school trustees for that purpose, and when they desired to erect a church on the property they sought and obtained permission from the school trustees; and appellants have not shown a shadow of legal title to the  $1\frac{1}{4}$  acres of land between the schoolhouse property and the rail fence, or any sort of

possession thereof which could have ripened into title by adversary possession.

From the pleadings and the proof in the cause it clearly appears that it was only some eight or nine years prior to the institution of this litigation when permission was granted to the Altha Grove Baptist congregation to erect a church on the lot conveyed to the school trustees and to remove the schoolhouse to another point on the property. This they did, but erected the church partly on the land claimed by Owen in this suit, which was not conveyed to the school trustees by Munford and wife. About the same time the members of Altha Grove Baptist Church commenced to bury their dead on what was supposed to be the schoolhouse lot, and this graveyard likewise encroaches upon the land claimed by Owen.

It further appears that when a survey of the schoolhouse lot was made in May, 1904, in running the dividing line between it and the land of Owen, it was found that a part of the church building and a part of the graveyard were located on Owen's land, whereupon he directed the surveyor to "drop back" and run the line in such a way as to put the whole of the building on the schoolhouse lot, and offered in his answer filed to the original bill in this cause to release all claim he had to that part of the graveyard which is on his land; but these offers of settlement of the controversy were declined by appellants, and they assert, as stated, a claim to the whole of the land lying outside of the rail fence, and including, not only the schoolhouse lot, but the  $1\frac{1}{4}$  acres, notwithstanding the fact that the school trustees of Forest school district do not claim title to or right of possession in any land except the 3 roods 85 poles conveyed to their predecessors in office by Munford and wife, but, on the contrary, disclaim any right to more of the land than was so conveyed.

The claim of appellants, that they have had exclusive, notorious, and hostile possession for a period of time sufficient to bar appellee from setting up a claim to any of the land outside of the rail fence, is absolutely discredited by the admissions made in the pleadings and proof in the cause. The boundaries of the schoolhouse lot were not marked on the land, further than was shown by a public road; and the fact that the colored people have for some time encroached upon the land of appellee could not ripen into a title by adverse possession: First. Because their right of possession is subordinate to and dependent upon the right of possession of the school trustees. The school trustees claiming nothing except what was conveyed to them by the deed of Munford and wife, the colored people could never obtain any greater right. Second. Because neither the building of the church, which was built partly upon appellee Owen's property, nor the encroachment of the graveyard thereon, began more than eight or nine years prior to

the institution of this suit, a period far short of the period of limitation. Appellants claiming in their bills under the deed from Munford and wife, and under that deed alone through the school trustees, the erection of a part of the church building on appellee's land, and the mere encroachment of a part of the graveyard thereon, has not and never can ripen into a good title, from the fact that it had its origin in a mistake, and not a claim of right from the beginning. The colored people who built the church thought that they were putting it entirely upon the schoolhouse property, as conveyed to the school trustees by Munford and wife. They thought that the graveyard was on that land, and did not for a moment think that they had a right to more land than was conveyed by that deed to the school trustees. The school trustees undertook to give them the right to occupy no land except what was conveyed by that deed. So that the fact that appellee, Owen, thought that the church and graveyard were on the schoolhouse lot, and for that reason made no objection to the erection of the church or the burial of the dead, does not estop him now from asserting his rights, when he has ascertained for the first time that there has been such encroachment, and for the first time has learned exactly where the line between the schoolhouse property and his property is located.

In the amended bill filed by appellants is an allegation which of itself, if more than what has been stated were needed, is conclusive that the relief they seek in this litigation was properly denied, viz., that "very soon after said land [the schoolhouse lot] was conveyed as aforesaid the colored people of Forest district, near the property in the bill mentioned, organized a church or religious congregation by the name of 'Altha Grove Baptist Church,' and said congregation with the consent and co-operation of the trustees mentioned in said deed [i. e., the trustees of Forest school district], jointly built a house on said land for the purpose of holding religious services therein and teaching public school." In other words, by appellants' own showing, they have no title whatsoever to the land which is the subject of this controversy, but the title thereto is in the trustees of Forest school district as to the schoolhouse lot, and outside of that they make no sort of claim to any part of the land of appellee Owen; and it is through these trustees and subordinate to their rights that the colored people of Forest school district obtained permission to build a church on the schoolhouse lot for the purpose of holding religious services therein and teaching a public school.

As was held in *Clarke v. McClure*, 10 Grat. (Va.) 305: "Where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession, which could silently ripen into title by adverse possession under the statute of limitations."

"Where one went into possession of land with the verbal consent of the owner, his possession could not ripen into a title, in the absence of a clear, positive, and continued disavowal of the owner's title, brought home to his knowledge." *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674, and authorities there cited.

Again, appellants put themselves in an inconsistent position when they claim in the argument here that they are the legal successors to the trustees mentioned in the deed from Munford and wife, while in their pleadings they admit that the successors to the school trustees named in Exhibit A, filed with their amended bill (deed from Munford and wife to the school trustees of Forest district) are E. N. Nelson and two others named, being the same persons who were the school trustees of Forest district at the time this suit was brought, made parties to the amended bills, and have answered as stated.

The decree appealed from is without error, and will therefore be affirmed.

(197 Va. 376)

#### WISE TERMINAL CO. v. McCORMICK.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

#### 1. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADING.

Where the cause and form of action are the same in both the original and amended declarations in an action by a brakeman for injuries sustained in attempting to board the tender of an engine, the amended declaration will not be regarded as stating a new cause of action, so as to bar the right of recovery, the amendment being made after the statute of limitations has run, merely because it charges the negligence complained of in varying form to meet different phases of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

#### 2. EVIDENCE—OPINION EVIDENCE—SUBJECT OF EXPERT TESTIMONY.

In an action by a brakeman for injuries sustained in attempting to board the tender of an engine, witnesses shown to be competent may give their opinions with respect to the distance within which the engine could have been stopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2323.]

#### 3. EVIDENCE—TESTIMONY ON FORMER TRIAL.

Evidence held insufficient to excuse the failure to produce a witness or take his deposition, so as to warrant the introduction of his testimony on a former trial.

Error to Circuit Court, Wise County.

Action by W. B. McCormick, a brakeman, against the Wise Terminal Company, for personal injuries sustained in attempting to board the tender of an engine. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

Ayers & Fulton and Bullitt & Kelly, for plaintiff in error. Wm. H. Werth, for defendant in error.

WHITTLE, J. The evidence in this case, which is before us the second time, was ex-

haustively reviewed on the former hearing and held not to establish actionable negligence on the part of the plaintiff in error, the *Wise Terminal Company v. McCormick*, 104 Va. 400, 51 S. E. 781. It is now alleged that the second recovery is founded on substantially the same evidence, and must therefore be controlled by the former decision. On the other hand, the defendant in error contends that the evidence at the second trial, set out in the stenographic report, is not sufficiently identified to constitute part of the record, and the original record was brought up on a subpoena duces tecum to substantiate that assertion.

As a new trial must be granted on another ground, it is unnecessary to pass upon that question; but, before dismissing the subject, the objections to inadequate certification of evidence with which we are repeatedly confronted justify our again calling the attention of the profession to the importance of paying more regard to this essential feature in making up a record. *Jeremy Improvement Co. v. Commonwealth*, 106 Va. 482, 56 S. E. 224.

The first assignment of error which claims our attention is to the action of the trial court in rejecting the plea of the act of limitations. The assignment proceeds upon the theory that the amended declaration makes a new case.

In this the plaintiff in error is mistaken, as an inspection of the pleading plainly shows. The cause and form of action are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet different phases of the evidence.

The principle is clearly stated in *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300, as follows: "If an amended declaration assert rights or claims arising out of the same transaction, act, agreement, or obligation as that upon which the original declaration is founded, it will not be regarded as a new cause of action, however great may be the difference in the form of liability asserted in the two declarations."

That the case falls within the rule thus laid down will be seen from the statement, in the petition for a writ of error, that "the evidence on the last trial was confined mainly to the issue presented by the amended declaration; but the same issue was raised by the former declaration, and substantially the same evidence was introduced and \* \* \* held insufficient to support a verdict."

Several assignments involve objections to the admission of opinions of witnesses with respect to the distance within which the engine could have been stopped. Subject to proper restrictions, based on the knowledge and experience of the witnesses, such evidence is admissible, and is usually relied on to prove that fact.

The next assignment is founded on the al-

leged effort of the plaintiff to discredit one of his own witnesses; but the record does not sustain the objection. The purpose of the examination, which is made the ground of exception, was to refresh the memory of the witness by reference to his testimony at the former trial, and not to impeach him.

Another error assigned is to the action of the court in allowing the testimony of the witness Campbell on the former trial to be read to the jury. The rule of practice, which, in civil actions at least, under certain circumstances, permits proof of what a witness stated at a previous trial between the same parties and upon the same issues, is conceded.

In 16 Cyc. 1088, the rule is stated thus: "The court must be satisfied (1) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced. The first three of these conditions render the reported evidence relevant. The fourth is necessary to justify the court in receiving it."

In the same work, at pages 1095, 1096, after declaring that such testimony is substitutionary, it is said: "The court will therefore insist upon being satisfied, not only that the situation of the case promises some advantage from its use, but also that a sufficient reason be shown why the original witness is not produced, and that it is impossible, fairly speaking, for the person offering the evidence to produce the living witness or to take his deposition." In note 24, on the quantum of proof necessary, it is declared that, "inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted, as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant has caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be reviewable on appeal when properly exercised"—citing *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 530.

Illustrations of what constitutes due diligence in such cases are given at page 1098, note 32: "To ascertain by writing to the postmaster of a certain town in a distant state that a former witness is not in the postmaster's town, but in another town of the postmaster's state (the Texas case, *supra*), or to show that the witness is reputed

to be out of the state (*Baldwin v. St. Louis, etc.*, R. Co., 68 Iowa, 37, 25 N. W. 918), or for an officer charged with the service of a subpoena to report that he has made diligent search for a witness at the supposed residence and been informed by persons unknown to him that they had heard that the witness was dead (*Augusta, etc.*, R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706), have been held under the facts of these particular cases not to be sufficient. Alleged absence from the jurisdiction must be established by the testimony of some one who knows the fact, or can testify to circumstances within his knowledge which will justify the inference of such fact. *Baldwin v. St. Louis, etc.*, R. Co., 68 Iowa, 37, 25 N. W. 918; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510. Statements by persons with peculiar means of knowledge may, together with lack of further opportunity for inquiry, suffice to admit the evidence. Thus, in case of an attesting witness, the reply of his parents that he was in America was considered by Mr. Justice Erle as 'reasonable evidence that the witness is out of the jurisdiction of the court.' *Austin v. Rumsey*, 2 C. & K. 738. The mere fact that a party who could have summoned a witness has preferred to rely on his promise to attend voluntarily is no reason for admitting the witness' former evidence. *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302. The action of the court in deciding what search is sufficient will not be revised, in the absence of evidence of gross abuse of discretion. *Vaughan v. State*, 58 Ark. 353, 371, 24 S. W. 885; *Clinton v. Estes*, 20 Ark. 216."

In further discussion of the subject in the text, it is observed: "The more modern tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to require further that the party offering the evidence should show to the satisfaction of the court that he could not by the use of reasonable diligence have procured the deposition of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence, and that, from ignorance of the witness' whereabouts or other reason, his deposition could not have been given."

The Virginia statute (Va. Code 1904, § 3365) provides that in a civil case at law a deposition taken on proper notice may be read, if, when offered, the witness be dead or out of the state. But it has been held that hearsay evidence that the deponent has left the country and has not returned is not sufficient to authorize the reading of his deposition. *Collins v. Lowry*, 2 Wash. 75 (2d Ed. 97). See, also, *Powell v. Manson*, 22 Grat. 177, 187, and cases cited.

Campbell resided at Pulaski, Va., and the

foundation laid for admitting his former testimony was the statement of the sheriff of Wise county that he sought him at Blackwood and heard that he had left. The defendant in error also testified that in response to his inquiries he learned that Campbell had left Blackwood, and he believes he heard that he had gone to Knoxville. He says that at Norton a young man from Pulaski told him he did not think Campbell was at home. He likewise made inquiry of a man at Tom's Creek, who said that if Campbell was at Pulaski he did not know it, but that he had been absent from that place for several weeks, perhaps for one or two months. Witness admitted that he had neither written to Pulaski concerning Campbell's whereabouts, nor otherwise inquired for him at his home. It is true a subpoena, directed to the sheriff of Wise county, was returned "Not found"; but manifestly the return of an officer of a bailiwick other than that in which the witness usually resides affords but scant evidence of the fact that he is beyond the process of the court.

The preliminary evidence relied on in this instance is obviously insufficient to have warranted the introduction of Campbell's testimony at the first trial.

Errors are assigned to the action of the court in giving and refusing certain prayers; but they are dependent on evidence, and, as we cannot anticipate that the precise questions involved will likely arise at the next trial, it is unnecessary to notice these exceptions.

For the error of the trial court in the particular indicated, we are of opinion to reverse the judgment complained of, to set aside the verdict of the jury, and remand the case for a new trial.

(107 Va. 278)

CLEAR CREEK WATER CO., Inc., v.  
GLADEVILLE IMP. CO.\*

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

1. EMINENT DOMAIN—EXTENT OF POWER—ACQUISITION OF WATER RIGHTS—STATUTES.

Under Va. Code 1904, § 1105c, cl. 2 (f), authorizing public service corporations to condemn "sand, earth, gravel, water or other material," and sections 1105f (4) and 1105f (5), prescribing the procedure for condemning any "land or other property or any interest or estate therein," and section 1105f (9), as amended by Acts 1906, p. 452, c. 257, providing that, on the payment of the compensation awarded and the confirmation of the report of the commissioners in proceedings to condemn property, the title shall vest in the petitioner, and declaring that nothing in the act shall authorize the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is instituted, which revises the law on the subject as embodied in Code 1873, c. 56, § 11, and Code 1887, c. 46, § 1079, a public service corporation may condemn a partial interest in land when a partial interest only is needed, and a public service water company may condemn the water rights of an inferior riparian proprietor, by condemning the right to

\* Rehearing denied November 20, 1907.



divert water without condemning the land over which it flows.

2. SAME.

A public service water company sought to condemn the water rights of an inferior riparian owner without invading the land of the latter, and only desired to divert the water of a stream flowing through his land. The riparian owner owned the estate in fee simple, and his riparian rights were appurtenant to and coextensive with the estate. *Held*, that the company must participate in the water of the stream on the basis that the riparian owner's rights in the water were appurtenant to his estate, and must appropriate the perpetual easement of the owner therein.

Appeal from Circuit Court, Wise County.

Proceedings by the Clear Creek Water Company, Incorporated, to condemn a water right of the Gladeville Improvement Company. From a judgment sustaining a demurrer to the petition and dismissing the proceeding, the petitioner appeals. Reversed.

Bullitt & Kelly and Jno. W. Chalkley, for appellant. Vicars & Peery, for appellee.

WHITTLE, J. The plaintiff in error, the Clear Creek Water Company, Incorporated, a public service corporation having authority to condemn lands, water, water rights, or any other property, and any estate or interest therein, for its uses and purposes, filed its petition in the circuit court of Wise county against the defendant in error, the Gladeville Improvement Company, an inferior riparian proprietor, under chapter 46b, Va. Code 1904, for the purpose of condemning certain riparian rights of the defendant in error in Clear creek, by intercepting and diverting all the waters in said creek and the two main forks thereof (or as much as would flow through a 12-inch pipe) into and through the plaintiff in error's pipe line at the point of its proposed intake, dams, and reservoir, above the lands of the defendant in error, to supply the inhabitants of the town of Norton with water for domestic purposes.

There was a demurrer to the petition, and the circuit court, "being of opinion that the law does not authorize a water company to condemn a water right only, but that it must, if it condemns at all, condemn the whole interest owned by the defendant, that is, the land itself," sustained the demurrer and dismissed the petition.

That this ruling is a correct exposition of the law as it was under the Codes of 1873 (chapter 56, § 11) and 1887 (chapter 46, § 1079) is admitted. Indeed, the provisions referred to (which are identical) were so construed by this court in the cases of *City of Roanoke v. Berkowitz*, 80 Va. 616, and *City of Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520. In the latter case the court observes: "It may be true, as counsel for the city earnestly contend, that it is a great hardship upon the city to be compelled to condemn and pay for property which it does not need in order to get what is necessary

for its purposes. This is an argument more properly addressed to the Legislature than the courts."

It is suggested that these decisions accentuated the necessity for a more liberal policy and induced the Legislature to revise the law and adopt the rule which at present obtains. However that may be, the statutes now in force manifest a legislative purpose to confer upon public service corporations the power to condemn interests in land other than the entire interest, when a partial and not the entire interest is needed for the purposes of the corporation.

Thus Va. Code 1904, § 1105c, cl. 2 (f), authorizes such corporations, "in the manner and subject to the limitations provided by the general statutes \* \* \* for the condemnation of land," to condemn for their purposes "sand, earth, gravel, water, or other material"; and sections 1105f (4) and 1105f (5) prescribe the procedure for condemning any "land or other property, or any interest or estate therein." This phraseology characterizes the various provisions of chapter 46b, and differentiates them from the statutes construed in the cases cited.

Section 1079 of the Code of 1887 declares that upon the payment to the parties entitled thereto, or into court, of the sum ascertained by the commissioners as a just compensation for the land taken and for damages to the residue of the tract, "the title to that part of the land for which compensation is allowed shall be absolutely vested in the company \* \* \* in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purposes of said company shall be vested"; while the corresponding provision of the present statute (section 1105f (9), as amended Acts 1906, p. 452, c. 257), is as follows: "Upon such payment, either to the person entitled thereto or into court, and confirmation of the report, the title to the part of the land, and to the other property for which compensation is allowed, shall be absolutely vested in the company, in fee simple, except in the case of a turnpike company, when a sufficient right of way only for the purpose of such company shall be used, and except also the case of any other company, when, if the notice of the application to the court shall so specify or describe, and the petition shall so pray, the interest or estate as shall be so specified and prayed for shall be vested. *Nothing in this Act contained shall be construed as authorizing the condemnation of a less estate in the property taken than is owned by the party against whom the proceeding is.*" The italicized words constitute the limitation imposed by the amendment in Acts 1906, p. 452, c. 257.

Among other definitions, Bouvier observes that "estate" "signifies that quantity of interest which a person has, from absolute ownership down to naked possession." It is in

this sense that the term is employed in the amended act of 1906. It denotes the quantity of interest of the owner in the subject sought to be condemned. Prior thereto it might have been competent to carve an inferior estate (e. g., an estate for life or years) out of the fee simple, and to have condemned the lesser estate, leaving the reversion in the owner. The purpose of the amendment was to abolish a provision so obviously unjust to the owner, and to require the condemnation of the entire estate in the property proposed to be taken.

It will be noticed that the word "interest" does not occur in the amendment. So far as the "interest" which may be condemned is concerned, the statute is left intact. The amendment deals only with the "estate." Authority to condemn interests in "any land, sand, earth, gravel, water, or other material" is left unimpaired; but the entire estate in such parts of these various subjects as is proposed to be taken, whatever that estate may be, must be condemned.

In this instance the plaintiff in error's water mains are to connect with a reservoir above, and will not invade the land of the inferior riparian owner. The company needs to intercept and divert the water of the stream for its purposes, but has no occasion to use the bed of the creek, and may not, therefore, be required to condemn the land over which the water flows. But the defendant in error owns an estate in fee simple in the lower premises, and its riparian rights in the water are appurtenant to and coextensive with that estate. The condemning company must therefore participate in the water of the stream on that basis, and expropriate the perpetual easement of the defendant in error therein.

Interests in water, as well as in land, are subject to the law of eminent domain. *Hamor v. Bar Harbor Water Co.*, 78 Me. 127, 3 Atl. 40. Such interests are indispensable to water companies, and when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived. This principle is illustrated by numerous decisions. The following have more or less pertinency to the case in judgment: *Cooper v. Williams*, 5 Ohio, 391, 24 Am. Dec. 299; *Glizinger v. Saugerties Water Co.*, 66 Hun, 173, 21 N. Y. Supp. 121; *Smith v. City of Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Heilman v. Union Canal Co.*, 50 Pa. 268; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335; *Avery v. Fox*, Fed. Cas. No. 674, 1 Abb. (U. S.) 246.

The remaining ground of demurrer, based on the alleged insufficiency of the plat which the statute requires shall accompany the petition, is not sustained by the record, and was properly overruled.

Upon the whole case, we are of opinion that the law on the demurrer to the petition is with the plaintiff in error, and it must, consequently, be overruled, and the case remanded for further proceedings.

Reversed.

(197 Va. 269)

BATTERSHALL et al. v. ROBERTS.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

EXCEPTIONS, BILL OF-TIME FOR PRESENTATION, ALLOWANCE, AND FILING.

Va. Code 1904, § 3385, provides that a bill of exceptions may be signed by the judge, either during the term at which the opinion of the court is announced, or in vacation within 30 days after the end of such term, or at such other time as the parties, by consent entered of record, may agree on, and that any bill so signed shall be a part of the record. *Held*, where a final judgment was entered for plaintiff at the term at which the verdict was returned, and defendants allowed until the next term to file a bill of exceptions, and at the next term, not by consent of record, but on motion of defendants, they were allowed until the next term, and by similar orders the matter of authenticating and filing the bill was kept open and carried from term to term until the same was filed, that the bill so signed and copied into the record was not properly authenticated and could not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 72½.]

Appeal from Circuit Court, Carroll County.

Ejectment by Catherine Roberts against M. E. Battershall and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Bolen & Tipton, for appellants. N. P. Oglesby and M. M. Caldwell, for appellee.

CARDWELL, J. This is an action of ejectment, brought in the circuit court of Carroll county, in which the jury returned the following verdict: "We, the jury, find for the plaintiff in fee simple the land in the declaration mentioned." And the final order in the case, entered at the term at which the verdict was returned, is as follows:

"Whereupon the defendants moved the court to set aside the verdict of the jury and grant them a new trial, which motion the court overruled. The defendants then moved the court in arrest of judgment, which latter motion the court likewise overruled. Therefore it is considered by the court that the plaintiff recover against the defendant the land in the declaration mentioned in fee simple, as therein claimed and specified, and her costs by her about her suit in this behalf expended. To which ruling of the court in refusing to set aside the said verdict and to arrest the judgment the defendants excepted, and they are allowed to the next term to file their bill of exceptions and spread the facts."

On the 9th day of May, 1905, at a subsequent term of the court, this order was en-

tered: "On motion of the defendants they are allowed until the next term of this court to file their bills of exceptions and spread the facts in the case." A similar order was made at a still subsequent term, September 14, 1905, and again on the 12th day of December, 1905; and finally, at a term of the court held on the 10th day of March, 1906, an order was entered in the cause as follows: "The defendants this day presented their four bills of exceptions, in which are contained the facts proven on the trial of the case, which bills are signed, sealed, and made a part of the record." Then follow the four bills of exceptions referred to, to which a memorandum, signed by counsel for plaintiff and defendants, is annexed, in the following words: "The foregoing four bills of exceptions have been examined and agreed to."

The first question presented for our consideration is: Are the bills of exceptions copied into the record properly authenticated?

If the memorandum annexed to the four bills of exceptions could be construed as an agreement between counsel that the bills of exceptions might be then signed and made a part of the record, the question still remains whether or not they could by such an agreement be ingrafted upon the record for consideration by this court.

In the case of *Virginia Development Co. v. Rich Patch Iron Co.*, 98 Va. 700, 37 S. E. 280, the final order entered in the circuit court contained the following language: "By agreement of counsel, and for reasons appearing to the court, leave is hereby given the plaintiff to file bills of exception within 60 days from the rising of the court, such bills to have the same effect as if signed, sealed, enrolled, and filed during the present term." And this court held that there was no authority under the statute for the circuit court to sign bills of exceptions after the term at which the final judgment was entered, and that bills of exceptions so signed and copied into the record were not properly authenticated and could not be considered.

Following the decision in that case, the statute in force since the adoption of the Code of 1849—which provided that bills of exceptions could be signed during the term at which the final judgment was entered (*Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606)—was amended by an act approved February 15, 1901 (Acts 1901, p. 186, c. 172), so that any bill of exceptions might be tendered to the judge and signed by him, either during the term at which the opinion of the court was announced to which exception was taken, or in vacation within 30 days after such term, or at such other time as the parties by consent entered of record might agree upon, and that any bill of exceptions so ten-

dered shall be part of the record of the case. Va. Code 1904, § 3385.

It is clear, upon reading the statute as thus amended, that in order to clothe the judge of the trial court with authority after the court is adjourned for the term to authenticate and make part of the record bills of exceptions to rulings of the court noted during the trial, as was attempted in this instance, the consent of the parties that this may be done must be entered of record as a part of the final order of the court in the cause.

As was said in *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908, the object of the act was to extend the time within which bills of exceptions might be taken; but, in order to perfect bills of exceptions duly taken to rulings during the trial, they must be presented in vacation within 30 days after final judgment, or within such time as the parties shall agree of record.

In *Hoover v. Saunders*, 104 Va. 783, 52 S. E. 657, it was held that, in the absence of any agreement between the parties, bills of exceptions can only be signed during the term at which the opinion of the court is announced to which exception is taken, or in the immediately succeeding vacation, within 30 days after the end of that term. They cannot be signed during a succeeding term, nor during any other vacation than that immediately succeeding the term at which the opinion was announced. The beginning of a new term, although within 30 days, puts an end to the court's jurisdiction to sign such bill.

It appears in this case, not only that a final judgment was entered at the March term, 1905, of the circuit court, but that the court, by its order entered at its subsequent May term, 1905—not by consent of the parties entered of record, as the statute requires, but on the motion of the defendants—allowed the defendants until the next term of the court to file their bills of exceptions, etc., and by similar orders the matter of authenticating and filing the bills of exceptions was kept open until the March term of the court, 1906, which was wholly without any authority conferred by the statute.

In *Va. Devel. Co. v. Rich Patch I. Co.*, supra, it is shown that the power to authenticate bills of exceptions and make them a part of the record in the trial of a case at law in which a writ of error or supersedeas lies to a higher court is of statutory origin, and that by the terms of our statute then in force it could not be exercised after the end of the term at which the final judgment was rendered; that, in order to give the court at a subsequent term authority to add to the record by signing a bill of exception, some control must be reserved by the court over the case, as by failure to enter a judgment, by entering a motion for a new

trial and continuing it until the next term, or by leave reserved to sign a bill of exception on or before a particular day of the next term, and the presentation of the bill of exception for signature in accordance with the terms of the leave reserved. In other words, the statute conferring authority upon the trial court to add to the record by signing a bill of exception must be strictly observed; the signing of bills of exceptions so as to make them part of the record being a judicial act, and such a judicial act as the court itself was powerless at common law to perform, even during the term at which the judgment was rendered, or at any time.

In the case at bar the statute has not been observed. Therefore, though with regret, we have to reach the conclusion that the bills of exceptions copied into the record are not properly authenticated and cannot be considered.

It is, perhaps, well to call attention to the fact that more miscarriages, in the effort to bring the rulings of trial courts under review in this court, have occurred in the six years since the amended statute, *supra*, has been in force than in all the years prior to its passage. And why? Simply because the statute has not, in the cases where the miscarriages have occurred, been strictly followed, as is absolutely necessary in order to confer authority upon the judges of trial courts to sign a bill of exceptions and make it a part of the record after the adjournment of the term at which the final judgment in the cause is entered.

The bills of exceptions copied into this record, not being properly authenticated, for that reason cannot be considered, and therefore, no error appearing in the judgment of the circuit court, it has to be affirmed.

(107 Va. 310)

**HART et al. v. DARTER et al.**  
(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

**WILLS — EQUITY — JURISDICTION — CONSTRUCTION OF WILLS.**

Testator devised all his lands to his six living children, and provided that "if one sells, sell it to one of six, and if one dies with esue, its part shall go to the other children." *Held*, that a court of equity was without jurisdiction of a bill to construe such clause of his will, and to have it adjudged that the words "with esue" meant "without issue," and determine whether devisees could sell to persons other than devisees; devisees under such clause of the will obtaining purely legal titles, and the construction of wills not being of itself a ground of equity jurisdiction, but only an incident to the court's jurisdiction on some one of the recognized grounds of equity jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1666.]

Appeal from Circuit Court, Scott County.  
Bill by W. H. Hart and others against M. L. Darter and others. Decree for defendants, and complainants appeal. Affirmed.

Richmond & Bond, for appellants. W. S. Cox, for appellees.

**BUCHANAN, J.** In the year 1882 the will of Eyre Hart, deceased, was admitted to probate. The object of this suit, which was instituted by certain of the devisees under the sixth clause of the will, was to have that clause, which is as follows, construed:

"I will all my lands to my 6 living children, Elizabeth Hobbs has received her full portion of all I possess, my living children W. H. Hart, B. F. Hart, M. Donihio, M. S. Darter, J. B. Hellon, Virginia Hart, and if one sells, sell it to one of six, and if one dies with esue, its part shall go to the other children."

The trial court, upon a hearing of the cause, dismissed the bill without prejudice to the rights of any party, upon the ground that the case was not in such a condition as to permit a decision of the matter in issue.

It appears from the record that the devisees under the sixth clause of the will partitioned the land devised them and took possession of their respective shares; that all the devisees are living, some having children and others none; that some have aliened their interest in the land devised to persons other than devisees. The bill alleges that doubt and uncertainty exist as to the exact rights of the parties in the land devised, which greatly incumber and hamper the complainants in dealing with their interest in the same, and that the complainants are advised that it is necessary, in order to ascertain the respective interests of the devisees, to have the will judicially construed. The prayer for relief is that the court will construe the sixth clause of the will and adjudge that the words "with esue" therein be held to mean "without issue," and determine whether the devisees who have attempted to alien their interest had a legal right to sell to persons other than the devisees under that clause, to determine any other matter deemed pertinent by the court or required by any party in interest, and for general relief.

While the bill prays for general relief, it is clear from its allegations that the suit was brought solely for the purpose of having the sixth clause of the will construed by the court, and that no case is made for further relief. The first question, therefore, to be determined, is whether or not a court of equity has jurisdiction of the case made.

The courts are not, in accord as to the ground of the jurisdiction of a court of equity to interpret and enforce the provisions of a will. Some hold that such jurisdiction is merely an incident to its general jurisdiction over trusts, and that it will not exercise its powers to construe a will which only deals with and disposes of purely legal estates or interests in land, and makes no attempt to create any trust relation in respect to the property devised. Others hold

that its jurisdiction arises from the complicated character of the provisions of the will, from the difficulty of understanding their meaning, and from the doubt and uncertainty as to the rights of the parties claiming under them. Sec. 3 Pom. Eq. Jur. §§ 1155 to 1157, and cases cited; note to Crosson v. Dwyer, 2 Am. & Eng. Dec. in Eq. 687-690, and cases cited. But the prevailing doctrine in this country is that, in order to give a court of equity jurisdiction to take cognizance of and construe or interpret a will, there must be an actual litigation in respect to a matter which is the proper subject of jurisdiction of a court of equity as distinguished from a court of law.

Pomeroy, in discussing this question, says (section 1156) that "the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that the special jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated."

In the case of Chipman v. Montgomery, 63 N. Y. 221, 230, it is said: "The rule is that to put a court of equity in motion there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court, as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers as an incident to that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy." 3 Pom. Eq. Jur. § 1155.

In this state, as in England, courts of equity have jurisdiction over the administration and settlement of decedents' estates, whether the deceased die with or without a will, and in the exercise of and as incident to that jurisdiction they construe and enforce wills of personal property. See Pom. Eq. Jur. § 1155; Adair v. Shaw, 1 Sch. & Lef. 243, 262; Nelson v. Cornwell, 11 Grat. (Va.) 724, 737.

The English courts of chancery, under their general jurisdiction over trusts, had the power to construe and enforce wills of real as well as of personal property, so far as they create or their disposition involves the creation of trusts; but "so far," says Pomeroy, "as a will of real property bequeaths purely legal titles, and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment, the courts of law having full power to construe and interpret the instrument and to de-

termine the rights of the devisees. There is no necessity, and therefore no power, of resorting to a court of equity in order to obtain a construction of such wills." Section 1155; Bowers v. Smith, 10 Paige (N. Y.) 198; 16 Cyc. 54-101.

No case involving the precise question now under consideration has been before this court; but in the case of Snyder v. Grandstaff, 96 Va. 482, 31 S. E. 647, 70 Am. St. Rep. 863, it was treated as settled law by the learned circuit judge who decided the case, and whose opinion was approved and adopted by this court, that the construction or interpretation of wills and deeds was not of itself a ground of equity jurisdiction, but that the power to construe such writings was simply an incident to the court's jurisdiction over a case on some one of the recognized grounds of equity jurisdiction. This view, as we have seen, is in accord with correct principles, is sustained by the weight of authority, and should be adhered to, although perhaps not necessary to a decision of that case.

The clause of the will which this suit was brought to have interpreted, whatever the interest given be, it is clear, disposes of purely legal estates or interests and makes no attempt to create any trust relation in respect to the land devised. There being no trust relation involved in the devise, and no other ground of equity jurisdiction shown, the bill was properly dismissed by the circuit court, and its decree must be affirmed.

(107 Va. 315.)

ISAAC EBERLY CO. v. GIBSON et al.  
(Supreme Court of Appeals of Virginia. Sept 12, 1907.)

1. **BILLS AND NOTES—BONA FIDE PURCHASER—RIGHTS ACQUIRED.**

A maker of a note, who, on receiving notice of the assignment thereof, promises the assignee to pay it and assures him that it is all right, cannot by any transaction with the payee render it void and uncollectible in the hands of the assignee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 767.]

2. **SAME.**

A merchant sold his stock in bulk, without complying with Va. Code 1904, § 2460a, prohibiting a merchant from selling his stock without making an inventory thereof and a schedule of his creditors, etc. The buyer bought in good faith and in ignorance of the law. He executed notes for a part of the purchase price. The merchant assigned them to a creditor. The buyer assured the creditor that the notes were all right and promised to pay them at maturity. The creditor, on the faith of the assurance, took no action to enforce his claim against the merchant. The buyer thereafter resold the stock to the merchant. *Held*, that the buyer was liable on the notes, for to permit him to repudiate the promise would operate as a fraud on the creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 767.]

Appeal from Circuit Court, Buchanan County.

Suit by the Isaac Eberly Company against

B. G. Gibson and others. From a decree granting insufficient relief, complainant appeals. Reversed in part, and remanded.

Routh & Routh, for appellant. Finney & Stinson, for appellees.

CARDWELL, J. It appears that Paris Charles was, on June 3, 1904, and prior thereto, engaged in the retail mercantile business, buying his stock from wholesale merchants in the usual manner; that on the date named he sold his stock of merchandise in bulk, invoicing at \$1,700.44, to B. G. Gibson; that Charles was indebted to the Isaac Eberly Company, complainant in the court below and appellant here, a wholesale company, in the sum of \$995.35 for goods sold him; that Charles was indebted to other merchants in various sums for goods equal in value to the stock sold to Gibson; that the sale to Gibson was not in the ordinary course of trade, but with the intent on the part of Charles to quit the mercantile business; that Charles and Gibson made no inventory of the goods at the time of the sale, as required by the statute (now section 2460a, Va. Code 1904), nor complied with any of the other provisions of the statute; that Gibson paid Charles on the stock of goods that day taken possession of by Gibson \$400 in cash, two mules at the value of \$400, and executed notes for the balance of the purchase money to Charles, two of which notes (one for \$300, due 8 months after date, June 3, 1904, with interest from date, and another for \$300, bearing the same date, due 12 months after date, with interest from date) were on July 14, 1904, duly assigned by Charles to appellant for a valuable consideration, and when collected were to go as a credit on the debt of Charles to appellant, above mentioned; that after the assignment of these notes, and on the same day, Gibson was notified by appellant of the assignment, and he assured appellant that the notes were all right and promised that he would pay them at maturity, even going to the extent of saying that he would pay them before maturity if a discount would be allowed upon them, but refused to give any security for their payment. At this interview between appellant's agent and Gibson, the latter's attention was called to the statute above referred to, which provides that it shall be unlawful for any merchant buying and selling merchandise, while he is indebted to any person, to sell his entire stock of merchandise in bulk, or to sell the major portion thereof otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, etc., and that if the terms of the statute prescribing in what manner and under what conditions a merchant engaged in buying and selling merchandise may sell his entire stock in bulk, or the major portion thereof otherwise than in the ordinary course of business, etc., were not complied with, the sale would prima facie be

presumed to be void and fraudulent as against the creditors of such seller, and the merchandise, or such other part thereof as might be found in the hands of the purchaser, should be liable to the creditors of the seller, and in the event that the same, or any part thereof, be withdrawn by the purchaser, then the purchaser himself should be liable to the creditors of such seller for the merchandise so received by him and thus withdrawn. Upon obtaining this information from appellant's agent, Gibson declared that he did not know of the statute, and that he was sorry that he did not know of it sooner, as he had paid off one of the notes executed by him to Charles; the note so paid off being held by an assignee of Charles other than appellant or Charles himself. On the following day, namely, the 15th of June, 1904, Gibson executed, delivered, and had recorded in the clerk's office of Buchanan county a deed to his wife, conveying to her, in consideration of \$300, said to have been in hand paid, a tract of land situated in that county, containing 203 acres; and on July 30, 1904, notwithstanding declarations on his part to the agent of appellant that he still had the stock of goods in question in possession and intended to hold on to them, he made a pretended resale of what remained back to Charles, without any pretense of complying with the provisions of the statute, supra; whereupon Charles, on the same date, executed to one C. W. McCoy, trustee, a deed of trust on this stock of goods to secure to the creditors of Charles, other than appellant, the one \$1,100 and the other \$466. It further appears that from the time Gibson obtained this stock of goods from Charles, on the 3d day of June, 1904, to the date of his pretended resale of the same to Charles, on July 30, 1904, he had sold of the goods the amount of \$235.77, so that the invoice price of the goods at the pretended resale to Charles was \$1,464.67.

At the second August rules, 1904, appellant filed its original bill in this cause (which is the only bill copied in this record), setting out the foregoing facts, and relying upon them as showing that the deed from Gibson to his wife, as well as the pretended resale of the stock of goods by Gibson to Charles, were fraudulent transactions, made and had for the purpose of defrauding the creditors of Charles, especially appellant, and charging that Gibson was liable to appellant, not only for the \$235.77 realized by him from the sale of a part of the goods while in his possession, but for the two notes of \$300 each, above mentioned, and that appellant was entitled to a lien therefor upon the tract of land which Gibson had fraudulently conveyed to his wife.

Upon the hearing of the cause upon the bill, the answer of Gibson, and depositions of witnesses, the circuit court held that appellant was not entitled to recover of Gibson the amount of the two notes of \$300 each, executed by Gibson to Charles and by the latter

assigned to appellant and sued on, but that Gibson was liable to the creditors of Charles for the difference between the amount of the goods turned over to him by Charles and the amount of the goods returned to Charles by Gibson, namely, the difference between \$1,700.44 and \$1,464.67, and interest thereon, and that the same should be paid to appellant, the first and only creditor attacking that transaction; and it was adjudged, ordered, and decreed that appellant recover of Gibson the sum of \$235.77, with interest thereon from the 30th day of July, 1904, until paid, and costs of its suit, and that as to this recovery the deed executed on the 15th day of July, 1904, by Gibson to his wife, Cordella Gibson, conveying certain lands therein described, was not made for consideration deemed valuable in law, but was made with intent to hinder, delay, and defraud appellant, as a creditor of B. G. Gibson, and therefore was fraudulent and void as to its debt against Gibson, and that this decree be a lien upon the lands in question, to be enforced by proper decree to be thereafter entered in the cause.

From this decree the appeal under consideration is taken, and we are asked to reverse it only in so far as it holds that the two notes executed by Gibson to Charles for \$300 each, and assigned by the latter to appellant, are void and uncollectible because of failure of the consideration for which they were executed; the effect of the decree being that, the sale of the stock of goods from Charles to Gibson having been made without a compliance with the provisions of the statute, *supra*, the transaction was void, and therefore the consideration for which the notes in question were executed failed.

Besides the fact, already mentioned, that after the assignment of these notes to appellant Gibson not only recognized them as valid obligations which he was bound in law to meet, but expressly promised appellant that he would pay the notes, the statute does not declare that the sale of the goods was fraudulent and void as to Gibson, the buyer, but only that the sale was *prima facie* presumed to be fraudulent and void as to the creditors of the seller, and, further, that the merchandise in the hands of the purchaser, or any part thereof, if it be found in his hands, should be liable to such creditors, and in the event that the same or any part thereof be withdrawn by the purchaser then the purchaser himself personally shall also be liable to said creditors of such seller to the extent of the merchandise so received by him and thus withdrawn.

The contention of appellant is that after notice to appellee, Gibson, of the assignment of the notes to appellant, Gibson and Charles could by no subsequent transaction invalidate the notes in the hands of the assignee; and this contention is clearly sound. The notes in the hands of appellant were only subject to

any equities between Charles and Gibson prior to notice of the assignment, and it is not pretended by Gibson or any one else that any such equity existed at the time of the assignment and notice to him on July 14, 1904; and, had there been, his express promise to pay and assurances to the representative of appellant that the notes were all right would have destroyed even such prior equities, much more any arising after notice of the assignment. This principle is rightly carried in such a case so far as to work an estoppel against the debtor and the assignor. The express promise of Gibson to appellant to pay these notes, and his assurances that they were all right, meant, of course, that he had no prior equities to set up against them, and concluded him as to any right by a transaction with Charles to render the notes void and uncollectible. Had he not attempted to do this, as he gave assurances that he would not do, the goods would have remained in his possession and been liable to appellant for the payment and satisfaction of the notes in question, by virtue of section 2460a of the Code of 1904, relied on by the circuit court as giving appellant a lien upon the money received by Gibson from a sale of a part of the goods while they were in his possession.

According to the answer of Gibson there was no fraud or dishonesty in his purchase of the stock of goods in question from Charles, and hence it was an innocent and valid purchase. Therefore the *prima facie* fraud was eliminated, and Gibson was the owner of the goods free from any consequences and results imposed by the statute, *supra*, under no obligations to the creditors of Charles, and was clothed with the right to hold the goods by payment, either directly to Charles or to his assignee, of the invoice price thereof evidenced by the notes he had given, so that the notes were for a legal and valid consideration, and Gibson could not by his own act relieve himself of the express promise to pay them to appellant.

In *Stebbins v. Bruce*, 80 Va. 389, while it is held to be settled law in this state that the assignee of nonnegotiable paper stands in the shoes of his assignor and takes subject to all defenses of the debtor against the assignor existing before notice of assignment, it is further held that where, after notice of assignment, the debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defense he had against the assignor. The opinion in that case recognizes the correctness of the statement of the law in the authorities cited, to the effect that while no acknowledgment made after an assignment will prevent the debtor from proving, if he can, any equity against the assignor before he had notice of the assignment, he will be estopped from setting up any equity or defense, however well founded originally, if by his assurance made beforehand he has

induced the assignee to acquire the debt, and that the assignee in general only holds an equitable interest in the assigned instrument. This statement of the law is declared to be subject to the qualification that where, after notice of the assignment, the debtor expressly or impliedly promises the assignee to pay the debt, he will be concluded thereby, if the retraction of such promise would operate as a fraud upon the assignee. "In this and other like cases," says the opinion, "where the assignee has been influenced to act, or to refrain from taking action, by the representations of the debtor, to permit the latter to repudiate those representations to the injury of the former would be contrary no less to the well-settled rule of the common law than to the plainest principles of natural justice. And the same principle prevails in equity."

This qualification of the rule of law in that case applies with full force to the case at bar, for it plainly appears from the facts already stated that the effort on the part of appellee, Gibson, to retract his promise to appellant to pay the two notes in question, operated as a fraud upon the appellant. Relying upon the promises and assurances given by Gibson that the notes were all right and that he would pay them, appellant took no action to enforce its indebtedness against Charles, and without any notice whatever to appellant Gibson permitted the stock of goods to be withdrawn by Charles, so that the latter could and did put them beyond the reach of appellant by conveying title thereof and transferring the possession thereof to a trustee for the benefit of the creditors of Charles other than appellant.

Ignorance of the law could not avail Gibson, and to permit him, under the facts and circumstances appearing in the record, to retract his assurances to appellant with reference to the two notes in question, or to repudiate his express promise to pay them, would operate, in our opinion, as a fraud upon the rights of appellant, and be, not only contrary to the established law, but to the "plainest principles of natural justice." *Stebbins v. Bruce*, supra; 2 Min. Inst. 326; 1 Greenleaf on Ev. (15th Ed.) § 207; 2 Pom. Eq. (3d Ed.) § 812.

For these reasons we are of opinion that the decree of the circuit court, in so far as it holds that the appellant is not entitled to recover of the appellee, B. G. Gibson, the two notes, of \$300 each, executed by Gibson to Paris Charles and by the latter assigned to appellant, is erroneous; and we are further of opinion that appellant is entitled to a lien on the tract of land conveyed by Gibson to his wife by deed of July 15, 1904, for the amount of said notes, with interest thereon from their maturity, as well as the lien for the sum of \$235.77, with interest thereon from the 30th day of July, 1904, until paid, with the costs of this suit, as decreed by the circuit court. Therefore the said decree, to

the extent that it denies appellant the right to recover of Gibson the amount of said notes and a lien upon said land as security for their payment, will be reversed and annulled, and the cause remanded to the circuit court to be further proceeded with in accordance with this opinion.

Reversed in part.

(107 Va. 263)

### BARNES v. TIDEWATER RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

#### 1. EMINENT DOMAIN—DETERMINATION OF COMPENSATION—JUDICIAL REVIEW.

The determination of commissioners appointed to ascertain the compensation for land sought to be taken in proceedings to condemn land and to award damages to property not taken will not be disturbed, unless the award is clearly excessive or inadequate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 685.]

#### 2. SAME.

In proceedings by a railway company to condemn land, the commissioners, after viewing the premises and hearing the testimony, decided that a tract not taken would not be injured. On the hearing of the exceptions to the report the owner showed by eight witnesses that the commissioners erred in not giving damages, and the company showed by six witnesses that the property would not be damaged. There was no showing of prejudice or corruption on the part of the commissioners. *Held*, that the court properly confirmed the report of the commissioners.

Error to Corporation Court of Roanoke.

Proceedings by the Tidewater Railway Company to condemn land owned by H. C. Barnes. There was a judgment confirming the report of the commissioners appointed to award the compensation and damages, and H. C. Barnes brings error. *Affirmed*.

Robertson & Wingfield, for plaintiff in error. Robertson, Hall & Woods, for defendant in error.

HARRISON, J. This proceeding was instituted by the Tidewater Railway Company for the purpose of condemning and acquiring title to a portion of certain land owned by H. C. Barnes, the plaintiff in error.

It appears that the plaintiff in error owned two parcels of land, one located on the south side of Ferdinand avenue, in the city of Roanoke, through which the railroad passes, and the other on the north side of the same avenue, no part of which is taken for railroad purposes. Commissioners were appointed by the court to ascertain a just compensation for the land taken, and to award the damages to the adjacent or other property of the defendant, Barnes, or to the property of any other person, beyond the peculiar benefits that would accrue to such properties, respectively, from the construction and operation of the works of the railroad company.

The commissioners found the aggregate of land taken to be 3.31 acres, more or less, and assessed the compensation therefor at \$1,250.



They further ascertained that the damages to the adjacent and other property of the plaintiff in error, by reason of the construction and operation of the works of the company, beyond the peculiar benefits that would accrue to such properties, respectively, was \$2,650, making an aggregate finding for land and damages in favor of H. C. Barnes of \$3,900. They further found and reported that no damage was done to the property of any person other than the plaintiff in error.

This report was excepted to by the plaintiff in error, upon the ground that the compensation and damages awarded were inadequate, and because no damage was allowed for the property on the north side of Ferdinand avenue. The commissioners made no separate finding as to the property on the north side of Ferdinand avenue; but the testimony taken in the case shows that upon due consideration thereof they reached the conclusion that the land on the north side of the avenue would not be damaged by the construction and operation of the railroad. It was agreed at the hearing that the \$3,900 awarded by the commissioners should be accepted in full satisfaction of all compensation and damage to which the plaintiff in error was entitled, except that which it was contended would be sustained by the land on the north side of the avenue from the construction and operation of the railroad, as to which the commissioners concluded no damage accrued.

On the hearing of the exception, which was under the agreement limited in the manner already indicated, both parties introduced evidence on the question as to whether or not the property on the north side of Ferdinand avenue would be depreciated in value by the construction and operation of the railroad. After hearing the evidence the court entered the judgment complained of, overruling the exception of the plaintiff in error, and confirming the report of the commissioners.

The only error assigned by the petitioner is that the report of the commissioners should have been set aside because it allowed no damages for the land on the north side of Ferdinand avenue, no part of which was taken. In support of this assignment the plaintiff in error discusses the act concerning the exercise of the power of eminent domain, the damages thereby contemplated for injury done to land lying adjacent to that taken by the construction and operation of a railroad, and elaborately considers the elements of injury that should be regarded in such a case; it being insisted that the evidence before the commissioners and before the court shows that the land on the north side of the avenue will be injuriously affected by the operation and construction of the proposed railroad.

In disposing of this case it is unnecessary for us to follow the consideration and discussion given by counsel for plaintiff in er-

ror to the "eminent domain act"; for, if his view as to the proper construction of the statute be sound (as to which we express no opinion), it could not affect the result in this case, there being nothing in the record to show that there has been any failure on the part of the court or the commissioners to consider all the elements of injury which it is insisted should be considered. The court was not asked to instruct the commissioners as to the elements of injury they should consider, nor does any issue touching that matter appear of record to have been presented in any other form. The order appointing the commissioners follows, substantially, the language of the statute, and explicitly directs that they go upon the premises and view the land or other property, or such interest or estate therein, wanted by the railroad for its purposes, and, after viewing the same and hearing such proper evidence as either party may offer, ascertain a just compensation therefor, and award the damages, if any, resulting to the adjacent or other property of the defendant, or the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the works of said company. The report of the commissioners also follows the language of the statute, and shows that, after ascertaining a just compensation for the land taken, they estimated the damages resulting to the adjacent and other property of the owner, by reason of the construction and operation of the railroad, beyond the peculiar benefits, etc.; and the evidence shows that the commissioners duly considered the land north of Ferdinand avenue, viewed the premises, and, after hearing the testimony of witnesses introduced by the parties, reached the conclusion that the land north of Ferdinand avenue was not injured by the construction and operation of the railroad.

The sole question presented for our determination is whether or not the lower court erred in overruling the exception taken to the conclusion and finding of the commissioners and in confirming their report.

The doctrine is well established that the findings of a commission in a case like this are entitled to great weight, and are not to be disturbed by the courts, except in instances where excessive or inadequate estimates on their part is shown by very clear evidence. For error of judgment of the commissioners in arriving at the amount of damages, if any, there can be no correction, especially where the evidence is conflicting, unless the damages allowed are so excessive or inadequate as to show prejudice or corruption.

As said by Judge Keith, in *Railroad Co. v. Chamblin*, 100 Va. 401, 406, 41 S. E. 750, 752: "The best that can be done is to appoint capable and upright commissioners to go upon the land, examine it, hear testimony, and consider all the facts and circumstances surrounding the situation and likely to en-

ter into the value of the subject, and thus ascertain what is the value of the land to be taken, and the effect of such taking upon the residue of the tract." *Cranford Paving Co. v. Baum*, 97 Va. 501, 24 S. E. 906; *R. & P. R. Co. v. Seaboard, etc., Co.*, 103 Va. 399, 49 S. E. 512; *Tidewater Ry. Co. v. Cowan*, 106 Va. 817, 56 S. E. 819, 1 Va. App. 177; *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

In the case last cited the court, at page 306 of 147 U. S., page 393 of 13 Sup. Ct., 37 L. Ed. 170, says: "The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from *Mills on Eminent Domain*, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up, so as to correct the report as being against the weight of evidence. Hence for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.'"

In the case at bar there is no suggestion of prejudice or corruption on the part of the commissioners. It appears that, after viewing the premises and hearing the testimony of the witnesses introduced by the parties, the commissioners reached the conclusion that the adjacent or other land of plaintiff in error, lying on the north side of Ferdinand avenue, would suffer no injury from the construction and operation of the railroad, and therefore no damage was reported on that account. It further appears that upon the hearing of the exception taken to the report of the commissioners the evidence was very conflicting; the plaintiff in error introducing eight witnesses, who testified that the commission committed error in arriving at the conclusion that the property in question would not be damaged, and the defendant in error six witnesses, who sustain the judgment of the commissioners by testifying that in their opinion the property would not be damaged. After hearing this evidence the learned judge of the lower court, who had the opportunity of seeing the witnesses and of observing their manner of testifying, was of opinion that the exception to the commissioners' report should be overruled.

Upon well-settled principles the lower court could not, under the circumstances of this case, have done otherwise than overrule the exception to the report; and its judgment must be affirmed.

(145 N. C. 7)

## ROGERSON et al. v. LEGGETT.

(Supreme Court of North Carolina. Sept. 11, 1907.)

## 1. DISMISSAL AND NONSUIT—FAILURE TO SUE OUT SUMMONS.

Where defendant dies after being served with summons, the case, as to subsequent service of summons, is not within Revisal 1905, §§ 437, 438, providing that, when defendant is not served with summons within the time the summons is returnable, plaintiff may sue out an alias or pluries summons, returnable in the same manner as the original summons, and a failure to keep up the chain of summons issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance; but is within sections 415, 417, providing that no action shall abate by death of a party, but the court, on motion at any time within a year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative, and, when the suggestion of the death of a party has been made before a clerk, it shall be his duty to issue a summons to the party succeeding to the rights or liabilities of the decedent.

## 2. PAYMENT—PRIMA FACIE EVIDENCE—RE-CITAL IN DEED.

The attorney in fact being authorized by his power to deed land and to receive payment, his deed acknowledging payment is at least prima facie evidence of payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 228.]

## 3. PRINCIPAL AND AGENT—ACTING IN PRINCIPAL'S NAME—NECESSITY—EXECUTION OF DEED.

It is a good equitable defense to an action for land that defendant bought it of one having a power of attorney to sell and convey it, and paid him therefor, recorded his deed and entered and remained in possession thereunder, though the deed was executed in the name of the attorney, as attorney, instead of in the name of the principal, by the agent as attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 433.]

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by G. C. Rogerson and others against Council Leggett. Judgment for defendant. Plaintiffs appeal. Affirmed.

The title to the land in controversy was on and prior to August 12, 1856, in Patsy Dudley, for life, remainder to J. C. Rogerson and W. O. Rogerson. On said day J. C. Rogerson executed to Hosea Dudley a power of attorney, under seal, authorizing him to sell and convey his interest in the land. Said power of attorney was duly registered. W. O. Rogerson prior thereto had conveyed to said Hosea his one-half interest. On the same day, to wit, August 12, 1856, the said Hosea Dudley, together with his wife, the life tenant, executed a deed describing the said land to Noah Leggett, which contained appropriate words of conveyance. The premises of said deed is as follows: "This indenture made \* \* \* by and between Hosea Dudley in his own right as assignee of W. O. Rogerson, of Hosea Dudley as attorney for Josephus Rogerson and of Hosea Dudley and wife Patsy, of the first part," etc. The said deed was signed and sealed by Hosea Dudley and

his wife, and by "Hosea Dudley, Attorney for Josephus Rogerson," and duly proven and registered November 17, 1856, in the office of the register of deeds of Beaufort county. Noah Leggett, the grantee, entered immediately into possession of the land, and remained therein until his death during the year 1898, whereupon his son and heir at law, Council Leggett, entered, and has at all times since remained, in possession thereof. Patsy Dudley, the life tenant, died July 26, 1877. Josephus Rogerson died intestate during the year 1888. Summons was issued herein July 6, 1897, and served upon Noah Leggett July 13, 1897. At the Fall term, 1898, of the superior court, the following docket entries appear: "Complaint filed Dec. 1, 1897. Death of defendant suggested and notice ordered to issue to personal representative and heirs at law to come forward and defend suit. Continued." At the Fall term, 1899, the same entries appeared, together with the word "Issued." The same entries appear at each term, with the exception of two terms—1900, 1901—until, and including the October term, 1902. At the October term, 1905, an order was passed making Council Leggett and his wife, heirs at law of Noah Leggett, parties defendant and directing alias summons to issue. Time was allowed plaintiffs to file amended complaint. Summons was duly issued and served on them November 17, 1905. At the February term, 1906, plaintiffs filed a complaint, setting forth the title to one half undivided interest in Josephus Rogerson at the time of his death, and alleging ownership in themselves, as his heirs at law, of said interest, that defendants were the owners of the other half and in possession of the whole tract wrongfully, withholding same from plaintiffs. Defendants answered, denying plaintiffs' title, pleading the statute of limitations, and, for further defense, setting up the facts herein stated. They insist that, if the paper writing executed by Hosea Dudley as attorney for Josephus Rogerson did not operate to convey the legal title to said Rogerson's interest, it was a valid contract to convey, supported by a valuable executed consideration, and vested in their ancestor a perfect equity to call for the legal title. His honor instructed the jury, upon the entire evidence, that plaintiffs were not entitled to recover. Plaintiffs excepted. Verdict and judgment. Plaintiffs appealed.

Ward & Grimes and A. R. Dunning, for appellants. Small & MacLean and Nicholson & Daniel, for appellee.

CONNOR, J. (after stating the case as above). In the view which we take of this appeal, the failure, on the part of the plaintiffs, to cause notice to issue and be served upon defendant, Council Leggett, within one year after the death of his ancestor, becomes immaterial. We concur with the plaintiffs'

counsel that, upon the record, there could be no discontinuance. This occurs only when the summons has not been served. Revisal 1905, §§ 437, 438, provide for such cases. This case is controlled by section 415 (1). While, as held in *Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412, the statute is not "automatic," and a judgment of the court is necessary to abate the action, it would seem that unless the plaintiff, within a reasonable time, which the statute fixes at one year, proceeds to prosecute his action against the "representative or successor in interest" of the original defendant, the court should ex mero motu enter judgment of abatement. It will be noted that by section 417 it is made the duty of the clerk, upon suggestion of the death of defendant, to issue summons to the representative, or person, who succeeds to the rights or liabilities of the deceased plaintiff or defendant. The wisdom of this requirement is illustrated by the record before us. Noah Leggett died within a few months after the action was brought, July 6, 1897. His death was called to the attention of the court at the next term. So far as the record informs us, his heir had no notice or knowledge that any action was pending involving the title to his land until November 13, 1905. Certainly the law does not contemplate that the plaintiff may keep his action in a semi-dormant condition for seven years, and then, when it suits his pleasure or possibly his interest, call the heir at law into court to find that by a legal fiction he has been deprived of his defenses, and called to answer, when, by the lapse of time, he has become disabled to make good his defense or that which his ancestor may have made. The liberal provisions of the statute permitting the continuation of the action after the death of the defendant should not be permitted to work out such results. Fortunately, under our reformed procedure, which permits the defendant to avail himself of equitable defenses, the court is enabled to administer justice upon the facts as they appear in the record. While it is true as contended by the plaintiffs, "that, where any one has authority as attorney to do any act, he ought to do it in his name who gives the authority," it is also true that, where the attorney has the authority and pursuant thereto executes the instrument in his own name, as attorney, for his principal, and receives the consideration, though the deed be inoperative for want of formal execution in the name of the principal, it is binding in equity; hence, a deed executed by an agent, though defective and inoperative to convey the property, will be enforced as an agreement to convey in equity. 1 Am. & Eng. 1084. This statement of the law is abundantly sustained upon principal and authority. It appearing that Hosea Dudley had a power of attorney, under seal, to convey the interest of Josephus Rogerson, and that he attempted to execute the power, and, by his act intended to do so, a perfected eq-

uity was created in Noah Leggett to call for the legal title. He entered into possession under and pursuant to this right, and remained therein until his death during the year 1898. Josephus Rogerson, with notice of the action of his attorney, by the registration of the deed November 17, 1856, lived until 1888, asserting no claim to the land nor doing any act repudiating his deed. While it is true that until July 26, 1877, the life estate of Patsy Dudley prevented him from demanding possession or maintaining a possessory action, this did not prevent him from disaffirming the act of his attorney. From July 26, 1877, the time of the death of Patsy Dudley, until the death of Josephus Rogerson in 1888, Noah Leggett was in the possession of the land and subject to a possessory action. The possession of Leggett, pursuant to his equity, precludes the suggestion of abandonment of his right to call for the legal title. The status of the defendant, with its effect upon his rights, is well stated by Dillard, J., in *Farmer v. Daniel*, 82 N. C. 152, 160: "The defendant has now and had, at the institution of the action, the possession of the land \* \* \* consistent with the equitable title ever since it arose. \* \* \* Under these circumstances, no presumption of abandonment, satisfaction, or release of the equity can arise against the purchaser or his assigns. No presumption of abandonment or release can arise from lapse of time against parties who, all the time, stand upon their equitable right and possess and use the property as their own." The learned counsel contended that, to perfect his equity, the representatives of Noah Leggett should show that Rogerson received the purchase money. The power of attorney authorized Hosea Dudley to receive it. His deed acknowledges its receipt, which is at least prima facie evidence of the fact. It has never been held in this state that a party paying money to an agent, or trustee, was required to see to its application. *Hauser v. Shore*, 40 N. C. 357.

Much of the discussion before us was directed to the question of ouster and the operation of the statute of limitations between tenants in common. The defendant's title is not based upon an ouster perfected by adverse possession. The entry of Noah Leggett was under Josephus Rogerson in respect to his equity. As we have seen, the ancestor of the defendants was at all times since November 17, 1856, until his death, in the rightful possession of the land. His equity passed to the defendants, and their possession is therefore in accordance with this equity. As all of the parties in interest were before the court, defendants would have been, if requested, entitled to a decree that plaintiffs convey to them the legal title, and that such decree operate to vest it in them pursuant to the provisions of the statute. Revisal 1905, §§ 566, 567. It would be a strange result if the defendants, whose ancestor paid for the

land, took title from a duly empowered attorney, recorded his deed in 1856, remained in possession until his death in 1898, should now be ejected by reason of a technical defect in the execution of the deed by the attorney.

We concur with his honor, and the judgment must be affirmed.

(145 N. C. 24)

**SAWYER v. ROANOKE R. & LUMBER CO.**  
(Supreme Court of North Carolina. Sept. 11, 1907.)

**1. RAILROADS—INJURY TO PERSON ON TRACK—NEGLIGENCE.**

A company, operating a railroad for the purpose of hauling logs, has the duty of keeping a lookout in the direction its train is going for the purpose of avoiding injury to persons on the track apparently unconscious, though it is a remote place, with no one there, or likely to be there, except its own employes, some of whom are engaged in cutting out the way, and some in laying track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1257-1263.]

**2. SAME—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.**

Even if one was negligent in going on the track of a logging railroad, yet there was no contributory negligence on his part; he having been struck by lightning and rendered unconscious, and the train which ran over him having been far enough away and going slow enough to have allowed him to be seen and train to be stopped in time to avoid the accident, had a lookout been kept.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1325.]

**3. EVIDENCE—ADMISSIONS IN ANSWER.**

Plaintiff may put in evidence an admission in the answer, it being an admission of a distinct and separate fact relevant to the issue, though it is only part of a paragraph; the rest in no way modifying or altering the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 713.]

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by J. L. Sawyer against the Roanoke Railroad & Lumber Company for personal injury alleged to have been caused by defendant's negligence. Judgment for plaintiff. Defendant appeals. Affirmed.

See 55 S. E. 84.

There was evidence tending to show: That in May 1904, plaintiff was run over and seriously injured by a logging train of defendant company, while he was in the employment of the defendant and engaged in cutting out its right of way. That defendant had constructed a railroad track of iron rails from Slatersville, a station on the Norfolk & Southern, to a tract of timber about five miles out, and at the time of the injury was engaged in operating a logging train, by which the logs, as they were cut and loaded, were hauled over the spur track to Slatersville, and thence over the line of the Norfolk & Southern to Plymouth, where defendant's mill was situated. That the plaintiff was with a gang of hands engaged in cutting out.

a right of way through this timber, and as this was done another gang would lay the track, when the train—consisting on this day of a locomotive and several logging cars—would be moved backwards down the track, and the timber logs that had been cut from and on either side of the track were loaded onto the train. That this loading was done chiefly by a skidder, a machine which was placed on the rear car, being in front as the train was moving—a large machine consisting of an engine, cable, etc., which was inclosed in a building or large box several feet wider than the car on which it was placed, and 8 or 10 feet high. This box, inclosing and protecting the machinery, had a door and perhaps a window at the rear, from which those who were engaged in operating the skidder could, when required, look down the track, and there was a door and steps for entrance at the front of the skidder. That several hands were required to operate the skidder when the loading was being done, and some were on the car at the time of the injury. That when the track was laid the engine would back the train along the same, and the skidder would draw in and load the logs from either side of the track onto the logging cars. That some of the hands were engaged in the woods, some cutting the right of way, some were engaged with another machine at the end of the track, and plaintiff himself, with one Billie Boyd, was engaged in grinding plaintiff's ax some 10 or 12 feet from the track, when a thunder and rain storm came up, and plaintiff and Boyd started along the track toward the skidder, with the intention of going into the same for shelter. The train and the skidder on the front car was at this time being backed down the track toward plaintiff at the rate of about 2 miles an hour, and could have been stopped within a distance of 15 feet. That as plaintiff and Billie Boyd were so moving down the track to take protection in the skidder they were struck by a bolt of lightning; Boyd being instantly killed and plaintiff knocked down and rendered unconscious, remaining so until he was run over by the train. The place where the plaintiff fell and remained upon the track was 75 yards ahead of the moving train, on a straight track, and in view of the hands and employes in the train, if any had been looking. Three issues were submitted: (1) As to defendant's negligence; (2) contributory negligence on part of plaintiff; (3) damages. Under the charge of the court there was verdict for the plaintiff. Upon judgment thereon, defendant excepted and appealed.

Small & MacLean, for appellant. Bragaw & Harding, Nicholson & Daniel, and Ward & Grimes, for appellee.

HOKE, J. (after stating the case as above). The judge below imposed upon the defendant the duty of keeping an outlook along the

track in the direction in which the train was moving, and in this connection charged the jury that, if they found the facts to be that the defendant company was operating a railroad for the purpose of hauling logs, and operating an engine and cars, the law imposed upon it the duty to keep a lookout for the purpose of avoiding injury to persons on the track apparently unconscious, and if it failed in this duty it was negligent, and if such failure was the real and proximate cause of the plaintiff's injury they would answer the first issue "Yes," etc.

It is urged for error that, on account of the remote placing of this occurrence, with no one ahead along the track, or likely to be there, except its own employes, whom they had every reason to believe were there alive and in health and in proper possession of their faculties, the judge should have charged the jury that upon the entire testimony, if believed, there was no negligence shown on the part of the company, and the jury should answer the first issue "No." But we are of opinion, and so hold, that the charge of the court correctly expresses the law applicable to the case, and that this assignment of error cannot be sustained. These logging roads, in various instances, and in different decisions, have been described and treated as railroads, and held to the same measure of responsibility and the same standard of duty. *Hemphill v. Lumber Company*, 141 N. C. 487, 54 S. E. 420; *Simpson v. Lumber Co.*, 133 N. C. 96, 45 S. E. 469; *Craft v. Lumber Co.*, 132 N. C. 156, 43 S. E. 597. And it is well established that the employes of a railroad company engaged in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty. *Bullock's Case*, 105 N. C. 180, 10 S. E. 968; *Dean's Case*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902; *Pickett's Case*, 117 N. C. 616, 23 S. E. 204, 30 L. R. A. 257, 53 Am. St. Rep. 611. This particular duty arises, not so much from the fact that railroad companies are common carriers, or quasi public corporations, as from the high degree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious, and in many instances fatal, injuries are almost certain to result in case of collision. As said by Burwell, J., in *Haynes v. Gas Company*, 19 S. E. 346, 114 N. C. 211, 26 L. R. A. 810, 41 Am. St. Rep. 786: "The utmost degree of care, so far as skill and human foresight can go, is required, for the reason that a neglect of duty is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance." And quoting from *Ray on Negligence*, p. 53: "As a result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that

amount of care and skill in order to prevent accidents." These reasons apply with equal force to logging roads, when their trains are operated by steam or other mechanical power, and are of such exigent nature as to impose this requirement of keeping an outlook as an arbitrary duty, whether in remote or more populous localities. Certainly, on the facts disclosed by this testimony, there should be no relaxation of the rule. Some of the employes were ahead engaged in cutting out the way, others in laying down the track, and yet others were at work at the end of the track with another machine of the same kind. They were engaged in rough work, and not unlikely to be in and upon the track at different places, and at times and in different ways to be down and helpless upon it; and it was a negligent act to back a train in their direction without keeping an outlook. The duty is imposed because some injury, and serious injury, was likely to follow from its neglect, and when such injury does follow it is no answer that the injured party was down and helpless from some unusual or unexpected cause. *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 523; *Hudson v. Railway*, 142 N. C. 198, 55 S. E. 103; *Horne v. Power Co.*, 144 N. C. 375, 57 S. E. 19. As stated in *Hudson v. Railway*, 55 S. E. 105, 142 N. C. 198, the correct doctrine is as follows: "In order that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

Defendant further contends that on the entire evidence the plaintiff was guilty of contributory negligence, and objects to the following part of the charge on that question: "If you find from the evidence that defendant was backing its train down its track, that the plaintiff fell on the track in an apparently unconscious condition, that when he so fell he was far enough from the train for it to have been stopped in time to have avoided the injury, that the defendant failed to keep a lookout, and that if a lookout had been kept the defendant, by the exercise of ordinary care, could have discovered that plaintiff was on the track, in an apparently unconscious condition, in time to stop its train and avoid the injury, then the plaintiff's negligence, if any, would not be contributory; and if you so find you will answer the second issue 'No.'" We think this position is also correct, and clearly states the law applicable to the issue. A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury, and although the plaintiff in going on the track may have

been negligent, when he was struck down and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence; and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury, its negligence became the sole proximate cause of the injury, and the act of the plaintiff in going on the track, even though negligent in the first instance, became only the remote, and not the proximate or concurrent, cause. This responsibility of a defendant by reason of a negligent failure to avail itself of the last clear chance to avoid an injury is sometimes submitted to a jury under a separate issue, and, while it is sometimes desirable, it is not always necessary, so to present it, and the trial judge in his discretion, as he did in this instance, may submit the proposition and have same determined by his charge on the issue as to contributory negligence. The same course was pursued by the judge and approved on appeal in *Pickett's Case*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611. The defendant in the present case has been fixed with responsibility because of its negligent failure to avail itself of the last chance to avoid injury, and for that alone, and the judge below properly told the jury in effect that, if this were true, the act of the plaintiff in going on the track in the first instance, even if negligent, would not bar a recovery, because only the remote cause of the injury, and therefore not contributory.

The court below also correctly ruled that plaintiff could put in, as an admission on the part of the defendant, a section of the answer, as follows: "And said machine ran upon plaintiff, injuring his arm so that same had to be amputated." This is an admission of a distinct and separate fact relevant to the inquiry, and, though it was only a part of an entire paragraph, plaintiff was not required to put in qualifying or explanatory matter inserted by way of defense, and which in no way modified or altered the fact. *Hedrick v. Railroad*, 136 N. C. 510, 48 S. E. 830; *Lewis v. Railroad*, 132 N. C. 382, 43 S. E. 919.

There is no error, and the judgment is affirmed.

No error.

(145 N. C. 22)

ALEXANDER v. MORRIS.

(Supreme Court of North Carolina. Sept. 11, 1907.)

LANDLORD AND TENANT—LEASES—ASSIGNMENT.

After death of one to whom a lease was assigned with provision that it should revert to the lessee in case of death of the assignee before its expiration, the lessee, by her general agent, at a time when the unexpired term was so short that it could be assigned by parol,

wrote on the back of the assignment, which referred to and fully described the lease and property, "We hereby transfer all our right and title and interest in this lease to M." Held that, the original lease being meant by the words "this lease," there was a valid assignment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 237.]

Appeal from Superior Court, Tyrrell County; W. R. Allen, Judge.

Action by Dora S. Alexander against Lula Morris to recover possession of a leasehold. Judgment for defendant. Plaintiff appeals. Affirmed.

J. E. Alexander and M. Majette, for appellant. W. M. Bond, for appellee.

**BROWN, J.** The property in controversy was leased for eight years, beginning on January 2, 1900, to Mrs. F. E. Cahoon, wife of E. P. Cahoon. On July 30, 1903, F. E. Cahoon and husband duly assigned the lease to Abner Alexander, with a proviso that, if Alexander should die before the expiration of the lease, the property shall return to Mrs. Cahoon for the remainder of the lease. Alexander died April 8, 1904, and on August 30, 1904, Dora S. Alexander, the plaintiff, took from Mrs. Cahoon a verbal assignment of the unexpired term. On July 23, 1906, F. E. Cahoon and her husband executed to the plaintiff a written assignment of the lease. It appears, however, that on May 21, 1906, F. E. Cahoon delivered to the defendant the written assignment of the lease which had been made to Abner Alexander on July 30, 1903, with the following indorsement: "We hereby transfer all our right and title and interest in this lease to Lula Morris." This is dated May 21, 1906, and is signed: "F. E. Cahoon, per E. P. Cahoon, Agent." It is admitted that the latter was the general agent for his wife, and that by virtue of such assignment defendant was in possession of the property.

The verbal assignment of the lease made to plaintiff was absolutely void because at the date thereof, August 30, 1904, the lease had more than three years to run, and therefore such an interest in land could only have been assigned in writing. Revisal 1905, § 976. At the time of the written conveyance dated July 23, 1906, made by Mrs. Cahoon and husband to plaintiff, they had on May 21, 1906, assigned the unexpired term to defendant. As there was then only about 19 months of the term remaining, it required no deed under seal or privy examination to effect a conveyance thereof. It could be assigned by parol. It is admitted that E. P. Cahoon was the general agent of his wife in the management of her property, and his authority to act for his wife is not contested. Under and by virtue of this assignment defendant has remained in possession of the leasehold estate up to this time. We cannot agree that the assignment is invalid, because not written on the original lease. The

paper upon which it was written referred to and fully described the lease and the property, and in using the words "this lease" in the assignment the assignors plainly meant the original lease executed to Mrs. Cahoon by Winston Sikes. Upon the facts agreed we concur with his honor that plaintiff is not entitled to recover.

Affirmed.

(145 N. C. 51)

## DANIEL v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Sept. 17, 1907.)

### 1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

Plaintiff testified that while engaged in the line of his duties, in accordance with the custom prevailing among defendant's employes, he attempted to board one of defendant's cars, and while so doing, as the train was moving slowly and in the immediate view of the engineer, the latter suddenly opened the throttle and accelerated the speed of the train with a jerk, by which plaintiff was thrown under the car and injured. Evidence held insufficient to show that plaintiff was negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1123.]

### 2. SAME—ACTION—INSTRUCTIONS.

An instruction that if defendant's engineer saw plaintiff when he attempted to board the car, and knew or had reason to believe that plaintiff would attempt to get on the car, or could by ordinary prudence have seen that plaintiff would make such attempt, and while plaintiff was getting on the car the engineer pulled the throttle, causing the train to jerk suddenly forward and throw plaintiff under the wheels, and that a reasonably prudent man would not have pulled the throttle under the circumstances, they should find the issue concerning defendant's negligence in the affirmative, was proper.

### 3. APPEAL—NECESSITY OF EXCEPTIONS.

A ruling on the admissibility of evidence, to which defendant took no exception and with which the record showed defendant appeared to be content, could not be urged as reversible error on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal an Error, § 1503.]

### 4. EVIDENCE—OPINIONS—COMPETENCY—KNOWLEDGE OF SUBJECT.

Where defendant had been employed a month at the time he was injured while attempting to board one of defendant's cars, it was not error to permit him to testify that it was customary for defendant's servants to ride on the cars as he was attempting to do at the time of his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2255.]

### 5. MASTER AND SERVANT—INJURIES TO SERVANT—CUSTOM.

Where, after seeing plaintiff, a servant of defendant railroad company, attempting to board a car, as testified by him, the engineer opened the throttle of the engine, causing the train to jerk suddenly and throw plaintiff under a car, which ran over his leg, it was not material to defendant's liability whether plaintiff attempted to get on the car in accordance with a custom of the railroad's employes or not.

### 6. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where plaintiff, a young man, was awarded only \$1,000 for the loss of a leg while working

as defendant's servant, defendant was not prejudiced by the admission of evidence that he had been promised promotion, to show his reasonable expectation of earning wages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by Andrew Daniel against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Day, Bell & Dunn and Murray Allen, for appellant. E. L. Travis and Geo. C. Green, for appellee.

CONNOR, J. Although the record contains 41 exceptions, the merits of the controversy are presented upon defendant's motion for judgment of nonsuit, and involve but few facts. Plaintiff alleges, and in support of his allegations testifies, that he was employed by defendant company to work on and about its yards at Weldon, N. C.; that on the day of the accident he was directed by a fellow servant to go to the coal chute and deliver a message to one Reed, another employé, in regard to moving an engine and some coal cars; that in the discharge of the duty imposed upon him he met an engine to which two coal cars were attached. He thus describes the manner in which he sustained the injury for which he seeks to recover damages: "Mr. Owens was the engineer, and he was looking at me when I was meeting the engine. When the engine was passing, Mr. Owens was laying out of his window watching when I was meeting the engine, and was looking back at me after I passed the engine, and the second that I went to catch the car Mr. Owens opened the throttle and made a jerk, about the time I went to catch the car, and had my foot on the stirrup, and that jerk threw me under the car, and the whole run over me, and broke my leg all to pieces. The engineer could see me when I went to take hold of the car. I was going back downtown on the car about three-quarters of a mile. There were two cars attached to the engine. According to the best of my knowledge the engine was moving at about the rate of three miles an hour. I could catch it in a fast walk. There was nothing between me and the engineer to prevent him from seeing me as I went to get on the train. I attempted to board the car next to the engine." He was cross-examined at much length, but the foregoing is the substance of his testimony regarding the manner in which he was injured. He further testified that he and other railroad employes were in the habit, or that it was customary for them, to get and ride on the cars as they moved slowly along the track in the yard. Plaintiff was contradicted in his account of the transaction, custom, etc.

Defendant does not deny that the testimony, if believed, shows negligence on the part of

its engineer. It contends that the same testimony which establishes negligence shows, as matter of law, contributory negligence on the part of the plaintiff, and upon that ground bases its motion for judgment of nonsuit. Conceding the truth of plaintiff's testimony, as must be done in disposing of the motion, we do not perceive how his honor could have rendered judgment of nonsuit. There is in it but slight, if any, evidence of contributory negligence. Plaintiff says that while engaged in the line of his duty, in accordance with the custom prevailing among defendant's employes, he attempted to board the car under the circumstances narrated, and was by the act of the engineer injured. This testimony falls far short of establishing contributory negligence as a matter of law. The jury having found, under the instruction of the court, that the injury was sustained as testified to by plaintiff, the conduct of the engineer was manifestly negligent. It is but just to him to say that he denied the statement made by plaintiff, giving an entirely different account of the matter, and that his testimony was strongly corroborated by others who saw the accident, but was rejected by the jury. We are compelled to take the testimony as true, and from that point of view his honor correctly denied the motion.

His honor instructed the jury, after stating the general contentions of the parties, as follows: "And [if] you further find that the engineer saw him [plaintiff] at the time he made the attempt to get on the car, or saw him immediately before he made the attempt, and that the engineer knew or had reason to believe that plaintiff would make the attempt to get on the car, or could by the exercise of ordinary prudence have seen that the plaintiff would attempt to get on the car, and if you further find by the weight of the evidence that, when the plaintiff attempted to and was in the act of getting on the car in the manner testified to, the engineer pulled the throttle, thereby causing the train to suddenly jerk forward, and that the sudden jerking of the train caused the plaintiff to lose his hold and fall under the wheels of the car, crushing one of his legs, and further find that a reasonably prudent man would ordinarily not have pulled the throttle at the time and under the circumstances as you may find them to be, then you will answer the issue 'Yes.' If you do not so find, you will answer the issue 'No.' " This instruction, to which defendant excepts, is clearly correct, and fairly presents the question of fact to the jury. They found against defendant, and after doing so, logically, found that the plaintiff was not guilty of contributory negligence. They could not, after finding the first issue, come to any other conclusion. His honor correctly charged the jury in regard to the measure or standard of duty imposed upon the plaintiff in at



tempting to get on the car. We have examined the prayers for instruction submitted by defendant, and his honor's ruling upon them. We find no error in this respect.

Defendant excepts to several rulings made by his honor regarding the admissibility of testimony. The one most strongly urged upon us is thus presented upon the record: "Plaintiff was asked: Did he see you when you went to get on? Answer: Yes, sir. Defendant objected to his saying whether he could see him or not. The Court: Yes; I reckon that is a matter for the jury. Q. Was there anything between you and the engineer when you went to get on the train to prevent him seeing you? A. No. Defendant objected. Overruled, and exception by defendant." Defendant insists that the court erred in permitting the answer to the first question. Without expressing an opinion upon the admissibility of the question and answer, the record shows that defendant was content with his honor's action and made no exception thereto. It is a fair construction of the language that his honor excluded the answer, saying that whether the engineer saw plaintiff or not was an inference to be drawn by the jury from the evidence as to position of the parties, etc. This is manifest from the form of the next question, which was clearly competent. His honor would have made his language more explicit if defendant had indicated that it was not content. The witness had, without objection, testified that the engineer could see him. The difference is rather slight, in view of the condition of the record, to base a finding of reversible error.

The exception to the admission of plaintiff's testimony that it was customary for defendant's servants to ride upon the cars, as he was attempting to do, is without merit. It is true that plaintiff had been in defendant's employment but one month. He may, within that time, have become acquainted with a custom respecting his own employment and the discharge of his duties. He was cross-examined at much length, and the jury given ample opportunity to properly weigh and value his testimony. In the aspect of the case found by the jury, it was not material whether he attempted to get upon the car in accordance with a custom or not. If, after seeing plaintiff attempting to get on the car in the manner testified to by him, the engineer opened the throttle to his engine, thereby causing him to be thrown under the car and injured, the defendant would be liable for negligence upon well-settled principles and adjudged cases. *Deans v. Railroad*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902, and many other cases.

Defendant excepts because plaintiff was permitted to say that he was promised promotion. His honor admitted this evidence as tending to show his reasonable expectation of making wages. We do not find any reversible error in this. In view of the fact that

the jury gave plaintiff, a young man, only \$1,000 for the loss of his leg, we do not think it probable that his expectation of increased wages made much impression upon their minds. The cause was fairly submitted to the triors of the fact. We find no valid exceptions to his honor's rulings.

The judgment must be affirmed.

(145 N. C. 48)

#### HAWK v. PINE LUMBER CO.

(Supreme Court of North Carolina. Sept. 17, 1907.)

#### ACTIONS—JOINDER—CONTRACT OR TORT.

Where plaintiff contracted to log certain land for a specified price and to furnish equipment for a tram road, part of which was to be constructed by defendant, plaintiff was entitled to join an action for damages for defendant's breach of the contract with an action for defendant's conversion of plaintiff's property placed on the land for the purpose of doing the work under the contract, under Revisal 1905, § 489, providing that any causes of action may be united where they arise out of the same transaction or a transaction connected with the same subject of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 490-510.]

Appeal from Superior Court, Craven County; Neal, Judge.

Action by G. E. Hawk against the Pine Lumber Company. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

The plaintiff alleged in his complaint: That the defendant owned a large tract of land in said county and employed him to log the same at \$3 per 1,000 feet, there being 150,000,000 feet of timber on the land at the time. In order to cut and deliver the timber as required by the contract, it was necessary to lay a tramway, part of which was constructed by the plaintiff and the other part by the defendant; the plaintiff having agreed to furnish trucks and certain other equipment and supplies for carrying on the work, which he did, and the defendant having agreed to furnish other equipment and materials necessary for the said purpose, which it failed to do. That the defendant in other respects refused to perform its contract. While the plaintiff was engaged in the performance of his part of the contract, the defendant unlawfully seized and took possession of the tramway, and converted to his own use certain property which the plaintiff had furnished and placed on the premises for the purpose of doing the work required of him by the contract, and thereby prevented him from performing the same. He prays judgment for \$100,000 for the breach of the contract, for \$3,470 for seizing the tramway which was built by the plaintiff at his own expense, and for \$2,174 for the conversion of the personal property, making in all \$105,644. The defendant demurred for misjoinder, because the plaintiff had united a cause of action

for unliquidated damages, which arose out of a contract with one for the conversion of personal property, which arose out of a tort. The demurrer was overruled, and the defendant appealed.

W. W. Clark and Simmons, Ward & Allen, for appellant. D. L. Ward and W. D. McIver, for appellee.

WALKER, J. (after stating the facts as above). It is true, as argued by the learned counsel for the defendant, that at common law the causes of action stated in the complaint could not have been joined. 23 Cyc. 392; Logan v. Wallis, 76 N. C. 416; Doughty v. Railroad, 78 N. C. 22. But this rule has been changed by the reformed procedure, and now any causes of action may be united "where they arise out of the same transaction or a transaction connected with the same subject of action." Whether they be for the breach of a contract and for a tort, or legal or equitable, or both, will make no difference. Revisal 1905, § 469. The courts have not attempted to state any general rule by which all cases may be tested under that statute, as it has been found impossible to do so. The language, no doubt, was chosen because of the very wide scope of its meaning, enabling the courts to construe it as will be found most convenient and best calculated to promote the ends of justice. 1 Enc. of Pl. & Pr. 185. Having no very definite principle to guide us, it is safer for courts to pass upon the question as each case is presented, except when it comes directly and clearly within some established precedent.

We think the causes of action were properly joined in this case, and that the court was right in overruling the demurrer and requiring the defendant to answer. In Hamlin v. Tucker, 72 N. C. 502, the court held that the plaintiff had properly united causes of action for harboring his wife, for the conversion of personal property belonging to the plaintiff jure mariti, for inducing the wife to execute a deed for land to the defendant while so harbored, and for converting certain personal property, the subject of a marriage settlement. It would seem that the case just cited is more than a good precedent for the ruling of the court in this one. The causes of action are not so nearly related to or connected with each other as are those in this case; the only difference being that in Hamlin v. Tucker they were legal and equitable, while here they are in contract and in tort. But this is merely a nominal distinction. By clear analogy many cases sustain the ruling of the court. Young v. Young, 81 N. C. 92; King v. Farmer, 88 N. C. 22; Benton v. Collins, 118 N. C. 196, 24 N. E. 122; Cook v. Smith, 119 N. C. 350, 25 S. E. 958; Daniels v. Fowler, 120 N. C. 14, 26 S. E. 635; Fisher v. Trust Co., 138 N. C. 224, 50 S. E. 659; Oyster v. Mining

Co., 140 N. C. 135, 52 S. E. 198; McGowan v. Insurance Co., 141 N. C. 387, 54 S. E. 287. "The result of the decisions is that, if the causes of action be not entirely distinct and unconnected; if they arise out of one and the same transaction, or a series of transactions forming one course of dealing and all tending to one end; if one connected story can be told of the whole—the objection of multifariousness does not arise." Young v. Young, 81 N. C. 91; Bedsole v. Monroe, 40 N. C. 313.

But Badger v. Benedict, 1 Hilton (N. Y.) 414, seems to be directly in point. In that case there were separate causes of action, arising out of the breach of a contract and injuries to property, the subject of the contract, which was in the possession of the plaintiff for the purpose of enabling her to perform it and by the conversion of which she was prevented from doing so. The court held that they were properly united under a statute of that state identical in language with ours, as they arose out of one and the same transaction. That decision is not a binding precedent with us, but it must be regarded as very persuasive authority. If the causes of action stated in the plaintiff's complaint in this case did not arise out of the same transaction, and we think they did, they surely are connected with the same subject of action. We do not see how the defendant can possibly be prejudiced in his defense by the joinder.

We conclude that the ruling of the court was right. The defendant will be allowed to answer.

No error.

(145 N. C. 46)

#### DIXON v. DIXON.

(Supreme Court of North Carolina. Sept. 17, 1907.)

#### TRUSTS—EXPRESSED TRUSTS—ENFORCEMENT—LIMITATIONS.

Where a wife purchased certain real estate with money furnished her by her husband, and later, knowing that title was taken in her name, consented to transfer the property to him, but afterwards refused to do so, her acknowledgment operated to create an express trust in favor of her husband, so that limitations did not begin to run against the husband's suit to enforce the trust until her subsequent disavowal.

Appeal from Superior Court, Craven County; Ferguson, Judge.

Suit by John Dixon against Melissa A. Dixon. From a decree in favor of complainant, defendant appeals. Affirmed.

W. W. Clark, for appellant. Moore & Dunn, for appellee.

CLARK, C. J. This is an action by the husband to have his wife declared trustee for him of the property described in the complaint, which alleges that all said property was bought by the defendant with money furnished her by the plaintiff under instruc-

tions to take title in his name, but that instead she took the title in her own name. The jury found the facts to be as thus alleged.

The deeds to the wife for the property were dated July 14, 1880, October 24, 1889, January 26, 1889, and January 15, 1892. This action was begun January 19, 1904. The defendant pleaded the 10-year statute of limitations. By consent, the facts as to this plea were found by the judge, which, in addition to what is above stated, are that while plaintiff and defendant were living together as man and wife, "knowing title had been taken in her, he, by and with her consent, took the deeds to a lawyer to have the title perfected in him, but was called off by a telegram, and the transfer was never made." It does not appear when this occurred; but the judge further finds that there was no evidence of any contest or friction about the title or possession of the property until the defendant instituted an action for divorce November 2, 1903. It is therefore unnecessary to discuss the interesting question whether the statute could run between husband and wife; for, the trust being acknowledged, it became an express trust, of which there was no disavowal or adversary holding until November 2, 1903. Till then the statute did not run, and the court properly held that the plaintiff's action is not barred by the statute of limitation.

Affirmed.

(77 S. C. 550)

**JACKSON v. SOUTHERN RY., CAROLINA DIVISION, et al.**

(Supreme Court of South Carolina. Aug. 13, 1907.)

**1. RAILROADS—COMPANIES LIABLE FOR INJURIES—LESSORS AND LESSEES.**

Where both a lessor railroad and a lessee are sued for the negligence of the lessee, a nonsuit should not be granted to the lessor, unless it should also be granted to the lessee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 813.]

**2. MASTER AND SERVANT—FELLOW SERVANTS.**

Whether a bystander is a fellow servant with a station agent, who calls him in to assist in rolling cars away from a fire, is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1062.]

**3. SAME—INCOMPETENCY OF FELLOW SERVANT.**

A master is only required to exercise due care in selecting his servants, and is not liable for injuries caused to a servant by reason of the incompetency or inefficiency of a fellow servant where he exercised such care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 336.]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of York County; J. C. Klugh, Judge.

Action by W. F. Jackson, Jr., against the Southern Railway, Carolina Division, and the Southern Railway Company. Judgment

for plaintiff, and defendants appeal. Reversed.

See 54 S. E. 231.

J. E. McDonald, for appellants. Wm. B. McCaw, for respondent.

POPE, C. J. This is the second appeal in this case. 73 S. O. 557, 54 S. E. 231. The facts are as follows: On the night of October 9, 1903, a large fire took place in Tirzah, a station on defendant's road in York county. The fire had done much damage and was threatening to destroy several freight cars standing on a side track between the fire and defendants' depot. In order to save the cars and the station, which would necessarily have caught had the cars been burned, S. M. Carothers, defendants' agent at Tirzah, sought to roll the cars down the track. In pursuance of this plan he called to Will Roach and George Wilson to help him, and he himself got upon the cars to work the brakes. Will Roach having failed to respond to his request and George Wilson being unable to move the cars, Carothers called one or more persons to his aid, among whom was the plaintiff, W. F. Jackson, Jr. To facilitate moving the cars he ordered George Wilson to uncouple them. Jackson, according to his own testimony, believing that Wilson had carried out the order, got between the cars and was pushing, when the car behind caught his right foot, crushed his ankle, and bruised his right leg considerably. Plaintiff alleged negligence on the part of the defendants in not furnishing him, through their representative, S. M. Carothers, a safe place to work, reasonably safe and suitable appliances with which to work, a competent servant to uncouple the cars, and a sufficient and competent force to move them. The defendants deny any negligence on their part, and allege that plaintiff's injury was due to an unavoidable accident and that the injuries were caused by the acts of fellow servants, and therefore they are not liable. The case came on for trial at the May, 1906, term of court for York county. At the conclusion of the plaintiff's testimony defendants moved for a nonsuit. Judge J. C. Klugh, the presiding judge, refused the motion and allowed the case to go to the jury. The result was a verdict of \$6,000 for the plaintiff. The motion for a new trial having been refused, defendants appeal to this court.

1. The first exception raises the point that the motion for a nonsuit should have been granted as to the defendant Southern Railway, Carolina Division, as there was a total failure of proof tending to show negligence on its part. It was admitted on all sides that the defendants occupied the relation to each other of lessor and lessee. Under our law the defendant Southern Railway is agent of its lessor, and the lessor is responsible for all acts of negligence on the

part of the Southern Railway's officers and agents. *Smalley v. Railway*, 73 S. C. 572, 53 S. E. 1000; *Franklin v. Railway*, 74 S. C. 332, 54 S. E. 578; *Reed v. Railway*, 75 S. C. 170, 55 S. E. 218. Therefore, unless the nonsuit could have been granted as to the Southern Railway, no error was committed in refusing it as to the Southern Railway, Carolina Division. Let us consider, then, if the motion should have been granted as to the lessee. The motion was made on the grounds that there was no evidence tending to show negligence on the part of the defendants, and that plaintiff's injuries, if he were injured, were due solely to the acts of fellow servants. These grounds resolve themselves into the question whether Carothers was the representative of the master and a superior servant having a right to control and direct the services of the plaintiff. On the former appeal it was held that there was testimony going to establish this relation and the nonsuit was properly refused. On this trial the evidence is equally strong, if not stronger. Carothers himself testified that he had control of defendants' property at Tirzah. Several witnesses testified to the same effect. The property being in danger, he called upon the plaintiff to aid in protecting it, and the plaintiff responded. Under these circumstances we think the question was properly submitted to the jury to say whether he was a superior or a fellow servant. The nonsuit, therefore, was properly refused.

2. The next question raised by the defendants' exceptions is that the circuit judge charged the jury that, in order to constitute the relation of fellow servants, there must be equality in the matter of doing work. This exception misconstrues the charge. Throughout Judge Klugh seemed anxious to impress upon the jury that difference of rank did not necessarily prevent persons from being fellow servants. After charging defendants' request to this effect, he added these words: "That makes clear the distinction that I have been seeking to bring to your attention all along between the relation of fellow servants and the relation between the superior servant representing the master and the under servant, and I so charge you." It is impossible that the jury could have been misled by the words objected to. Therefore we overrule the objection.

3. The circuit judge charged the jury in effect that if the master fails to employ competent servants, and an employé is injured by reason of the incompetency or incapacity of his fellow servants, then the master is liable. The defendants object to this charge on the ground that it renders the master absolutely liable if injury results from the employment of incompetent servants. This contention must be sustained. It is true that one entering service does not assume the risk arising from the negligent selection of incompetent servants, and it is also true that

evidence of incompetency of a servant raises a prima facie presumption of negligence in the master selecting him, in the absence of evidence of due care in selection. But it was error to charge the jury that if the master fails to employ competent servants, and an employé is injured by reason of incompetency or incapacity of his fellow servant, then the master is liable, for the master is liable only for due care in the selection of his servants. It is true the circuit judge did charge: "Now, after the employer has exercised reasonable care in selecting employées, he is not bound to compensate a fellow servant for the negligence of his fellow servants, as I have already instructed you." But he immediately followed it with this inconsistent and erroneous instruction: "But if he fails to employ competent fellow servants, and an employé is injured by reason of the incompetency or incapacity of the fellow servants to do the work they are employed to do, that is a risk the employé does not assume; but the employer is bound to compensate him if he was injured by the incompetency of his fellow servants, just as much as he is bound to compensate him if he is injured by reason of the unsafe or unsuitable appliances that might be necessary for the doing of the work and that are furnished by the employer."

The defendants' fifteenth request to charge was: "The law is that when one enters into the employ of another he assumes the natural and ordinary risk of such employment, which includes the negligence of a fellow servant, if the master has selected such fellow servant with due care. If the jury should find that Carothers had authority to direct and control those who were working under him, and if they should find further that he gave orders and directions, but that such orders and directions were not obeyed or carried out, and that that was the proximate cause of the plaintiff's alleged injury, then the plaintiff cannot recover, and the verdict must be for the defendant." In commenting on this request the circuit judge again emphasized the error in these words: "That is, if you should find that those orders were not carried out because of the negligence of the fellow servant to whom they were given. If you should find that they were not carried out because of the inefficiency or incompetency of a fellow servant, the defendant would be liable, because you must bear in mind the difference between the liability of the employer for the negligence of his fellow servants and his liability for inefficiency and incompetency. He is not liable for the negligence. He is liable if he has selected incompetent or inefficient fellow servants, just the same as he would be liable for a defect in any other appliance which he furnishes that would be necessary to do the work, and so I charge you." This, in effect, makes the master a guarantor of the competency of his servant, whereas all that the law imposes up-

on the master is the exercise of due care in selecting his servants. The question of due care under all the circumstances should have been submitted to the jury.

4. The last alleged error is failure of the circuit judge to grant a new trial on the ground of insufficiency of evidence to sustain the verdict. There was testimony on all the material issues in the cause. The jury heard the case and rendered a verdict for the plaintiff. The circuit judge, on the motion for a new trial, we must take for granted, carefully considered the testimony, and his conclusion was that the verdict was proper. Under the well-settled law this court cannot review the evidence. *Miller v. Railway*, 69 S. C. 116, 48 S. E. 99; *Jones v. Hiers*, 57 S. C. 427, 35 S. E. 748; *Wilson v. Assurance Co.*, 51 S. C. 549, 29 S. E. 245, 64 Am. St. Rep. 700.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

JONES, J. (concurring). I concur in the judgment for reversal. The testimony, in view of the decision on the former appeal in this case (73 S. C. 572, 54 S. E. 231), leaves no room to doubt that plaintiff was fellow servant with Wilson in the matter of moving the cars from the threatening fire, and that the failure of Wilson to uncouple the cars, as directed by Carothers, representing the master, was the proximate cause of the injury. The plaintiff testified that, just before he went in between the cars to push with Wilson, he heard Carothers direct Wilson to uncouple the cars, and that he supposed the order had been obeyed. Being a fellow servant with Wilson, however regrettable his misfortune, plaintiff cannot recover of defendant for injuries resulting from the negligence of Wilson in failing to obey the order of Carothers. The master is liable to a servant for the acts or omissions of a fellow servant, due to incompetency and incapacity, when the master is negligent in the selection of such fellow servant. Proof of a servant's incapacity raises only a prima facie presumption of negligent selection by the master; but in this case there was no evidence that Wilson, a section hand, was incompetent to uncouple standing freight cars, and there was no evidence that it was a negligent act to select Wilson to aid in the sudden emergency and necessity for quick action caused by the fire.

For these reasons there was error in refusing to grant a nonsuit as alleged in subdivisions "a" and "b" of the second exception, in charging the jury as alleged in the fourth and fifth exceptions, and in refusing a new trial for want of evidence to sustain the verdict, as alleged in the eighth exception.

GARY, A. J. (dissenting). Mr. Chief Justice POPE uses this language in his opinion: "The circuit judge charged the jury in ef-

fect that if the master fails to employ competent servants, and an employé is injured by reason of the incompetency or incapacity of his fellow servants, then the master is liable. The defendants object to this charge on the ground that it renders the master absolutely liable if injury results from the employment of incompetent servants. This contention must be sustained. \* \* \* This, in effect, makes the master a guarantor of the competency of his servant, whereas all that the law imposes upon the master is the exercise of due care in selecting his servants. The question of due care under all the circumstances should have been submitted to the jury." In order to determine whether there was error in that portion of the charge just mentioned, it will be necessary to refer to the pleadings, for the purpose of ascertaining the issues involved.

The complaint, in specifying the particulars in which the defendant was negligent, alleges that it failed to "select or employ a competent servant to uncouple the freight or box cars, to further and expedite their removal"; also, to "furnish a sufficient and competent force to remove said freight or box cars, with due regard to the safety of plaintiff." While the answer of the defendants does not deny this allegation in express terms, it may, under a liberal construction, be regarded as put in issue; but the defendants did not set up as a defense that they exercised due care in the selection of their servants. In the case of *Hicks v. Railway*, 63 S. C. 559, 375, 41 S. E. 753, the court says: "We see no reason why it should not be prima facie evidence of negligence to employ an incompetent servant, as well as to furnish defective machinery. Nor do we see why a servant should be held to assume the risk of negligence on the part of an incompetent fellow servant, when he does not assume the risk arising from defective machinery, especially since it has been decided that the word 'appliances' includes the persons necessary to operate the machinery." The principle is thus stated in *Branch v. Railway*, 35 S. C. 405, 407, 14 S. E. 808: "The allegation on the part of a servant that he has sustained an injury while in the service of the master by reason of the neglect of a duty which the latter owes to the former unquestionably states a cause of action; for, as said above, the omission of such duty affords at least prima facie evidence of negligence, and while it is true that such prima facie showing may be rebutted by evidence tending to show that such omission of duty on the part of the master was not owing to his want of care and diligence, but was due to other causes which he could not control, yet until such prima facie showing is rebutted it will be conclusive. For instance, the master may show that he did not know, and could not by the use of due care and diligence have ascertained, that there were any

such defects in the machinery, or other appliances furnished the servant as would be likely to cause the injury complained of; but, until this is shown, the failure to perform an acknowledged duty stands unexcused, and renders the master responsible. It seems to us, therefore, that want of knowledge on the part of the master of the defect in the machinery, being a matter of excuse for the failure on his part to perform an acknowledged duty, constitutes matter of defense, and is not an element in the cause of action. \* \* \* As the law, recognizing the imperfection of human nature, does not require absolute perfection in the performance of duty, it will listen to excuses for nonperformance as a defense to an action to recover damages for an injury sustained by one by reason of the failure of another to perform a duty which the latter owes to the former. We think, therefore, that knowledge on the part of defendant company, in this case, of the defect in the machinery, by reason of which the injury complained of was sustained, constitutes no part of the plaintiff's cause of action, but is a matter of defense."

Under this authority (which has been affirmed in subsequent cases) the charge mentioned in the opinion, even standing alone, was free from error. But his honor, the presiding judge, charged specifically that, "after the employer has exercised reasonable care in selecting employes, he is not bound to compensate a fellow servant for the negligence of his fellow servants," thus submitting the question squarely to the jury, whether there was due care in the selection of the servants. It seems to me that the doctrine announced in the opinion would practically overrule the case of *Branch v. Railway*, 35 S. C. 405, 14 S. E. 808, in this particular.

For these reasons I dissent.

(77 S. C. 545)

**FIELDS v. LANCASTER COTTON MILLS.**  
(Supreme Court of South Carolina. Aug. 13, 1907.)

**1. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER.**

Where the superintendent of a cotton mill was intrusted with the control of its policies and the methods to be employed to prevent interference with its operatives, the cotton mill is liable to one going on the mill property to entice away its employes, where he is tied and thrown into a pond of water, in which acts the superintendent participated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1218.]

**2. TRIAL—VERDICT—DAMAGES—AMOUNT.**

In an action for tort, a verdict for plaintiff "for punitive damages" was not illegal, because excluding the idea of actual damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 784.]

Appeal from Common Pleas Circuit Court of Lancaster County; J. C. Klugh, Judge.

Action by Joseph H. Fields against the Lancaster Cotton Mills and another. Judgment for plaintiff. Defendant corporation appeals. Affirmed.

Williams & Williams, for appellant. J. Harry Foster, for respondent.

WOODS, J. On August 21, 1905, the plaintiff, Joseph H. Fields, went from Winnsboro to Lancaster for the purpose of hiring hands, then in the employment of the Lancaster Cotton Mills, for the Fairfield Mills. The coming of outsiders on the mill property and inducing the hands to leave was a serious grievance to the Lancaster Mills, and the superintendent had instructed the overseers to prevent it by warning such persons not to come on the mill property, and if the warning was unheeded to have them arrested by an officer. Having information of the coming of Fields, or of some other person, with the design of enticing away the mill hands, the overseers, Hope, Layton, Hull, Mahaffey, Joseph Johnson, and William Johnson, went to the railroad station and met Fields. The defendant Skipper was also at the station, but for the purpose, as he testifies, of mailing a letter. After a friendly greeting, Fields walked in company with the superintendent and overseers towards the mill settlement, saying to them, falsely, that he had no intention of trying to hire hands, and had come only "to see his girl." When they reached the mill property some of the party seized and tied Fields, and threw him into the mill reservoir, and kept him there for a minute or two. The plaintiff sued the Lancaster Cotton Mills and Skipper for \$25,000 damages, alleging the indignity to have been maliciously inflicted upon him, in pursuance of a preconcerted plan agreed on by them. The appeal is from a recovery of \$800 against the Lancaster Cotton Mills alone.

The defendant first insists the circuit court committed error in refusing to grant a nonsuit, and subsequently refusing to order a new trial, on the ground that there was no evidence whatever of the participation of the defendants in the tort. Without evidence of the participation of Skipper, the superintendent of the mill, there might be some question whether the mill would be liable for the wrong committed by the overseers, who had no authority to act for the mill beyond warning such persons as Fields to keep off the mill property and to appeal to the law if the warning should be unheeded. But there was a conflict of evidence on the point of Skipper's participation. All the overseers testified the seizure and ducking of the plaintiff was the result of his having drawn a knife on Hope without provocation, and they all support Skipper in his statement that he had nothing whatever to do with the assault. Skipper admitted that he had some years before thrown into the water a man who had troubled him in a similar way, and that on this occasion he stood by and saw Hope and others carrying the plaintiff to the reservoir with the avowed purpose of throwing him in. He testified, however, that he had no idea there was any serious in-

tention to carry out the threat. The plaintiff's testimony was to the effect that Skipper did not actually lay hands on him and was a little distance apart when he was cast into the water; but he also testified Skipper was one of the ringleaders of the mob, and when he was pulled out said: "Next time I come back here he would do me a damn sight worse." From this statement of the evidence it is manifest the issues of participation by the superintendent and the motive of the assault were for the decision of the jury. The superintendent of a cotton mill is usually the representative of the mill with respect to the hiring and management of its operatives and other features of its mechanical operations. The evidence on the part of the defendant shows the superintendent, in this instance, was intrusted with the control of its policy and the methods to be employed to prevent interference with the operatives. The Lancaster Cotton Mills cannot, therefore, escape the liability to third persons for any action taken by him with respect to the matters it had placed under his control. It makes no difference that the action was unlawful and that it would not have been sanctioned by the corporation itself. "The principal is liable for the acts of his agent done in the course of his employment." *Parkerson v. Wightman*, 4 Strob. (S. C.) 363; *Cobb v. Railroad Co.*, 37 S. C. 194, 15 S. E. 878; *Rucker v. Smoke*, 87 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; *Skipper v. Mfg. Co.*, 58 S. C. 143, 36 S. E. 509; *Hutchison v. Real Estate Co.*, 65 S. C. 75, 43 S. E. 295; *Polatty v. Railway Co.*, 67 S. C. 395, 45 S. E. 932, 100 Am. St. Rep. 750; *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723; *Williams v. Tolbert*, 76 S. C. 211, 56 S. E. 908. There was no error in refusing the motions for nonsuit and for a new trial made on the grounds that there was no evidence of the participation by the Lancaster Cotton Mills in the tort.

The verdict was in this form: "We find for the plaintiff eight hundred dollars against the Lancaster Cotton Mills, for punitive damages." The defendant contends this verdict was illegal, and should have been set aside, because its language excludes the idea of actual damages, and there can be no recovery for punitive damages without actual damages. Since this exception was taken the point has been settled contrary to the defendant's view by the case of *Doster v. Telegraph Co.*, 77 S. C. 56, 57 S. E. 671.

The judgment of this court is that the judgment of the circuit court be affirmed.

(77 S. C. 531)

**SINGLETON v. PROGRESSIVE BEN. ASS'N.**

(Supreme Court of South Carolina. Aug. 9, 1907.)

**INSURANCE—BENEFIT ASSOCIATION—FORFEITURE—WAIVER.**

A provision in a certificate of a benefit association that on the failure of the holder of the

certificate to pay his dues for four weeks he will become "nonfinancial in case of death, and those failing to pay their dues for three weeks will become nonfinancial in case of sickness and not entitled to any benefit for thirty days after such dues have been paid," and that when any person shall be in arrears for four weeks the certificate shall be null and void, but he may be reinstated by paying a regular initiation fee and presenting a doctor's certificate, means that a member who is four weeks in arrears in dues forfeits his certificate, but such forfeiture may be waived by the association accepting dues thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1909.]

Appeal from Common Pleas Circuit Court of Charleston County; R. O. Purdy, Judge.

Action by Ella Singleton against the Progressive Benefit Association. From an order affirming a judgment of a magistrate's court in favor of plaintiff, defendant appeals. Affirmed.

Jno. A. Gilliland and Jno. B. Edwards, for appellant. Nathans & Sinkler, for respondent.

POPE, C. J. This action was brought in the court of D. J. Baker, judicial magistrate for Charleston county, by the plaintiff, Ella Singleton, against the defendant association, to recover a benefit of \$40 alleged to be due her on a certificate issued to her husband, Jeremiah Singleton, on the 12th day of September, 1904. The complaint alleged Jeremiah's death and the fulfillment of all the conditions of the certificate. In order to relieve itself from liability under paragraph 6 of the conditions printed on the certificate, defendant introduced plaintiff's receipt book in evidence, which showed that from April 21st to May 26th, prior to Jeremiah's death on June 3, 1906, no payment had been made on dues. Plaintiff alleged waiver of the forfeiture by the association in receiving pay for four weeks on the 26th of May. The defendant then took the position that under the section above referred to it was optional with the association either to declare a forfeiture or to allow the delinquent member to make up arrears, on condition that, in case of death within 30 days, no benefit should be recovered. The magistrate found for the plaintiff the full amount claimed, and on appeal to the circuit court Judge R. O. Purdy, in a decree of November 17, 1906, affirmed the finding. The defendant now appeals to this court, alleging error on the part of the circuit court in holding that the forfeiture had been waived.

Section 6, relied on by the appellant, is as follows: "Persons failing to pay their duties for four weeks will become nonfinancial in case of death, and those failing to pay their dues for three weeks will become nonfinancial in case of sickness, and not entitled to any benefit for thirty days after such dues shall have been paid. When any person shall be four weeks in arrears all claims on the association shall be forfeited, and the

certificate thereon null and void. But such persons may be reinstated, after having been expelled for nonpayment of dues or assessments for a period of four weeks, by paying the regular initiation fee and presenting a doctor's certificate in addition thereto. A person presenting such a doctor's certificate shall be reinstated at the next regular meeting of the association." After most scrupulous care we are unable to arrive at any legitimate conclusion which will give meaning to all of the clauses of this condition. If an attempt is made to construe it as appellant wishes, we are met at the very threshold by the idea that it is clearly against the intention of the framers of the condition. In the first place, the two divisions of the section are diametrically opposed to each other. Hence it is hard to conceive, if it had been the intention that the association should have the optional power which it now claims, why some word implying such power would not have been used? It would have been the easiest thing, and certainly it is the most probable, that, if such had been the intention, some disjunctive word, such as "or" or its equivalent, would have been used. So far from the use of such a word, however, the language is not so arranged, nor are we able to discern any attempt at an arrangement which would imply inadvertent omission of such a connective. Were such the case, in order to carry out the intention, the needed word could be supplied and the section construed so as to give the association the power it claims. It seems, however, that it did not once occur to the drawers of the condition under consideration to allow members who had been delinquent for 4 weeks to pay up their dues and be reinstated only upon condition that, should death occur within 30 days thereafter, no benefit should be received. When the section is considered as a whole, there is strong reason to believe that the 30-day clause applies only to cases of sickness where there had been a failure to pay dues for 3 weeks. It will be noticed that, immediately after that provision, the section proceeds to declare the penalty for four weeks' neglect. Of course, if we had to be guided by a strict grammatical construction, it would be hard to demonstrate that the suspending clause in the first sentence did not apply to both of the clauses immediately preceding it; but in cases such as this intention is the needle pointing out our course, and if it is followed correctly we cannot go astray. When, therefore, it is declared in such unconditional language that forfeiture shall result from a failure of four weeks' dues, and the manner of reinstatement is so clearly and unequivocally prescribed, we cannot but think that that was the idea uppermost in the minds of the framers of the condition.

This conclusion is sustained by the fact that in most associations of like character,

where a forfeiture for nonpayment of dues is declared, a somewhat analogous mode of reinstatement is prescribed. Hence we hold that, in the absence of waiver, plaintiff's certificate was forfeited. That the company did waive the forfeiture here, as it had a perfect right to do, seems evident. Just a short time before plaintiff's husband's death, and after six weeks had elapsed since her last payment of dues, she was approached by the authorized agent of the association, who received her dues and receipted her book for them. Therefore, at the death of her husband, she was a member in good standing in the association and entitled to the benefit named in her certificate.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(77 S. C. 536)

#### SMITH et al. v. LINDER.

(Supreme Court of South Carolina. Aug. 9, 1907.)

#### 1. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—LIMITATIONS.

In an action to set aside a deed as obtained by fraud, the complaint must allege that notice of the fraud was had within six years, under Code Civ. Proc. 1902, § 112, subd. 6, providing for the bringing of such actions within six years from the discovery of fraud.

#### 2. SAME—KNOWLEDGE OF FRAUD—BURDEN OF PROOF.

In an action to set aside a deed obtained by fraud, the burden is on defendant to show that plaintiff had knowledge of the fraud for more than six years.

#### 3. SAME—LACHES.

In an action to set aside a deed as obtained by fraud, evidence that the grantor who, when she conveyed, thought she only had a life estate, knew that the grantee claimed the land in fee under the deed, but not that the grantee had imposed upon her in obtaining the deed, and that upon receiving such information she consulted an attorney, shows due diligence.

#### 4. DEEDS—VALIDITY—FRAUD—EVIDENCE.

Evidence held to show a deed from a mother to her son was obtained by the fraud of the son.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 645.]

Appeal from Common Pleas Circuit Court of Cherokee County; Dantzler, Judge.

Action by Nannie Smith and Edna Littlejohn against R. E. Linder. Judgment for defendant, and plaintiffs appeal. Reversed.

Butler & Osborne, Stanyarne Wilson, and J. E. Webster, for appellants. J. C. Jeffries and H. J. Haynesworth, for respondent.

GARY, A. J. The plaintiffs seek equitable relief on the ground that the defendant fraudulently induced their testatrix to execute a conveyance in fee of the land in dispute, while laboring under the mistaken belief that she was only conveying a life estate. The allegations of the complaint are substantially as follows: That by the will of Robert Lipscomb the said property was devised to his daughter, Mary Linder, and at her death to the heirs of her body; that there was born



to her, prior to 1895, as the lawful heirs of plaintiff Nannie Smith, and Alice Smith, who her body, the defendant R. E. Linder, the predeceased her, leaving as her only child the plaintiff Edna Littlejohn; that on the 15th of March, 1895, Mary Linder, in consideration of \$1,000, executed to the defendant a deed to "all her right, title, and interest in the land," the deed being to him and his heirs and assigns, forever, and with the usual covenants of warranty; that the defendant is now in the sole possession of the land, and has been since the death of Mary Linder, on the — day of May, 1905; that the conveyance was obtained through the fraud and influence of the defendant, who by his great and undue influence over Mary Linder induced her to believe that her interest in the land under the will was a life estate, and that at her death it would go to the heirs of her body—she being under the mistaken fact that her interest was, as now claimed by defendant and as then known to him, the entire estate in fee conditional, and that the deed, as executed, conveyed to him the estate in fee; that the consideration is wholly inadequate. The prayer of the complaint is: (1) That said deed be reformed and construed to convey only an estate for the life of Mary Linder; (2) that the defendant account for two-thirds of the rents and profits; and (3) for partition.

The defendant denied the allegations of fraud, and alleged the following by way of defense: "That said deed was immediately placed upon the records of Spartanburg county, and the defendant immediately went into possession of said land, claiming the same in fee simple, and has ever so continued to possess the same. (2) That at the time of the execution of said deed all of the facts connected with said transaction were within the knowledge of the said Mary A. Linder, and that at said time, and certainly for longer than six years prior to the commencement of this action, she had knowledge of all facts alleged to constitute the fraud. (3) That the said Mary A. Linder, being possessed of such knowledge, did receive the purchase money for said land, to wit, \$1,000, and did retain the same, and never at any time offered to return the same or any part thereof. That she acquiesced in and confirmed the plaintiff's title to said land, ratifying the said transaction and waiving any right to rescind. (4) That the said Mary A. Linder, and the plaintiffs who claim under her, are barred by laches, and by the statute of limitations, from any right to rescind said transaction or to sustain this action."

His honor, the presiding judge, sustained the defense of the statute of limitations and dismissed the complaint solely on that ground. The reasons assigned by him in sustaining said defense are as follows: "In relation to the defense of the statute of limitations—i. e., that for six years prior to the commence-

ment of this action Mrs. Linder 'had knowledge of all facts alleged to constitute fraud'—I will quote the testimony on that point. Mrs. Nannie Smith testified: 'A short time before her death she (referring to Mrs. Mary A. Linder) found out he (referring to R. E. Linder, the defendant) had a deed for the place. Mr. Ray told her that he had a straight-out deed for the land. That was five or six years before her death. I can't remember exactly.' After having testified to a conversation he had with the defendant in relation to the transaction in question, R. G. Ray was asked this question: 'Now, you say that you afterwards had several conversations with Mrs. Mary A. Linder about the matter. Where was it you had the conversations?' A. It was at her house, five or six years ago.' J. R. Beason testified: 'Q. State the time and circumstances, and what was said. A. It was the 1st of April, or last of March, 1895. I was on my way to Gaffney with Mr. John J. Jones, and we met Mr. Linder at Virgil McCraw's house. We stopped, and we had a conversation, and he told us about his big land deal that he had made, bragging about how rich he was, and about how much land he owned. I had done heard about his buying Mrs. Linder's lifetime interest, and I remarked to him that he only bought her lifetime interest, and he said, "Yes," but that he had a straight deed for it, and that there might be a hell of a lawsuit about it, but he had a straight deed for it, and would hold it.' On cross-examination by Mr. Haynesworth, the witness J. R. Beason said: 'Q. Who did you first mention this conversation to? A. The first one I talked to was Mrs. Linder herself. Q. How long was this afterwards? A. I don't remember. Something like two or three years.' On redirect examination the following was his testimony: 'Q. When you mentioned it to her, what did she claim? A. She claimed she had sold him only a lifetime interest. I heard her tell Ed. so once. Q. What did he say? A. He said he had a straight deed, and would hold it. Q. How long ago was that? A. About six years ago.' While there may be a doubt as to the time when Mrs. Linder was informed by R. G. Ray that defendant had a straight-out deed, as testified to by Mrs. Nannie Smith—whether five or six years before the death of her mother—yet the testimony of J. R. Beason is sufficiently definite, I think, to show that Mrs. Linder had notice of the facts constituting the fraud for at least, and probably more than, six years before her death. \* \* \*

The plaintiffs appealed upon several exceptions, but in different forms they present the question raised by the following exception: "That his honor erred in holding as follows: 'The testimony of J. R. Beason is sufficiently definite, I think, to show that Mrs. Linder had notice of the facts constituting the fraud for at least, and probably more than, six

years before her death'—the error being that the testimony of that witness, taken in its entirety, did not support the conclusion so reached by his honor, as there was nothing in such testimony presenting any fact brought to the knowledge of Mrs. Linder upon which she could have discovered or established the fraud practiced upon her by this defendant, and, further, error being that such conclusion should not have been based upon such unsatisfactory testimony of the one witness, when the great body of the testimony in the case shows that Mrs. Linder was never in possession of the facts constituting the fraud practiced upon her, or in position to establish such fraud by any facts brought to her attention."

1. The attorneys of the respective parties differ as to whether the provisions of section 112, subd. 6, or section 118, Code Civ. Proc. 1902, are applicable to the case. The provisions of these sections are as follows: Section 112, subd. 6 (within six years): "Any action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Section 118: "An action for relief, not heretofore provided for, must be commenced within ten years after the cause of the action shall have accrued." This court deems it only necessary to state that the case is to be determined under the provisions of section 112, subd. 6, of the Code. When an action is brought for equitable relief on the ground of fraud, and a longer time has elapsed than the statute permits within which the action must be commenced, it is essential to the cause of action for the complaint to allege that the fraud was not discovered until a period within which the action may be brought; and the burden is upon the defendant to prove that the plaintiff, or the person under whom he claims, had knowledge of the fraud, or of such facts as would have led to the knowledge thereof, if pursued with reasonable diligence. *Prescott v. Hubbell*, 1 Hill, Eq. 215; *Farr v. Farr*, 1 Hill, Eq. 391; *Shannon v. White*, 6 Rich. Eq. 101, 60 Am. Dec. 115; *Parham v. McCrary*, 6 Rich. Eq. 145; *McLure v. Ashby*, 7 Rich. Eq. 439; *Beattie v. Pool*, 13 S. C. 384; *Kibler v. McIlwain*, 16 S. C. 554; *Richardson y. Mounce*, 19 S. C. 482; *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42; *Garvin v. Garvin*, 40 S. C. 443, 19 S. E. 79; *Brown v. Brown*, 44 S. C. 382, 22 S. E. 412; *Bank v. Dowling*, 52 S. C. 367, 29 S. E. 788; *De Loach v. Sar-ratt*, 55 S. C. 254, 33 S. E. 2; *Toole v. Johnson*, 61 S. C. 41, 39 S. E. 254.

2. The testimony does not show that Mary Linder had actual knowledge of the fraud, but the defendant contends that she had notice of facts which, if pursued with due diligence by a person of ordinary prudence, would have led to a discovery of the fraud

six years prior to her death. In the first place, it seems to us that his honor, the circuit judge, erred in his finding of fact that Mary Linder received the information mentioned in the testimony of J. R. Beason six years prior to her death. That witness testified that he did not remember, and only undertook to state the time approximately. He, however, said she went to Spartanburg after his conversation with her. There was, also, other testimony to the effect that when R. G. Ray gave her similar information she was very much worried, went to Spartanburg, and consulted an attorney as to her rights. This was five or six years before her death. It is but reasonable to suppose that, if she had the conversation with Beason prior to that time, she would have gone at once to consult an attorney. It must be remembered that the burden of proof was on the defendant. But, conceding the fact that she received the information from Beason six years before she died, let us analyze it and see what it contained. It was simply, in effect, that he had a title in fee, and intended to hold the land at all hazards; but no fact was stated indicating that the defendant had imposed on her by fraud. In the case of *Cunningham v. Cunningham*, 20 S. C. 317, 382, the court recognizes the doctrine that, where there is an error common to both parties in the construction of a deed or will, it affords no ground for equitable relief, in the absence of fraud or imposition. In that case the court quotes with approval the following language of Chancellor Dargan, in *Kelt v. Andrews*, 4 Rich. Eq. 349: "The simple misconstruction of a will or deed, where there is no fraud or circumvention, cannot be regarded in any point of view as coming within the scope and authority of those cases where mistakes of law, in contradistinction to ignorance of law, have been considered as affording grounds for relief. It is a cardinal theory of the law, founded upon a necessary policy, that every one is presumed to have knowledge of its principles. This presumption prevails as well in reference to civil rights as in the criminal code. Without this doctrine, no system of law can practically fulfill the ends of its institution." Mary Linder, however, did not remain inactive, but consulted a prominent attorney in pursuance of the knowledge she had acquired as to the rights claimed by the defendant. The question, therefore, is, not whether the facts were sufficient to put her on inquiry, but whether she pursued such inquiry with due diligence; and the testimony satisfies us she did. The exceptions raising this question are sustained.

3. The respondent's attorneys gave notice that they would ask this court to sustain the decree on the additional grounds: (1) That there was no fraud in the transaction; and (2) that Mrs. Linder by retaining possession of the consideration and acquiescing in the

transaction, has elected not to repudiate it, and is barred by laches. We proceed to consider first whether there was fraud. R. G. Ray testified as follows: "Q. Do you remember about the time this deed was made from Mrs. Mary Linder to R. E. Linder? A. Yes, sir; I remember the day he said he had got it. Q. Now, then, prior to the date this deed was made, state what R. E. Linder said to you, if anything, as to his intention regarding this land. A. I will state as near as I can what I remember about it. Some time before this deed was said to have been made, he talked to me about getting the deed and making the trade. He went on to say that he thought he was entitled to that land down there and ought to have it, and that he had a deal to make that he thought would work all right, if he could get it to work like he had it in his mind. He said that his mother was under the impression that she only had a life estate in that land under her father's will, and that he had the will examined by attorneys, and that he found that that entailment didn't hold good, that it was null and void, and that if he could get her to sign a deed of any kind that he would be all right. Well, he went on to say that Beason and Spurgeon ought not to have any of it anyhow. Q. Did he say anything about his intention of fooling the old lady? A. Yes; he said that if he could get her to sign the deed he could work the trick and hold the property. Q. All right. After it was made, state what conversation you had with R. E. Linder. A. Well, he told me that he had got that trick worked, and had the deed fixed, and he thought he had it so it would take them a damn long time to get it; that he expected to be deviled, but that they would have a long fight to get it. Those were the words he spoke. Q. Did he not say how much he made in that deal? A. He said he had made about \$10,000 in that day's work, and that it had made him rich. Q. Was there anything about who he dreaded in the transaction? A. Yes. Q. Just tell what he said. A. After Nathan Littlejohn married into the family, which was some time after the first transaction that the deed was made, he said that he was looking for some trouble now, that Nathan Littlejohn had got in there, and that he had brains and money, and he dreaded the two together. That was just what he said. Q. Did you ever tell him about what you thought about him working the trick on the old lady? A. I do not know how much was said about it. I told him he ought not to work that kind of trick on his old mother. I had several conversations with him. Q. What did he say? A. He said he had it all right; that they would have to fight for it. Q. What estate did he say the old lady intended to convey to him? A. Life estate in the Bob Lipscomb land. That was my understanding. Q. Did you talk to him frequently about this matter? A. Yes, sir; he talked to me 50 times

about this matter, both before and after. Very often when he had a drink ahead; that was when he talked most. Q. Did you ever hear Mrs. Linder say what she had conveyed to him? A. Yes, sir; her life estate. Told me time and again that that was all she intended to convey to him. She even got me to go to Spartanburg on one occasion to see if she could not enter suit and have it back." W. L. Self testified as follows: "Q. Do you know R. E. Linder? A. Yes, sir. Q. How long have you known him? A. Ever since I was a boy. Q. Went to school with him? A. Yes, sir. Q. Been intimate with him since that time? A. Yes, sir. Q. What, if, anything, did you hear him say regarding the land that was deeded to him by his mother? A. About three or four years ago last fall me and him went to Spartanburg, and on our way back he was bragging how rich he was, what a fine plantation he had here before Gaffney; and I said, 'Yes; I heard Mr. Littlejohn say he was going to devil you after your mother died.' And he said, 'Yes'; he expected that. He said he had a straightout deed signed up; that she signed it; that she thought she was signing her lifetime interest; that he fooled her." Furthermore, the form in which the deed was prepared was suspicious, and the circumstances attending the execution of the deed tended to show that the defendant imposed upon his mother. This ground is therefore overruled.

4. We will consider next the second of the additional grounds: Nannie Smith testified as follows: "Q. Did she continue to believe that she only had a life estate? A. She went to Mr. Carlisle, it worried her so much. Mr. Carlisle told her to just state the case as it is, and she did so. He said: 'Mrs. Linder, you have only a lifetime interest in the place, and nothing can be done until after your death.' Q. And she acted on his advice and continued to believe she only had a life estate? A. Yes, sir." R. G. Ray testified as follows: "Q. After she told Mr. Carlisle as to what took place when the deed was signed, and the understanding between her and him, and as to what kind of an estate was being conveyed by that paper, what did Capt. Carlisle tell her? A. He told her that she had made a deed, and that he did not know that she could do anything during her lifetime, but that her heirs could take action after her death. Q. What was Capt. Carlisle's advice as to the situation? A. He told her that if she had only deeded him a lifetime interest that, of course it would hold good, and that her heirs would have a chance at it after her death. Q. And she acted on that advice? A. Yes, sir. Q. You went with her? A. Yes, sir; Mrs. Smith was along. Q. And Capt. Carlisle gave that advice under the information he received from Mrs. Smith and Mrs. Linder, as to what had taken place when the paper was signed? A. Yes, sir. Q. And the old woman was much relieved

when she got that information? A. Yes, sir; she seemed very much better satisfied." The conduct of Mrs. Linder, after she consulted Mr. Carlisle, was consistent with the advice which he gave her, and explains her seeming laches and acquiescence. This ground is also overruled.

It is the judgment of this court that the judgment of the circuit court be reversed.

(78 S. C. 210)

#### Ex parte ROMANS.

#### In re ROMANS' ESTATE.

(Supreme Court of South Carolina. Sept. 20, 1907.)

#### MARRIAGE—NEGROES—SOLEMNIZATION.

Act 1865 (13 St. at Large, p. 291) provides that persons of color desirous of thereafter becoming husband and wife shall have the contract duly solemnized, but also declares that cohabitation, with reputation or recognition of the parties, shall be evidence of marriage in civil and criminal cases. Act 1866 (13 St. at Large, p. 393) declares that all differences between persons of color and white persons as to right to contract are abrogated. *Held*, that solemnization is not essential to the validity of a marriage between negroes.

Appeal from Common Pleas Circuit Court of Greenwood County; George E. Prince, Judge.

Application by Luvinia Romans for administration on the estate of Daniel Romans, deceased, which was contested by Henrietta Romans. From a decree awarding administration to petitioner, contestant appeals. Affirmed.

Ellis G. Graydon, for appellant. McGhee & Richardson, for respondent.

WOODS, A. J. Upon the death of Daniel Romans, a negro, Luvinia Romans, claiming to be his widow, applied to the probate court of Greenwood county for letters of administration on his estate. The appellant, Henrietta Romans, denying that Daniel Romans and Luvinia Romans were married, asserted the right to administration as the lawful wife of Romans at his death. The judgment of the probate court, holding Luvinia to be the true widow was affirmed by the circuit court, and we can discover no ground to doubt the correctness of the conclusion.

Appellant admits that before her own marriage to Romans there was a marriage ceremony in December, 1868, by which Daniel Romans and Luvinia contracted in the presence of witnesses to be husband and wife, and that Romans and Luvinia immediately thereafter publicly entered into marriage relations, which were continued until he deserted her. The validity of Luvinia's marriage was attacked on the sole ground that the marriage was not solemnized by a clergyman, the district judge, or magistrate, or any judicial officer, as provided by the act of 1865. The statute of 1865 contains these provisions on which appellant relies: "Persons of color desirous hereafter to become husband

and wife should have the contract of marriage duly solemnized. A clergyman, the district judge, a magistrate, or any judicial officer may solemnize marriages." 13 St. at Large, p. 291. But the same statute also contains this provision: "Cohabitation, with reputation or recognition of the parties, shall be evidence of marriage in cases criminal and civil." In addition to this, by the act of 1866 (13 St. at Large, p. 393), all differences between persons of color and white persons as to the right to contract were done away with.

The judgment of this court is that the judgment of the circuit court be affirmed.

(61 W. Va. 434)

#### KIRCHNER v. SMITH et al.\*

(Supreme Court of Appeals of West Virginia. Feb. 5, 1907.)

#### 1. MINES AND MINERALS — PARTNERSHIP — WHEN IMPLIED.

If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 222.]

#### 2. SAME—COPARTNERS—SUITS FOR CONTRIBUTION.

In a chancery suit for contribution against his copartners by a partner in a mining partnership for money he has paid for such partnership, when he has recovered against them individually certain sums in proportion to their respective interests in the partnership, it is not error to retain the cause on the docket for further decrees against defendants for contribution in case plaintiff should fail to make on execution or otherwise the several amounts so recovered.

#### 3. EVIDENCE.

All facts having rational probative value are admissible, unless some specific rule forbids.

#### 4. APPEAL — REVIEW — DEPOSITIONS — EXCEPTIONS—WHEN WAIVED.

If a party wishes to rely upon an exception to a deposition, he must bring it to the attention of the trial court, so that it may be acted on; and, unless the record shows that this has been done, it will be by the appellate court deemed to have been waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2295-2299.]

#### 5. WITNESSES—PRIVILEGE—EVIDENCE BY ATTORNEY—WHEN ADMISSIBLE.

An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as a witness, at the instance of either, as to communications made when he was acting as attorney for all, although he could not disclose such communications in a controversy between his clients, or either of them, and third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 750.]

#### 6. TRIAL—DEMUERRE TO EVIDENCE.

Syl. point 8 in *Hefflebower v. Detrick*, 27 W. Va. 16, and Syl. point 3 in *Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025, approved and applied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 356.]

\*Rehearing denied May 4, 1907.

**7. PLEADING—WAIVER OF DEFECTS.**

A decree will not be reversed for want of replication to an answer, where the defendant has taken depositions as if there had been a replication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1389.]

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Bill by W. E. Kirchner against L. E. Smith and others. Decree for plaintiff, and defendants appeal. Affirmed.

J. V. Blair, Caldwell & Caldwell, Pugh & Pugh, and H. P. Camden, for appellants. B. Engle, J. H. Strickling, and C. R. Riggle, for appellee.

McWHORTER, J. On the 8th day of April, 1890, Junius A. McCormick and others assigned and transferred to L. E. Smith certain oil and gas leases described in the paper assigning the same. On the 15th day of September, 1892, the said L. E. Smith assigned the same to a corporation known as "Owls Head Oil Company." Both of the above-mentioned assignments were duly acknowledged and recorded in the county clerk's office of Tyler county. Afterwards the Owls Head Oil Company became involved, and its effects were levied upon under an execution issued upon a judgment rendered against said corporation, and sold by a constable, at which sale Frank P. McNell became the purchaser, and took from the constable, St. Myers, of Ohio county, a bill of sale of said effects; and on the 9th day of April, 1894, the said McNell sold and transferred all the property of the said Owls Head Oil Company so purchased at the constable's sale to L. E. Smith, C. H. Taney, T. M. Darrah, C. F. Kotzebue (now represented by Mary E. Matthews, late Kotzebue), J. A. Burgbacher, A. J. Jameson, J. S. Pierpoint, R. A. Martin, John Stealey, and W. E. Kirchner, all of whom were stockholders in the said Owls Head Oil Company, and holding together 120 shares of stock in the proportions shown in the record. None of the other stockholders in said Owls Head Oil Company participated in the purchase; those named as the purchasers buying for themselves alone. In said purchase were included the various oil and gas leases so transferred to the Owls Head Oil Company by the said L. E. Smith. The purchasers of said property held the same in the proportions in which they had held stock in the said corporation. Among the leases so purchased and held by them was one of July 31, 1889, for a tract of 104 acres, more or less, made by W. S. Lawson, one of August 2, 1889, made by David Hickman on a tract of 100 acres, more or less, and also one of August 6, 1889, made by E. P. Snyder on a tract of 105 acres, more or less, which leases were taken by William Johnson, who assigned an interest therein to the said McCormick and others, assignors of said L. E.

Smith. On the 18th of May, 1895, at a meeting of all the said 10 parties composing the said mining partnership, excepting John Stealey, who was not present, the said partnership entered into a contract with C. P. Tustin, guardian of Harvey Lawson, Ella Lawson, Maggie Lawson, James Lawson, and Calvin Lawson, infant children of W. S. Lawson, deceased, and Nathan Lawson, Ida Railing, and Milroy Railing, her husband, of the county of Tyler, as parties of the first part, with W. E. Kirchner, one of the said partners, of the second part, whereby, in consideration of the sum of \$2,500 cash and of the covenants and agreements made to the party of the second part for a lease, for the purpose of operating and drilling for gas and oil, of a tract of 96 acres of land. Under the agreement the party of the second part was to hold the premises for and during the term of two years from the date of the lease, and so long thereafter as oil or gas was produced in paying quantities or rentals paid thereon. The usual one-eighth part of the oil was to be given to the lessors, and \$300 per annum for each gas well the products of which was utilized off the premises; said lease to become null and void and all rights thereunder cease unless a well should be completed by the party of the second part within one year from the date of the lease, and the party of the second part to pay the other parties at the rate of \$2.50 per acre per month in advance from the date of the lease until a well should be completed on the premises, and containing a further provision that the second party, his heirs or assigns, should have the right to at any time surrender up the lease, from which time it should be null and void and no longer binding on either party, and that all conditions between the parties should be extended to their heirs and assigns.

On the 16th day of August, 1895, the said L. E. Smith, W. E. Kirchner, in his own right and as administrator of C. F. Kotzebue, T. M. Darrah, C. H. Taney, J. A. Burgbacher, A. J. Jameson, J. S. Pierpoint, R. A. Martin, and John Stealey (the latter mentioned in the body of the paper, but which was not signed or executed by him), in consideration of \$2,500 paid, granted, assigned, and set over to the Carter Oil Company, its successors and assigns, "all their interest in and to all the leases and contracts on and affecting the W. S. Lawson farm of 96 acres in Meade district, Tyler county, West Virginia"—followed by a general description of the land—"including an old Johnson lease on the premises and a lease from C. P. Tustin, administrator of the estate of W. S. Lawson, deceased, and guardian of the minor heirs, and the two major heirs, and a contract with B. Forst to complete a well on the premises without cost to the second party."

On the 16th of August, 1895, C. P. Tustin, guardian, filed his petition in a summary

proceeding in the circuit court of Tyler county to sell the interests of the infants in pursuance of said contract, and on the 19th of August, 1895, procured a decree from said court to sell the same to said Kirchner, under which decree the said Tustin, as guardian, conveyed the seven-eighths of the oil and the gas to the said Kirchner on the 20th of August, 1895; but from the decree and deed made thereunder the provision in the contract of May 18, 1895, of the right of surrender of the said lease by the lessee at any time was left out. At the end of two years from the date of the contract for lease, the infants, by their next friend, and the adult heirs of W. S. Lawson, brought their action of assumpsit against Kirchner in the circuit court of Tyler county for the rents accruing under the said contract, and obtained judgment for the said rents, amounting in all to, including interest and costs, \$5,687.48, which judgment was affirmed by this court upon writ of error obtained by the said Kirchner.

At the March rules, 1902, Kirchner filed his bill in equity against the parties interested in said contract for lease at the time it was taken, alleging that they composed at the time a mining partnership, and took the lease as such partners, and that he held the same for himself and them in trust, and prayed that the said defendants be required to answer; that plaintiff might have an accounting of said partnership business and affairs, and that the cause be referred to a commissioner for that purpose; that upon the coming in of the report of said commissioner a decree might be rendered in his favor against the mining partnership for the amount of all moneys found to have been expended by him on account of said judgment, interest, costs, attorney's fees, and expenses in said action of assumpsit and appeal, together with whatever balance of the judgment and interest accrued and accruing thereon that he might be liable to pay; that said mining partnership be dissolved; and for further and general relief. The defendants Smith, Taney, and Darrah, at the April term, 1902, filed their demurrer to the plaintiff's bill. On July 19, 1902, the court sustained the demurrer, and on motion of plaintiff the cause was remanded to rules for an amended and supplemental bill, which was filed at August rules, 1902.

In his amended bill plaintiff alleged that he had paid the residue of said judgment and named the persons composing the alleged mining partnership, and alleging: That by agreement of the said partners among themselves the whole number of interests or shares in said partnership were 120, owned and held by the members as follows: Smith, 20; Darrah, 22; Burgbacher, 2½; Jameson, 2½; Pierpoint, 5; Martin, 10; Stealey, 16; Matthews, 11; and plaintiff, 11. That profits accruing and losses sustained by

said mining partnership were shared by the members on the basis of the interests or shares so owned by them, respectively, as set out. That at a meeting of the members of such partnership, held in the town of Middlebourne, before said suit of Tustin against Susan Lawson, widow, and others, was instituted, in which said oil and gas interests were sold and purchased by said partnership in said 96 acres of land, it was agreed that said purchase should be made for the price of \$2,428.49 of the said guardian, and the price was actually paid by said members on the basis of their interests as set out. That it was understood and agreed by and among the said members that plaintiff was to take and hold the legal title to said oil and gas in his name for convenience in transacting the business, and to hold the same for the use and benefit of himself and the other members, and that he should be governed by the wishes and directions of the members; and in pursuance to the sale made by the said mining partnership of the oil and gas interests to the Carter Oil Company and the wishes and directions of said members he conveyed the same to the said Carter Oil Company by deed. That he caused notice of the pendency of said action of assumpsit against him for the rentals to be given to the members of said mining partnership to aid and help defend said suit, and gave notice of the judgment to said members, and appointed times and places to meet and make arrangements for such defense; but the members failed and refused to aid him in the defense of the suit or to advise him, and that all the members had failed and refused to contribute towards the payment of said judgment, interest, costs, etc., except Burgbacher, who paid \$118.04 on account of his 2½ shares, Jameson, who paid the same, Martin who paid \$474.16 on account of his 10 shares, and Mary E. Matthews, who paid \$519.37 on account of her 11 shares, and plaintiff paid the residue of said judgment, costs, and expenses, but did not release said members so paying from any further liability that might exist against them on that account—and again praying for an accounting on account of said judgment, costs, and expenses, and an accounting of said partnership business and affairs, and for general relief. The defendants Smith, Taney, and Darrah filed their demurrer to the said amended bill, which demurrer was overruled, and said demurrants then filed their joint and several answer; and defendant Stealey also filed his answer, to which answer of Stealey the plaintiff replied generally.

The defendants Smith, Taney, and Darrah denied the existence of such mining partnership, or that they were engaged in leasing lands and operating the same for oil and gas and marketing same as alleged; denied that in the month of August, 1895, said mining

partnership purchased in the summary proceeding from Tustin, guardian, the interests of said infant heirs of Lawson, or that the deed was made therefor to the plaintiff member of said mining partnership for convenience, or that title was vested in him for their benefit, or that the members of said mining partnership were jointly and severally liable to pay said judgment, costs, etc., as alleged, or that plaintiff was entitled to an accounting of the so-called partnership; denying all the material allegations of the bill, but averring that the facts were that they were, with plaintiff and different other persons, owners of stock in the Owls Head Oil Company, a corporation, which was owner of divers leaseholds for oil and gas purposes; that respondents, with other defendants in this suit, became part owners in the oil and gas privileges conveyed by Tustin, guardian, and the adult heirs of W. S. Lawson, to Kirchner by contract in writing commonly called an "oil and gas lease" on the 96 acres, bearing date the 13th day of May, 1895, but that it was not true that they, with said Kirchner and others, entered upon the premises and operated or attempted to operate the same for oil and gas as a mining partnership or otherwise; that they were such owners of said contract and leases from the 13th day of May, 1895, until the 16th day of August, 1895, when they sold and assigned the same to the Carter Oil Company, with all their interests in and to all the leases and contracts on and affecting the Lawson farm of 96 acres, which sale to the Carter Oil Company was before the said decree of sale, and before the sale and confirmation of the sale, and before the deed to Kirchner dated August 20, 1895, was made, so that at the time of his acceptance of said deed respondents had not, nor had either of them, any interest whatever, individually or as partners or otherwise, in said lands, oil, and gas, and no interest whatever in said summary proceedings and the acts and doings of said Kirchner therein; and denied that they authorized Kirchner to act for and in behalf of them, that he had no right, power, or authority to participate in any purchase, or accept any lease or contract or leasehold, differently from the terms, conditions, and covenants set forth in said agreement of May 13, 1895, "in which leasehold it was and is stipulated that the same shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on said premises within one year from the date hereof, and party of the second part shall pay to the party of the first part at the rate of \$2.50 per acre per month in advance from the date hereof until a well is completed on the premises hereby leased, and it is further agreed that the second party, his heirs, or assigns, shall have the right at any time to

surrender up this lease. Then and from that time this lease and agreement shall be null and void and no longer binding on either party, which stipulations and agreements therein contained were of material concern and interest to these respondents and to the said Carter Oil Company, the assignee of the owners of said leasehold as hereinbefore set forth," and that the Carter Oil Company refused to purchase of the said Kirchner and to accept a deed of assignment from him of the oil and gas rights and privileges conveyed to him by the deed of the 20th of August, 1895, which differed so materially from the agreement of May 13, 1895, and that if plaintiff was amerced in costs and damages and had to pay out and expend money by reason of his acceptance of said deed of August 20, 1895, and by reason of said action of assumpsit and judgment for the recovery of rentals, it was brought on by his own act, unauthorized by respondents, or either of them, or by the so-called mining partnership, and that he had no right to call on them for contribution.

The said Stealey says that from depositions taken in the case he learned of the assignment by McNell, April 9, 1894, of all the property of the Owls Head Oil Company purchased by him at constable sale to L. E. Smith, Darrah, Taney, respondent, and others; that he was not present when said transfer was made by McNell, nor advised of the meeting, nor consulted in regard thereto; that he never authorized or directed said McNell to so convey to him in connection with the other parties, nor did he direct or authorize any person to act for him or in his behalf in said transaction; denied that he was present or was consulted about the contract of May 13, 1895; that he had no part therein, and that he never authorized any one to act for him; that he never paid any part of the consideration of the contract of May 13, 1895; that he never was asked to sign, nor did he sign, the agreement made on the 16th day of August, 1895, between L. E. Smith and others and the Carter Oil Company; that he never in any manner, either personally or through any person authorized to act for him, to any extent authorized or directed plaintiff, Kirchner, to purchase the underlying oil and gas pertaining to the Lawson leasehold under decree of court and take title thereto in his name, as alleged in the amended bill; that the action of Kirchner in purchasing said leasehold, as far as respondent was concerned, was wholly without authority and as a matter of fact without respondent's knowledge; that he never authorized Kirchner, out of any fund received by him from the Carter Oil Company, to pay any rentals for the use and benefit of respondent, and that until the reading of depositions of Kirchner and others respondent never knew that such rentals upon said leasehold had been paid; that he never

claimed any interest in said fund and as a matter of fact had no interest in it, and that the act of Kirchner in paying such rentals was purely voluntary and wholly without the knowledge or consent of respondent; that respondent was not indebted to Kirchner, nor was he ever indebted to him, on account of matter or business transacted contained in plaintiff's original or amended bills; that so far as respondent was concerned said bills were without equity; that he should not be required to contribute any money for the relief and benefit of plaintiff as to any matter or transaction alleged in his bills, but as to respondent the cause should be dismissed.

On the 21st day of April, 1904, the cause was heard upon the bill and amended and supplemental bill and exhibits, the bills taken for confessed as to all the defendants except Smith, Taney, Darrah, and Stealey, upon the answers and replication to Stealey's answer, upon the depositions and exhibits filed therewith, and upon a certain contract in writing between T. M. Darrah and nine others (the defendants and others) and J. W. Henderson, dated October 13, 1897, filed in evidence by plaintiff, to which counsel for defendants objected and excepted and moved to strike out, which motion was overruled, when the court held, and so decreed, that the nine defendants named, together with the plaintiff, composed and formed a mining partnership as alleged in the bill and amended bill, holding interests or shares in said partnership as stated, making in the aggregate 120 shares or interests, and decreeing that they should pay to plaintiff the sums aggregating on the 19th day of March, 1902, the amount of \$5,695.97, and decreed against the defendants therefor in proportion to their shares or holdings in said partnership, with leave to plaintiff to sue out separate executions therefor against the defendants L. E. Smith, C. H. Taney, T. M. Darrah, J. S. Pierpoint, and John Stealey, and continued the cause for further decree against said defendants for contribution in case plaintiff failed to make, on execution or otherwise, off of said defendants or either of them, the said sums so decreed against them. From such decree the defendants Smith, Taney, Darrah, and Stealey appealed, and say the court erred in overruling their demurrers to plaintiff's amended and supplemental bill; that the bill fails to make proper averments of facts upon and from which a mining partnership can be inferred. The bill alleges the names of the 10 persons composing the partnership; that the whole number of interests or shares were 120, and showing the number held by each member; that all profits accrued and losses sustained by said mining partnership were shared by the members thereof on the basis of the interests or shares owned by them respectively, and all assessments against the members were made on the basis of their respective holdings, and

dividends paid in the same way, and all business of said partnership was done and transacted on the same basis; that the purchase price paid for the oil and gas interests in the 96 acres of Lawson land was contributed by the respective members in the same proportion according to their interests or shares, as well as the expense attending the procurement of the infants' interests; that the money received from the Carter Oil Company was divided and distributed among the members in the like proportions; that said mining partnership placed or caused to be placed on said 96 acres of Lawson land a boiler and other appliances, and caused to be erected a rig to drill for oil and gas thereon by virtue of a certain drilling contract in writing with one Bernard Forst, which said drilling contract by the terms thereof was subsequently, and before the bringing of the action of assumpsit for the rentals against plaintiff, forfeited, and the interest conveyed by said contract in writing reverted to said mining partnership, and passed by virtue of their deed of assignment to the Carter Oil Company. "If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property." Thornton, Oil & Gas, § 314. "The joint owners of a mine, which they unite and co-operate in working, constitute a mining partnership. Without any contract or agreement between them, by the act of uniting in working the mines the relation is established." Bar. & A. Mines & Mining, p. 750. In *Childers v. Neeley*, 47 W. Va. 70; 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777, it is held: "Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership." The bill in case at bar shows that the plaintiff, together with the defendants sought to be charged, were tenants in common, co-owners of the leaseholds, and united in working the same.

As a further ground of demurrer it is claimed that the record in the action at law, *Lawson v. Kirchner*, filed as Exhibit B with plaintiff's bill, shows that whatever was done by way of operating the Lawson farm was done by the Owls Head Oil Company, a corporation, and refers to the testimony of Burgbacher in said exhibit. It is true he calls it the Owls Head Oil Company, but says it was a partnership at that time—says it was in the month of August, 1895, which was more than a year after the effects of the Owls Head Oil Company had been sold out and purchased by the defendants, who had all been stockholders in the Owls Head Oil Company. While the purchasers were all members of the Owls Head Oil Company while it existed, all the stockholders did not participate in the purchase of its property, and the purchasers having been active in the



operations of the said corporation, it was not unnatural that the witness should refer to them as the "Owls Head Oil people," or even as the "Owls Head Oil Company." It clearly appears that the operation was by the defendants, and not by the Owls Head Oil Company.

A further ground of demurrer is that the record shows that the demurrants had sold out and parted with their interests in the Lawson lease, if any they had, before the rentals accrued for which Kirchner was sued. The bill, which the demurrer admits to be true, shows that the title to the lease given by Tustin, guardian, was made to Kirchner for the benefit of himself and all the defendants, that his name was used for the sake of convenience in transacting the business, that the money paid for the lease was paid by all the parties for whose benefit it was taken, and when it was sold to the Carter Oil Company the proceeds, \$2,500, was distributed amongst them all, each getting his share or proportion according to his holdings in the partnership; that Kirchner's name was used in the summary proceeding to get the infants' title for all alike in their agreed proportions, the oil and gas were sold to him, and he was bound to pay the rent, although paying it for himself and his co-owners, and they could not relieve themselves by assigning their equitable interests and let the burden fall upon their fellow, who held the legal title alone, except as to his own tenth interest in it. Demurrants further say that if they were members of a mining partnership owning the Lawson premises for the purpose of operating the same for oil and gas, and conveyed their interests to the Carter Oil Company before rentals had accrued, then plaintiff could have no claim on them but must look to their assignee or grantee. The Carter Oil Company had the contract as well of Kirchner as of all the defendants for a good title and with a surrender clause, and could not be made liable for the rentals, and was not, therefore, a necessary party to the bill, as claimed by demurrants. The demurrer was properly overruled.

Appellants' second assignment of error is in refusing to sustain their exceptions to the depositions taken on behalf of the plaintiff and in overruling their motion to strike out the contract in writing between Darrah and others and J. W. Henderson, bearing date the 13th of October, 1897. The record does not show that the exceptions taken to the depositions and indorsed thereon in the course of their taking were in any way brought to the attention of the trial court at the hearing, or that such exceptions were passed upon by the court. In such case such exceptions will be deemed to have been waived. *Hill v. Proctor*, 10 W. Va. 59; *Baxter v. Moore*, 5 Leigh (Va.) 219; *Simmons v. Simmons' Adm'r*, 33 Grat. (Va.) 451; *Rose*

*v. Brown*, 11 W. Va. 122; *McVeigh v. Chamberlain*, 94 Va. 73, 26 S. E. 395; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 595; *Fant v. Miller*, 17 Grat. (Va.) 187; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927.

It is also strenuously contended by appellants that their objections to the testimony of witnesses Engle and Riggle should have been sustained, and the evidence ruled out, because of their relationship as attorney and client with the plaintiff, Kirchner; that "these men were acting on the 13th day of May, 1895, as attorneys at law for the parties to this suit, and all that they learned upon that day, during the negotiations and consultations in their office, was through and by reason of that confidential, and almost sacred, relation"; that any directions given them by the parties, or any of them, respecting the proceedings to obtain a valid title of the infants' interest in the leasehold for oil and gas, and any advice they gave on that occasion, could not be legitimately divulged by them in this case without the consent of all the parties who employed them. The same rule would apply to the exception to the depositions of these witnesses as to the others just mentioned; but in case the objections had been especially called to the attention of the court and overruled, the ruling would have been correct. This is a case in which all the parties, the plaintiff and the defendants, who constitute the mining partnership, together employed the said Engle and Riggle as attorneys to prepare the contract with Tustin, guardian, conduct the summary proceedings to obtain the title of the infants to the Lawson land, and to advise them therein. As between themselves there was no privileged communications. In 23 A. & E. E. L. 65, we find: "An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as a witness at the instance of either as to communications made when he was acting as attorney for all. But he cannot disclose such communications in a controversy between his clients, or either of them, and third persons." In *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892, it is held that "communications made to an attorney who was acting for both parties and made in the presence of both parties cannot be regarded as confidential and privileged"—citing *Goodwin & Co.'s Appeal*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696; *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385; *Britton v. Lorenz*, 45 N. Y. 51; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Dunn v. Amos*, 14 Wis. 106; *De Wolfe v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Machette v. Wanless*, 2 Colo. 169; 1 Whar. Ev. § 587. And in *Hurlburt v. Hurlburt*, 128 N. Y. 420, 23 N. E. 651, 26 Am. St.

Rep. 482, it is held that "the provision of the Code of Civil Procedure (paragraph 835) prohibiting an attorney from disclosing professional communications made to him by his client does not apply as between the parties to communications made by two or more persons in consultation with an attorney for their mutual benefit. It cannot be invoked in any litigation which may thereafter arise between such persons, although it seems it may in a litigation between them and a stranger." "When two persons employ an attorney in the same business, communications made by them in pursuance of such common retainer are not privileged interests." *Gulick v. Gulick*, 39 N. J. Eq. 516. In section 587, vol. 1, Mr. Wharton, in his work on Evidence, says: "It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger their communications to the lawyer would be privileged. It is otherwise, however, as to themselves. As they stand on the same footing as to the lawyer, either could compel him to testify against the other as to their negotiations. See, also, *Lynn v. Lyerle*, 113 Ill. 128; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. 834; 6 Cur. Law, 1885, § 4. Besides the authorities cited, the same doctrine has been held in the states of Alabama, California, Kentucky, Missouri, Nebraska, Nevada, North Carolina, Oregon, Texas, and doubtless others. These witnesses, Engle and Riggle, in the meeting of May 13, 1895, were employed as attorneys alike for the plaintiff, Kirchner, and the defendants, composing the mining partnership, for their mutual benefit, the promotion of their common interests, and under the authorities cited there could be no privileged communications between them and their attorneys as among or between themselves. Hence the witnesses were competent to testify.

Appellants say the court erred in overruling their motion to strike out as evidence the contract in writing between T. M. Darrah and others and J. W. Henderson, dated October 13, 1897, offered with the deposition of the plaintiff. The leasehold described and assigned in this paper was a part of the leases sold by the constable to McNell as the property of the Owls Head Oil Company and assigned by McNell to the 10 persons constituting the alleged mining partnership. This contract of sale recites the fact that the parties of the first part sold and transferred thereby to the said J. W. Henderson all of their interests, respectively, "in and to the leases held by the parties of the first part in fifteen (15) acres compromise of the E. P. Snider tract of land, and also for two locations on the thirty (30) acres, part of the E. P. Snider tract of land, now owned by D. W. Snider, which two locations were secured to the parties of the first part by a compromise,

reference to which agreement of compromise, respectively, is hereto made. The said compromise agreements are to be turned over to the party of the second part as evidence of the rights of the parties of the first part in said tract of land, together with all the oil heretofore and hereafter produced from said tracts of land, and all the machinery, rigs, boilers, engines, casing, tubing, rods, tankage, and all other necessary fixtures and appurtenances thereto and thereon situated on the two tracts aforesaid." The consideration of this agreement was \$17,000. It is shown by this assignment on its face that the defendants had been operating for oil on said premises, as it speaks of oil theretofore and thereafter produced, as well as of machinery and all necessary fixtures and appurtenances for operating for oil. 1 Wig. on Ev. § 10, says: "All facts having rational probative value are admissible, unless some specific rule forbids." No specific objection was made to this paper; simply a general objection to its introduction and consideration, with a motion to strike out the same. This paper has probative value, especially in view of the answer filed by John Stealey, wherein he disclaims all interest in the property assigned to him and others by McNell, purchaser of the Owls Head Oil Company's property. This assignment of Darrah and others of October 13, 1897, represents a part of the leaseholds so assigned by McNell to Stealey and others, and in this assignment the said Stealey realized his proportion of the \$17,000 consideration from Henderson for the said conveyance. The contract was properly admitted.

Special effort is made to relieve the defendant John Stealey from any liability on account of the Tustin contract of May 13, 1895. Stealey filed an answer to the bill and amended bill, in which he admits being a stockholder in the Owls Head Oil Company, but denying participation in the purchase of the Tustin, guardian, lease, and denying, also, that he had any interest in the assignment made by McNell of the 9th of April, 1894; but we find not only the sale to J. W. Henderson of October 13, 1897, joined in by said Stealey, which was a transfer of a part of the leasehold so assigned by McNell to Stealey and others of the effects of the Owls Head Oil Company, but we find on the day that the said defendants and Kirchner made the contract with Tustin, guardian, May 13, 1895, John Stealey, with the other nine members of the mining partnership, executed a contract with Bernard Forst, dated May 11, 1895, but acknowledged on the said 13th day of May, assigning to said Forst an undivided three-eighths interest in what is known as the "Old William Johnson lease" on the said W. S. Lawson tract, dated July 31, 1889, called in said lease 104 acres, but shown by the record to be the same tract of 96 acres mentioned in the Tustin lease, and one of the

leases sold as the property of the Owls Head Oil Company, for the assignment of which interest said Forst was to begin forthwith to drill an oil well on said "W. S. Lawson lease, and drill same as rapidly as possible and without avoidable delay, down to and through the Big Indian sand, if necessary, so as to make it a well to thoroughly test said last-named leasehold," but to be drilled entirely at the expense of Forst. The interest that Stealey had in said leasehold can only be accounted for through the assignment of McNell of the property purchased by him of the Owls Head Oil Company. The Tustin lease was to supplement and perfect the title held by the said mining partnership in the Lawson land. All the circumstances go to show beyond question that John Stealey was a partner with the other members of the firm in their operations in buying and selling and operating oil leases. Another circumstance which adds strongly to this conclusion is that said Stealey failed to go upon the witness stand to sustain the averments of his answer and to contradict the statements made tending to show his interest in the said partnership. If it was a fact that he had no interest in the partnership, he should have proved the same by his own testimony and subjected himself to cross-examination, that his contention might have a clear showing. There was no one had such peculiar knowledge of his interest in the matter as Stealey himself, and surely the evidence connecting him with the partnership was of such a character, taken together with all the circumstances of the cause, as to call upon him to offer the best evidence at his command to overcome the prima facie case made against him by the plaintiff. In *Heflebower v. Detrick*, 27 W. Va. 18, it is held: "Where a party has in his possession or under his control evidence by the introduction of which at the trial he would be able to render certain a fact material to his success, which is otherwise left in doubt, and he withholds such evidence, the court will, upon a demurrer to the evidence introduced by his adversary, presume that the fact was against him." Also in *Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025, Syl. point 8: "Where the burden is on a party to a suit to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact raises the conclusive presumption that such witness' testimony, if introduced, would be adverse to the pretensions of such party." See, also, *Wells-Stone v. Truax*, 44 W. Va. 531, 29 S. E. 1008. The evidence establishes the fact that the parties bought the Tustin lease, that the title thereto was perfected by their counsel, Engle and Riggie, under the direction of all the members of the company who were present, the defendant L. E. Smith being the principal spokesman for the company, and the attorneys were instructed to get such title from the infants as would not be forfeited in case the rentals should not be paid strictly on time. While there is some

conflict in the evidence, there is a strong preponderance thereof establishing the mining partnership as alleged in the bill; and the direct evidence, taken together with all the circumstances of the case, make it reasonably certain that John Stealey was a member of said partnership and liable as such.

Defendants Taney, Smith, and Darrah contend that the decree ought to be reversed as to them because there was no replication to their answer. Section 4, c. 134 (section 4035, Code 1906), provides: "No decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." And in *Moore v. Wheeler*, 10 W. Va. 35, it is held: "A decree will not be reversed for want of a replication to the answer when the defendant has taken depositions as if there had been a replication." *Richardson v. Donehoo*, 16 W. Va. 685; *Chalfants v. Martin*, 25 W. Va. 394; *Skaags v. Mann*, 46 W. Va. 209, 220, 33 S. E. 110; *Martin v. Kester*, 49 W. Va. 647, 653, 39 S. E. 599; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765; *Goddin v. Vaughn's Ex'x*, 14 Grat. (Va.) 102, 131; *Justis' Anno*. 942.

It is claimed to be error holding said suit on the docket for further decrees and in refusing to dismiss the bills. It was necessary to retain the cause for the final adjustment between the parties, in case the plaintiff should not be able to collect from all the parties against whom he so recovered the amounts thereof, and it was proper to retain the cause until the execution of the court's decrees. We see no reversible error in said decree, and therefore affirm the same.

Affirmed.

MILLER, J., absent.

(32 W. Va. 310)

#### STATE v. LOTONO.\*

(Supreme Court of Appeals of West Virginia.  
June 17, 1907.)

##### 1. FORGERY—WHAT CONSTITUTES.

Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 1.]

##### 2. SAME—ALTERATION OF INSTRUMENT.

An alteration in an instrument, to constitute forgery, must be of a material part thereof; and a material alteration of an instrument is one which makes it speak a language different in legal effect from that which it originally spoke, or which carries with it some change in the rights, interests, or obligations of the parties to the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 21.]

\*Rehearing denied September 9, 1907.

### 3. SAME—MATERIALITY.

The materiality of the alteration is a question of law for the court, upon the admissibility of the altered instrument in evidence; and, the alteration being shown, nothing remains for the jury to pass upon.

### 4. SAME—FIGURES IN CHECK.

The figures in a check, following the words in the body thereof denoting the sum called for, are not a material part of the instrument; the words being controlling in determining its legal effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 24.]

(Syllabus by the Court.)

Error from Circuit Court, Monongalia County.

Frank Lotono was convicted of forgery, and brings error. Reversed.

Wm. S. John and Wm. J. Snee, for plaintiff in error. C. Wm. Cramer, Pros. Atty., for the State.

MILLER, J. The grand jury preferred an indictment in eight counts against Frank Lotono for forgery. His motion to quash was sustained as to the first count and overruled as to the others. On the trial, after the evidence was all in, but before argument, the prosecuting attorney elected to rely on the eighth count, and the defendant was found guilty as charged therein. This count charged that the defendant "on the \_\_\_\_\_ day of December, 1906, within one year next preceding the date of the finding of the indictment, in the said county, did afterward, on the day and year aforesaid, at the Citizens' National Bank of Morgantown, West Virginia, aforesaid, fraudulently and unlawfully and feloniously utter and attempt to employ as true, to the Citizens' National Bank of Morgantown, West Virginia, a certain other false, forged, and counterfeit writing or paper." The paper described is a check of the American Sheet & Tin Plate Company, of December 15, 1906, payable to defendant, or bearer, for \$2.70, at the Citizens' National Bank, Morgantown, W. Va. When presented to the bank by the defendant for payment, the sum called for was written thus: "Two and 70-100 Dollars \$20.70." The defendant presented this check, with six others and a slip on which all were listed, together aggregating \$76.29. It was listed at \$20.70; but the teller, in payment of the checks, counted it at \$2.70. There was no direct evidence that the defendant altered the check; but the paymaster of the company, who wrote the check and delivered it to Lotono, testified that when delivered it called for \$2.70, but since had been altered by inserting a cipher after the figure 2, so as to make the figures read \$20.70, in which condition it was when presented to the bank for payment. The teller testified that when he handed the defendant the amount of the checks the latter said he did not have enough money; that he then showed Lotono the alteration, but did not remember what he said.

Our statute (Code 1899, c. 146, § 5 [Code 1906, § 4289]) provides: "If a person forge any writing other than such as is mentioned in the first and third sections of this chapter, to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two nor more than ten years." Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice. Clark, Cr. L. §§ 11, 112; Turnipseed v. State, 45 Fla. 110, 33 South. 851, and cases cited; 2 Bishop, New Cr. L. §§ 573, 577; Burgess v. Blake, 86 Am. St. Rep. 86, note, and cases cited; State v. Briggs, 34 Vt. 501. An alteration in an instrument, to amount to forgery according to the authorities cited, must be such as to make it speak a language different in legal effect from that which it originally spoke, or which carries with it some change in the rights, interests, or obligations of the parties to the writing. It follows that an immaterial change—a change which, if true, would not affect the legal liability of the parties in an action on the instrument—would not amount to forgery. 1 Bish. Cr. L. § 572; State v. Poindexter, 23 W. Va. 805. The test is the legal effect of the change or alteration, not whether some one may be misled or deceived by the paper. Here the only change was in what are called in some cases the "marginal figures," which, while they might mislead one who should fail to observe the body of the instrument, could not change or affect the legal status of the parties, or tend in legal effect to prejudice another's rights. The alteration of the check in this case did not deceive the bank, and its legal effect was not changed. The materiality of the alteration is a question of law for the court, upon the admissibility of the altered instrument in evidence; and, the alteration being shown, nothing remains for the jury to pass upon. Manufacturing Co. v. Watson, 58 W. Va. 189, 195, 52 S. E. 515.

Was the alteration of the figures in the check a material one? We think not. It is true the figures follow the words in the body of the check denoting the sum called for, as is frequently the case, and are not strictly marginal; but we do not think they form a material part of the paper. They are for ready reference, as if written at the top or in the margin, and for convenience. They are not controlling, and do not change the legal effect of the paper. The words are the controlling portion, and the figures constitute no material part of the instrument. Many authorities so hold. 2 Cyc. 196, 211, and cases cited; Schryver v. Hawkes, 22 Ohio St. 308. We are cited to only one case which holds the contrary. Commonwealth v. Hide, 94 Ky. 517, 23 S. W. 195. That case stands

alone, unsupported, and we do not think it states the law correctly. As a matter of law, upon the undisputed facts in this case, we do not think the prisoner guilty of any offense.

We therefore reverse the judgment of the circuit court, set aside the verdict of the jury, and discharge the prisoner from further prosecution.

(128 Ga. 791)

WHITLEY GROCERY CO. et al. v. JONES et al.

(Supreme Court of Georgia. Aug. 8, 1907.)

1. ADMINISTRATORS — JUDGMENT AUTHORIZING SALE OF LAND—MOTION TO SET ASIDE—PARTIES.

To a motion to set aside a judgment of the court of ordinary authorizing a sale of land by an administrator such administrator is a necessary party.

2. SAME.

If letters of dismission have been granted to the administrator, the judgment discharging him must be reopened before the motion to set aside the judgment authorizing the sale by him can be entertained.

3. SAME.

Although the purchasers at the sale and those holding under them, and also the person who had formerly been the administrator, but to whom letters of dismission had been granted, were made parties to a motion to set aside the judgment authorizing a sale by him, this would not obviate the effect of the grant of the letters of dismission or the absence of the administrator, as such, on whose application the judgment was rendered.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Petition by Josephine Jones and others in the court of ordinary to set aside an order granting leave to C. R. Whitley, administrator of Henry Jones, deceased, to sell certain land, and praying that a rule nisi be issued directing Whitley, the Whitley Grocery Company, and another to show cause why the relief prayed for should not be granted. On appeal to the superior court there was a judgment for movants, and defendants bring error. Reversed.

Josephine Jones and her children filed a petition in the court of ordinary of Sumter county to set aside an order granting leave to C. R. Whitley, administrator of Henry Jones, deceased, to sell certain land, alleging as follows: Henry Jones, the husband of Josephine Jones, died in Sumter county on November 21, 1897, leaving certain described real estate. C. R. Whitley was appointed administrator on his estate, and applied for leave to sell the land. At the February term, 1898, of the court of ordinary, an order was passed granting such leave. He sold the property to the Whitley Grocery Company, and it afterwards deeded a part thereof to the Standard Grocery Company. The order is null and void, because no notice of it was ever published in the public gazette in which the county ad-

vertising was published, and as the law requires, and neither of the petitioners had any notice of the application or knew anything of it until after the deeds were made. It was prayed that the order be declared null and void and set aside, and that the petitioners have such other and further relief as the premises may warrant and demand, and also that a rule nisi be issued directing Whitley, the Whitley Grocery Company, and the Standard Grocery Company to show cause at the next term why the relief prayed should not be granted. By amendment it was alleged that Whitley had applied for, and had issued to him by the court of ordinary, letters of dismission as administrator of the estate of Henry Jones, and that at the time of filing the original petition and since there had been no administration on the estate. Each of the defendants demurred to the petition. The case was carried by appeal to the superior court. The demurrers were overruled, and a verdict directed for the movants. The defendants excepted.

W. P. Wallis, and Allen Fort & Sons, for plaintiffs in error. J. A. Hixon and Shipp & Sheppard, for defendants in error.

LUMPKIN, J. (after stating the facts as above). This is not a proceeding in equity, but a proceeding to set aside an order authorizing the sale of real estate by an administrator, in the court of ordinary where such order was granted. The question involved is not, therefore, to be tested by the power of a court of equity, but by the power of a court of ordinary. The demurrers contained several grounds, but it is only necessary to deal with one of them which controls the case. Each of the defendants demurred to the proceeding, on the ground that neither C. R. Whitley as administrator of the estate of Henry Jones, nor any other administrator of the deceased, was made a party or served. The order granting the administrator authority to sell was a judgment of a court of general jurisdiction. The present application is an effort to set aside that judgment, without having before the court as a party the administrator on whose petition and in whose favor it was granted. It is an attempt by motion to set aside a judgment without having before the court the party on whose petition it was rendered. C. R. Whitley individually is not the same as C. R. Whitley as administrator of the estate of Henry Jones. It is urged that the administrator has since been granted letters of dismission by the court of ordinary, and therefore cannot be made a party to this petition. In that lies the insuperable difficulty to entertaining the proceeding at all. The administrator is a necessary party. If he has been granted letters of dismission, he cannot be made a party unless the grant is reopened and he is reinstated in office. It

is sought to avoid the necessity for making him a party by making parties of those who hold under the sale; but they alone were not interested. If the order is set aside, the sale and disposition of the proceeds might be a devastavit, and the securities on the bond of the administrator would be interested. Under certain circumstances it has been held that an equitable proceeding to set aside an executor's deed could be maintained without the presence of the executor, who had died. *Hodges v. Wheeler*, 126 Ga. 848.<sup>1</sup> But this is different from setting aside a judgment without the presence of the party in whose favor it was rendered, or any person representing him. See *Broach v. Walker*, 2 Ga. 428; *Carter v. Anderson*, 4 Ga. 516; *Groce v. Field*, 13 Ga. 24; *Whitaker v. Smith*, 33 Ga. 237; *Bell v. Hanks*, 55 Ga. 274; *McArthur v. Matthewson*, 67 Ga. 134. The demurrer should have been sustained, and the petition dismissed.

Judgment reversed. All the Justices concurred.

(128 Ga. 804)

**HENDERSON v. ARMSTRONG et al.**

(Supreme Court of Georgia. Aug. 8, 1907.)

**DEEDS—RECORDING—PRIORITIES—DEED FROM HEIRS.**

A deed to described wild land, executed by the general devisees of the deceased former owner, taken by the vendee therein for value and without notice of a deed to the same land executed by the testator, although recorded before the registry of the older deed, does not obtain priority over such senior conveyance.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Action by J. W. Armstrong and others against P. A. Henderson. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. W. Armstrong and others brought suit, in the superior court of Wilcox county, against Parker A. Henderson, to enjoin the defendant from cutting the timber upon lots of land Nos. 210 and 212, in the Eighth district of that county, and for damages for the cutting of timber thereon. At the trial, the plaintiffs amended the petition so as to claim damages for timber cut from the land after the filing of the suit. By agreement of the parties, the case was tried by the judge, without the intervention of a jury, under a written agreement as to the facts. It was admitted that the timber on the two lots of land had been cut by defendant during the pendency of the suit, and that the question of damages for the cutting of the same by defendant was to be included in the suit and to be determined by the court in deciding the case. It was also admitted that the value of the timber cut by defendant was \$800. The two lots were what is known as "wild land," no one being in possession of either until defendant entered upon them and began to cut the timber. The lots were granted by the

state to Herschel V. Johnson on February 6, 1847, and he conveyed the same to James W. Armstrong on October 15, 1847. The deed from Johnson to Armstrong was recorded February 12, 1900. Plaintiffs are successors in title to James W. Armstrong. Herschel V. Johnson executed his will on August 15, 1880, in which he devised all his property, of every description, to his wife, Ann F. Johnson, during her life, with full power to dispose of the same in any way that she might desire, by gift or sale, during her life, or by will at her death, with remainder to his children in whatever property should remain undisposed of at the death of Mrs. Johnson. Mrs. Ann F. Johnson survived her husband, and died without having disposed of the land in question. On December 23, 1899, the remaindermen conveyed the lots to the Georgia Title Guarantors Company. This deed was recorded on December 28, 1899. The Georgia Title Guarantors Company conveyed the property to P. A. Henderson on June 13, 1901, and the deed was recorded on that date. Upon this state of facts the judge rendered a judgment in favor of the plaintiffs and against the defendant for the sum of \$800 principal, and \$242 interest, as damages for cutting the timber, further finding that plaintiffs were the true owners of the land. To this judgment the defendant excepted.

C. J. Haden and E. D. Graham, for plaintiff in error. M. B. Cannon and Hal. Lawson, for defendants in error.

**FISH, C. J.** (after stating the facts as above). The facts in this case are undisputed, and counsel agree that the case is controlled by a single question of law.

The question upon which the case turns is whether, in a competition between a deed executed by the owner of land and a deed to the same land executed after his death by those claiming title under a general devise of the whole of his estate, the older deed is defeated, when it appears that it was not recorded until after the younger deed was executed and duly recorded, and that this latter deed was taken without notice of the existence of the other. This is purely a question of statutory construction, dependent for its solution upon the meaning to be given our statutes in reference to the recording of deeds; for it is perfectly clear that, without the assistance of a statute, one who purchases land from another who has no title can acquire no title to the land by such purchase. The remaindermen under the will of Herschel V. Johnson had no title to the lands in controversy to convey to the Georgia Guarantors Company, as such lands were no part of his estate at the time of his death; he having parted with the title to the same during his lifetime. As they had no title to convey, their grantee acquired none by the conveyance, and hence had none to convey to Hen-

derson, the defendant in this case, unless the fact that the Georgia Guarantors Company purchased these land lots from the devisees in remainder of the estate of the deceased former owner, without actual or constructive notice of the existence of his deed to James W. Armstrong, and then had its deed recorded before the Armstrong deed was placed upon record, had the effect of defeating the Armstrong title. Prior to the act of October 1, 1889 (Acts 1889, p. 106), there had been no material change in the law upon the subject under consideration since the passage of the act of December 25, 1837 (Cobb's Dig. p. 175, § 46). That act provided that "in all cases where two or more deeds shall hereafter be executed by the same person or persons, conveying the same premises to different persons, the one recorded within twelve months from the time of execution (if the feoffee have no notice of a prior deed unrecorded at the time of the execution of the deed to him or her) shall have preference; and if all be recorded or not recorded within the time specified, the eldest deed shall have preference." The section upon the subject in the Code of 1863 read as follows: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies, within one year from the date of such deed. On failure to record within this time the record may be made at any time thereafter; but such deed loses its priority over a subsequent deed from the same vendor, recorded in time, and taken without notice of the existence of the first." Code 1863, § 2667. Exactly the same provisions appear in Code 1868, § 2663, Code 1873, § 2705, and Code 1882, § 2705. The act of 1889 provided "that deeds, mortgages, and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office. And the said clerk is required to keep a docket for such filing, showing the day and hour thereof, which docket shall be open for examination and inspection as other records of his office." This is now section 2778 of our present Civil Code. Code 1895. The old law relative to the registry of deeds, as modified by the act of 1889, appears in Civ. Code 1895, § 3618, in the following language: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." It will be observed that the change wrought in the old law upon this subject, as it stood in the several

Codes prior to the present one, is simply as to the time when a deed may be recorded so as not to lose its priority over a subsequent deed from the same vendor duly recorded. The old law allowed one year in which to record a deed, during which time its priority over a subsequent recorded deed from the same vendor was preserved; whereas, under the law as it has stood since the act of 1889, no time is prescribed within which a deed may be recorded so as to preserve its priority, and the question of precedence between two deeds from the same vendor depends, when the deed last executed was taken without notice of the first, upon priority of record. Of course, construing sections 2778 and 3618 of the Civil Code of 1895 together, a deed is, when in competition with another, to be considered as recorded at the time when it is duly filed for record. Under the act of 1837 deeds made by the same person or persons were brought into competition with each other. Deeds made by different persons did not compete. But in construing this act it was held that "a purchaser at sheriff's sale, who has his deed first recorded, will gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself" (Ellis v. Smith, 10 Ga. 253), and that "a purchaser at an administrator's sale, who had his deed first recorded, will have the same preference over an unrecorded deed as if he had bought of the intestate in his lifetime" (Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488). The reasoning of the court in the first of these cases was this: "The effect of a sale by the law, in this respect, is just the same as if made by the individual, whose agent or trustee the officer becomes to make the transfer. All of the defendant's estate is sold. The purchaser takes his place." In the second case the first was cited, and it was held that "the rule and the reasoning in that case apply with full force to a purchaser at an administrator's sale." But in Webb v. Wilcher, 33 Ga. 565, it was held that the provisions quoted above from the act of 1837 were "inapplicable where an unrecorded deed [came] in competition with a junior deed to the same property, executed by the heir at law of the first feoffee, duly recorded." In the opinion, Jenkins, J., said: "The statute by its terms applies only to 'cases where two or more deeds shall be executed by the same person or persons,' for the same premises. In the case at bar the older deed was executed by William Tomlinson, and the junior by Rhoda Gilbert, two different persons. From this difficulty the plaintiff in error insists that he is relieved by the fact that Rhoda Gilbert, at the time of her conveyance, held as heir at law of William Tomlinson; and he relies upon the rulings of this court in Ellis v. Lessee of Smith, 10 Ga. 253, and in Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488." He then discussed the rulings made in those cases and the

principle upon which they were based, and said: "What is that principle? That the actual salesman in each [case] acted in a representative or fiduciary capacity, and by his deed transmitted not his own title, but that of the party he represented. The sheriff transmitted the title of the defendant in execution, the administrator that of his intestate. Can the same thing be said of Rhoda Gilbert's conveyance? By no means. She thereby transmitted not the title of William Tomlinson, but her own title. It matters not that she derived title from Tomlinson, nor does it matter how she derived it, whether by deed or by inheritance. Before her conveyance to Smith the title had become vested in her. It was only her title that could then be transmitted, and this makes her case to differ from those cited and considered." While in that case the act of 1837 was under construction, it is evident that the reasoning of the court and the principle upon which it based its decision would apply equally as well in a case involving the construction of the statute as it stood after the adoption of the first Code, wherein the words, "from the same vendor," were used in describing the deeds, instead of the words, "executed by the same person or persons," which were employed to describe the deeds in the original act. But it has been thought that the act of 1889 had the effect of opening the door of competition between the deeds to the same land, to junior deeds which could, before the passage of that act, have competed with senior unrecorded deeds. See *Ousley v. Bailey*, 111 Ga. 783, 788, 36 S. E. 750; *Equitable Loan Co. v. Lewman*, 124 Ga. 190, 202, 52 S. E. 599, 3 L. R. A. (N. S.) 879.

In neither of the cases just referred to was it necessary, however, to so construe the act in order to make the decision rendered therein. In the case first cited the ruling was that "a purchaser of land at judicial sale, acting in good faith and without notice, acquires title as against a prior conveyance by the owner, unrecorded at the time of the making and confirmation of such sale." This ruling was merely in accordance with the rulings made in *Ellis v. Smith*, and *Tucker v. Harris*, supra, which would have controlled the question presented, whether the act of 1889 had ever been passed or not; "for," as was held by this court in the *Ellis* case in reference to the priority of competing deeds to the same property, "the effect of a sale by the law in this respect is just the same as if made by the individual. \* \* \* All the defendant's estate is sold. The purchaser takes his place. The mischief of an unrecorded deed is the same to him as to a private purchaser. He examines the title, and, from anything that appears, the defendant is the undisputed proprietor, while, in fact, there is an outstanding deed from him, which would sweep off the property." While the court in that case said that the officer making a sale under execution becomes "the agent

or trustee" of the defendant in execution, "to make the transfer," it is evident that he only becomes such by appointment of the law, and, in this respect, a master commissioner or receiver, acting under orders of the court, is as such "the agent or trustee" of the person whose property he is ordered by the court to sell as is a sheriff, who sells property under execution, the "agent or trustee" of the defendant in execution.

As pointed out by Judge Jenkins in *Webb v. Wilcher*, supra, in discussing the rulings in the cases cited above from 10 Ga. 253, and 13 Ga. 1, 58 Am. Dec. 488, the actual salesman in each case by his deed transmitted, not his own title, but that of the party whose property he sold. "The sheriff transmitted the title of the defendant in execution, the administrator that of his intestate." And he drew the distinction between those cases and the one with which he was dealing by showing that the heir at law in that case, by her deed, transmitted not the title of her ancestor, but her own title. By a judicial sale the title transmitted is that of the person whose property has been seized and sold by the court. Consequently such a sale, when the question of priority of deeds to land thus sold is concerned, stands upon the same footing that a deed from a sheriff, or a deed from an administrator, stands when such question is involved. The vendor in each case is, within the meaning of Civ. Code 1895, § 3618, the person whose title was sold and conveyed. The purpose and the effect of recording a deed is to carry notice, to all whom it may concern, that the title to the land therein conveyed has passed from one designated person to another designated person, and the person from whom the title passes, by a deed of bargain and sale, is the "vendor" within the meaning of that word as used in section 3618. If the act of 1889 had never been passed, it would have been clearly subversive of the purpose and meaning of that section of the Civil Code to have held that because the court, in a particular sense, is said to be "the vendor" in a deed executed in pursuance of a judicial sale, as distinguished from a sale under execution, therefore such a deed and a deed to the same land made by the person as whose property the court seized and sold it are not, in contemplation of the statute, "from the same vendor." Under such a holding there never could be competition between such deeds, and a bona fide purchaser taking the younger deed, without notice, actual or constructive, of the older one, and having his deed first recorded, could obtain no title against the senior, unrecorded deed. And it would not make any difference whether the younger deed was the one made in pursuance of the judicial sale or not.

What the learned judge who delivered the opinion of the court in *Ousley v. Bailey*, supra, said in reference to the effect of the act of 1889 upon the previously existing law,



was unnecessary to reach the decision there rendered. The same may be said with reference to the statement by another learned judge now upon the bench in *Equitable Loan & Security Company v. Lewman*, *supra*, with reference to the effect of the act of 1889 upon competition between a recorded deed from an heir or devisee and an unrecorded deed from the ancestor. His remarks were based upon the ruling in *Holder v. American Investment Company*, 94 Ga. 640, 21 S. E. 897, which was made after the passage of the act of 1889, and is in apparent conflict with the decision in *Webb v. Wilcher*, *supra*. The ruling in the *Holder* case is contained in the fourth headnote, wherein it was held that the statute giving priority to a junior recorded deed over a senior unrecorded deed "applies where the senior deed was made by the testatrix and the junior by her devisee." No opinion was filed in that case; the rulings being embraced in headnotes only. No reference is made in any of the headnotes to the act of 1889; and whether the existence of that act influenced the decision of the court is a matter for conjecture only. The inference that it did must have arisen from the apparent conflict between that case and the earlier one above cited. But, after a careful consideration of the matter, we have been unable to see how that act changed the law with reference to the priority of deeds of bargain and sale to the same land under the recording acts. In *Donovan v. Simmons*, 96 Ga. 340, 346, 22 S. E. 966, in which case it was held that the registry act of 1889 did not create any new competition between deeds of bargain and sale and the lien of judgments, Judge Hart, who delivered the opinion of the court, speaking of this act in connection with such deeds, said: "The law as to deeds of this character is unchanged by it. The danger of a failure to record a deed is the exposure of it to defeat by a subsequent vendee without notice of the prior purchase. The only change made in the law by the act of 1889, so far as deeds are concerned, is to fix their time of going into effect and becoming operative relatively to the interests of certain persons." In *Toole v. Toole*, 107 Ga. 472, 33 S. E. 686, where it was held that a junior voluntary deed, though duly recorded and taken without notice of a prior voluntary deed executed by the same grantor and not recorded, does not obtain priority over such senior deed. Chief Justice Simmons, in speaking of the contention of counsel for plaintiff in error that sections 2778, 3530, and 3618 of the Civil Code of 1895 "are broad enough to protect grantees under voluntary deeds, because two of them declare in substance that all deeds must be recorded," said: "It will be observed, however, that in the latter part of section 3618,

where it provides a penalty for failure to record the first deed, it is declared that 'such deed loses its priority over a subsequent recorded deed from the same vendor.' The word 'vendor' was evidently used with reference to a deed of bargain and sale, based upon a valuable consideration. If it had been intended to include voluntary deeds, the word 'grantor,' and not 'vendor,' would have been used." It will be observed that the word "vendor," as used in Civ. Code 1895, § 3618, was here construed in its literal sense; that is, as meaning the party by whom a sale is made (*Anderson's Law Dict.*), or the person who transfers property by sale (*Black's Law Dict.*). And it was, in effect, held that, although two deeds to the same land may be from the same grantor, they cannot compete, under the statute, unless they are also from the same vendor. This is inconsistent with the idea that the effect of the act of 1889 was to broaden the meaning of the terms used in the existing statute to describe what deeds could compete thereunder for priority. As we have said, the ruling in *Holder v. American Investment Co.*, *supra*, appears to be in conflict with the decision in the earlier case of *Webb v. Wilcher*; and, if so, the older case would prevail. The present case, however, differs from the *Holder* case in this material respect: There the owner of a half interest, in certain land conveyed a small portion of it, and afterwards devised the entire half interest, describing it. It was held that the devise imported on its face to carry title to all of such interest in the land described, and therefore conflicted with the former deed. In the case at bar *Herschel V. Johnson* conveyed the land in controversy to *Armstrong* in 1847. In 1880 he made a will by which he devised and bequeathed to his wife "all [his] property, both real and personal, of every description," during her life, with remainder in "whatever remains of said property undisposed of by her as herein provided for" to his children. This does not purport on its face to devise any specific property, or to describe that now involved in controversy. The testator only sought by his will to pass all of his property, and this property was not his. There is nothing to indicate that he either actually had any interest in it when he made the will, or that he claimed to have any. It was wild land, in the possession of no one. So that, without more, a mere comparison of his previous deed with his will would lead to the conclusion that he did not devise this property at all. If not, then, of course, the deed from his devisees would not take precedence over his antecedent deed.

Judgment affirmed. All the Justices concur.

(129 Ga. 195)

**SUPREME LODGE KNIGHTS OF PYTHIAS v. CRENSHAW.**

(Supreme Court of Georgia. Aug. 4, 1907.)

**1. INSURANCE—CAUSE OF DEATH—DEATH "AT HANDS OF JUSTICE."**

Even though the killing by the husband of the paramour of the wife be under such circumstances that the law would class the act as justifiable homicide, such killing is not at the hands of justice, either punitive or preventive. Death by the punitive hand of justice is when the law commands the killing. Death by the hands of preventive justice is where the law permits the killing. In each instance the killing must be by some person authorized to carry out the commands of the law, or who is permitted by the law to do the act in the advancement of public justice.

**2. SAME.**

A policy of life insurance contained the stipulation that "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," the insurer would not be liable for the full amount of the policy, but only for an amount to be computed according to a mode prescribed in the policy. The insured was slain by a husband, either while he was attempting to have sexual intercourse with the wife, or immediately after the act of sexual intercourse was complete. *Held*, that the death of the insured was not caused or superinduced in the violation of, or attempt to violate, any criminal law, within the meaning of the policy as properly interpreted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, § 1937.]

**3. SAME—ACTION ON CERTIFICATE—PLEADING.**

In the petition in a suit on a certificate issued by a benefit society, containing a contract of life insurance, the plaintiff alleged, in one paragraph, that the insured was a member in good standing and the certificate was in full force at the time of the death of the insured, and, in another paragraph, that the plaintiff had furnished defendant with proof of the death and performed all the conditions of the contract, and, in still another paragraph, that all assessments and dues were duly paid. In the answer the defendant denied that the insured was a member in good standing at the date of his death, and that the certificate was in full force, and also denied, in a general way, the allegations in the other paragraphs. *Held*, that the denial of the defendant was in due form, and the effect of the same was to place upon the plaintiff the burden of proving the allegations as made, notwithstanding they were general in their nature.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by Kate Crenshaw against the Supreme Lodge Knights of Pythias on a benefit certificate. Judgment for plaintiff, and defendant brings error. Affirmed in part, and reversed in part.

Kate Crenshaw brought suit against the Supreme Lodge of the Knights of Pythias, alleging that the defendant was incorporated under an act of Congress, with an office and place of doing business in the county in this state in which the suit was brought; that it issued a benefit certificate and policy of insurance, insuring the life of Perry J. Williams in the sum of \$2,000; that the plaintiff is the mother of the insured and the beneficiary under the certificate; that the insured

was a member in good standing on February 1, 1906, on which date he departed this life; that during the month of February, and subsequently to his death, the plaintiff furnished proofs of death, and conformed to all the conditions of the certificate as required, and all assessments and dues were duly paid, and the defendant has not paid the policy, nor any part thereof. Judgment was prayed for the \$2,000, with interest. Attached to the petition as an exhibit is a copy of the certificate, which recites that it is issued upon the statements and agreements contained in the application for the same. The defendant filed a demurrer, which was overruled, and the defendant excepted. It also filed an answer, in which it admitted the allegations as to its corporate existence and place of business in the county alleged, and that it had issued the certificate as alleged. It denied that the insured was a member in good standing; that the policy was in force on the date that the insured died; that all assessments had been paid; and that proofs of death had been furnished. It admitted that the policy had not been paid, and denied all liability thereunder. It also filed three special pleas in bar. The first alleged that in the application for the certificate was the following provision: "It is agreed that if death is caused or superinduced at the hands of justice, or in violation of, or attempt to violate, any criminal law, then there shall be paid" a lower sum than the face of the policy, to be calculated according to the method prescribed in the application. It then alleged that the death of the insured was caused or superinduced by the hands of justice, for that he was shot to death by R. C. Lindsay while he was engaged in the attempt to commit the offense of adultery and fornication with the wife of the said Lindsay, who discovered them under circumstances showing that the act was about to begin, and the said Lindsay acted promptly and in the burst of passion and indignation which overwhelmed him on discovering the outrage which had been done him, and that the killing was justifiable. The plea then set forth the amount that is admitted to be due under the terms of the policy, which amount the defendant tendered to the plaintiff. The second special plea, after setting forth the stipulation in the application above referred to, and also making tender of the amount admitted to be due thereunder, alleged that the death of the insured was caused or superinduced in the violation of a criminal law, in that the insured was shot to death by Lindsay immediately after he had committed the offense of adultery and fornication with Lindsay's wife, Lindsay slaying him immediately after the guilty act was over, and in the killing he acted promptly and in that burst of passion and indignation that overwhelmed him on discovering the outrage that was done him, and, if the killing was not justifiable, it would reduce the crime from murder to manslaughter. The third special plea, after

alleging the stipulation in the application above referred to, and making tender of the amount admitted to be due thereunder, alleged that the death of the insured was caused or superinduced in the violation of, or attempt to violate, the criminal laws of this state, in that he was shot to death by Lindsay while engaged in an attempt to commit the offense of adultery and fornication with the wife of Lindsay, or immediately after he had committed the offense. The plaintiff filed demurrers to the answer and special pleas, which were sustained, and the plea stricken. The defendant excepted.

T. H. Parker, for plaintiff in error. Shipp & Kline and Robt. L. Shipp, for defendant in error.

COBB, P. J. (after stating the facts as above).

1. The first special plea set up the defense that the insured came to his death by the hands of justice. The agreement in the policy was that, if the death was "caused or superinduced at the hands of justice," the full amount of the policy could not be recovered. The Code declares: "Death by suicide, or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract." Civ. Code 1895, § 2118. It is contended, not that the death of the insured was the result of the administration of punitive justice, but that it was the result of the administration of preventive justice, that the law allows the husband to kill his wife's paramour under certain circumstances, and the killing, under these circumstances, is in the administration of preventive justice within the meaning of the Code. We do not think that the word "preventive" in the Code is to be given this interpretation. The word "punitive" certainly refers to death inflicted by an officer of the law in obedience to the commands of the law. The word "preventive" must be construed to refer to a killing by an authorized officer of the law, or a private person standing for the time being in the attitude of a public officer; as a member of the sheriff's posse, or the like, under those circumstances where the law authorizes the taking of human life in the advancement of public justice. It cannot be properly interpreted to ever include a killing by a private person to avenge or prevent a private wrong, even though the circumstances be such that the homicide is justifiable. This section is to be construed in connection with Pen. Code 1895, § 70, which enumerates the different cases of justifiable homicide, among them being the killing of a human being by commandment of the law in execution of public justice, and by permission of the law in the advancement of public justice. The word "preventive" was used to convey the same idea as is conveyed in the section of the Penal Code by the word "permission." It refers to a killing done in the advancement of public justice, and therefore must be a killing by an officer,

or some one having the rights of an officer who is authorized to take human life in the advancement of public justice, and not by a private individual merely to prevent a private wrong, although the act constituting it may be also a public offense.

2. The second special plea sets forth, as a reason why the defendant is not liable for the full amount of the policy, that the killing "was caused or superinduced in the violation of a criminal law," in that the insured had committed the offense of adultery and fornication with the wife of Lindsay, and that Lindsay had slain him immediately after the act was over. The third special plea set up that the killing "was caused or superinduced in the violation of, or an attempt to violate, the criminal laws of the state," in that the insured was engaged in an attempt to commit the offense of adultery and fornication with the wife of Lindsay, and was killed immediately after the offense had been committed. Certificates issued by benefit societies usually contain a stipulation that the society shall not be liable in case of death of a member while engaged in, or in consequence of, an unlawful act. A contract having such a stipulation is not voided by the mere fact that at the time of the death of the member he was violating the law, if the death occurred from some cause other than such violation. The rule seems to be that, in order to relieve the society, the violation of the law must be such as to proximately lead to the death of the insured by bringing him into danger of losing his life; that is, the act of the insured must be of such a character as to increase the risk of the insurer, and be entered into under such circumstances that the insured must have known that the act he was committing was of such character as to bring him into danger of losing his life. In *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, it was said: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk. A violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk." In that case the insured was killed while committing an assault and battery upon a member of the family of the slayer; he being a brother-in-law of the assaulted woman. The act of the insured was held in that case to be the proximate cause of his death, within the meaning of the law, upon the theory that the man who makes a violent assault upon a woman knows that he puts his own person and life in danger; for any male relative, and even a stranger, may interfere to preserve the life of the assaulted. It was said in that case: "The natural result of such an illegal act as that of the assured therefore was to bring his person into danger, and as death resulted his own act was the proximate

cause." We do not entirely agree with the conclusion reached in that case. In *Griffin v. Western Mutual Ass'n*, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848, the insured, with an accomplice, went to the state treasury at the capitol, and presented pistols and demanded money of the treasurer. He delivered it to them, and they started away with it, and had nearly reached the door of the capitol when they were fired upon by a policeman, and the insured was killed. It was held that the policy was not avoided under a stipulation providing that it should be void if the insured should "die while violating any law." The death of the insured in that case would not have occurred except for the crime committed by him, but his death was not the reasonable and natural consequence of the crime committed. In *Goetzman v. Conn. Mut. Life Ins. Co.*, 3 Hun (N. Y.) 515, the policy provided that there should be no liability if the insured should die "in consequence of his violation of any law." It appeared that the insured was killed by a husband immediately after he had criminal intercourse with the slayer's wife; and it was held that the killing could not be treated as the natural and legitimate effect of the act of adultery. Gilbert, J., in the opinion, says: "If the assured had been killed a week or a year after the injury, for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man, who has been thus wantonly killed by another, without necessity or lawful excuse, died in consequence of his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make." See, also, in this connection, *Niblack on Acc. Ins. & Ben. Soc.* (2d Ed.) § 157; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Insurance Co. v. Seaver*, 86 U. S. 531, 22 L. Ed. 155; *Supreme Lodge Knights of Pythias v. Bradley*, 83 S. W. 1055, 73 Ark. 274, 67 L. R. A. 770, 108 Am. St. Rep. 38; *Prudential Life Ins. Co. v. Higbee*, 22 Ky. Law Rep. 495, 57 S. W. 614; *Davis v. Modern Woodman of America*, 98 Mo. App. 713, 73 S. W. 923; *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen (Mass.) 308; *Brown v. Supreme Lodge Knights of Pythias*, 83 Mo. App. 633. It is deducible, from the authorities, that a stipulation of the character now under consideration must be given a reasonable construction, and that the liability of the company is not to be discharged, unless the violation of the law consisted in an act of which the death of the insured was the reasonable and legitimate consequence. If the insured does an act which is a violation of the law, and which he knows puts his life in peril at the time that he commits it, the company is not liable under a policy containing a stipulation of the character now before us. But there must be something in the

act itself, independent of other circumstances, which makes the death the reasonable consequence. Death may follow the commission of any violation of law, when the offense is a felony; for the arresting officer is authorized to kill under certain circumstances in order to effectuate an arrest, as in the case where the insured robbed the State Treasurer he knew that under the law of the land an arresting officer, or, in some circumstances, even a private person, would have the right to slay him in order to take him; but his death resulting from the effort to arrest him was not the reasonable and legitimate consequence of the robbery that he had committed a few minutes before. One who commits the offense of adultery with a married woman well knows that his life is imperilled if the outraged husband take the guilty pair in the unlawful act, or at its beginning, or at its conclusion; but it cannot be said as a matter of law that the killing of the adulterer is the natural and legitimate consequence of the illicit intercourse between him and the wife of the wronged husband. Death may result, but it can be no more said that death of the adulterer at the hands of the husband is the reasonable and legitimate consequence of the act of adultery than it can be said that the death of a felon at the hands of an arresting officer is the reasonable and legitimate consequence of the felony committed. Death does not follow in the ordinary sequence of events any more in the one case than in the other. In *Gresham v. Equitable Accident Ins. Co.*, 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 268, the policy excepted from the risk, death, or injury which may have been caused by fighting. The ruling in that case was simply that such a stipulation refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity, or fighting for which he is partially responsible, either as a volunteer or a rash speaker or as a wrongdoer. Fighting is an act which, in its nature and essence, is calculated to bring on injury or death. Fighting under any circumstances may be attended with disastrous consequences. Death resulting from a fight is the natural and legitimate consequence which is to be expected. There is nothing in the crime of adultery, although a violation of the law of the land and a great moral wrong, which in its essence is calculated to produce the death of the adulterer. Under some circumstances it may be the occasion of the death of the adulterer, but his death is not the natural and legitimate consequence of the adultery itself. There was no error in striking the special pleas.

3. The certificate declared that it was issued upon evidence received that the insured was "a member in good standing" of the order. In one of the paragraphs of the petition it was alleged that the insured "was a member in good standing," and that the poli-

cy and certificate were in full force and effect "on the date that the insured died." The answer to this paragraph denied that the insured "was a member in good standing" and that the policy was in full force on the date alleged. There was a demurrer to this paragraph, upon the ground that it did not distinctly answer the averments in the petition, but is simply a general denial, and did not put the defendant on notice of why the policy was not in force. Since the pleading act of 1893 it is not permissible for a defendant to file what was, in the common-law practice, a plea of the general issue. He cannot come in and file a plea merely that he is not indebted, and thus put the plaintiff upon proof of all the material averments in the petition. He is allowed, however, to deny every fact alleged in the petition, and he may interpose his denial by applying the same to each paragraph or each allegation; or he may, in one paragraph of his answer, deny all of the averments in every paragraph of the petition. Civ. Code 1895, § 5051. Whatever the plaintiff alleges he has a right to deny, and, if denied, the law places the burden upon the plaintiff of proving the allegation, provided it is material in itself, or the plaintiff has made it material in the manner in which he alleges it. The plaintiff saw proper to allege that the insured was a member of the order in good standing at the time of his death. The fact that he was a member in good standing may be made up of a number of facts, but the plaintiff has seen proper simply to make a general allegation. This was, in effect, the plaintiff saying to the defendant: "Deny this allegation, and proof will be introduced to support the same." If the plaintiff had seen proper to allege those things which constituted good standing, the defendant would have been required either to admit or deny each one of the facts going to make up this status. But, having rested simply upon the general allegation that the insured was in good standing, the defendant had a right to interpose a denial to the allegation as made, and thus impose the burden upon the plaintiff to sustain, by proof, the allegation. This is, in no sense, an evasive answer. It is a direct answer. If the defendant had answered that it could neither admit nor deny, the answer would have been evasive; for the facts which constituted good membership are peculiarly within the knowledge of the officers of the order, and the defendant would not be permitted to put the burden of proof upon the plaintiff by a merely evasive answer. But the answer denies the allegation as made, and the allegation as made must be proved to the extent that may be necessary to show a prima facie case of liability under the policy. The defendant cannot, under this denial, set up any affirmative defense growing out of a breach of the conditions of the policy or otherwise. What is said in reference to this portion of the answer will also

apply to those portions which deny that proof of death had been submitted and that all dues had been paid, etc. The court erred in striking those portions of the answer referred to in this division of the opinion.

Judgment affirmed in part and reversed in part. All the Justices concur.

(129 Ga. 62)

## DARNELL v. COLUMBUS SHOW CASE CO.

(Supreme Court of Georgia. Aug. 10, 1907.)

### 1. LANDLORD AND TENANT—LIABILITY OF LANDLORD—LEASE—CONSTRUCTION.

A lease of a tenement carries with it an implied grant of the right to light and air from the adjoining land of the landlord, where the situation and habitual use of the demised tenement is such that the right to light and air is essential to the beneficial enjoyment of the leased tenement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 58.]

### 2. SAME—LIABILITY OF LESSEE.

One who subsequently rents the adjoining land is invested with no greater privileges than his landlord, and is liable to his neighbor tenant in damages resulting from interference with the latter's implied easement.

### 3. SAME—PUNITIVE DAMAGES.

Ordinarily the damage recoverable is the depreciated rental value of the tenement; but, if the instrumentality which obstructs the light and air be so constructed as to project the rain-water through the window of the tenement, to the injury of the tenant's bedroom furnishings and to his personal discomfort, and this is done with the view of causing the tenant to abandon his lease, punitive damages may be allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 145.]

### 4. SAME.

Some of the special demurrers were well taken, and others should have been overruled.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Action by S. W. Darnell against the Columbus Show Case Company. Judgment for defendant, and plaintiff brings error. Reversed.

G. Y. Tigner, for plaintiff in error. Charlton E. Battle, for defendant in error.

EVANS, J. The case made by the petition was substantially this: The owner of two adjoining lots leased them separately to the plaintiff and the defendant; the lease to the plaintiff being prior to that of the defendant. Upon the lot demised to the plaintiff was a three-room tenement, which was used as a dwelling house. The only means of lighting and ventilating two rooms thereof was by a single window in each room, which overlooked the premises demised to the defendant. The defendant, being a manufacturing corporation dealing in lumber, piled a quantity of lumber on the lot rented by it in such a manner as to obstruct the light and air necessary for the use and enjoyment of the tenement by the other tenant, and to cause rain-water to drip into the house, rendering the

house damp, unwholesome, unhealthy, and uncomfortable. Other matters were also alleged, which will be noticed in a discussion of the special demurrers filed. The defendant demurred both generally and specially to the petition. The demurrers were sustained, and the petition dismissed.

The complaining tenant was a tenant by the year, and does not claim an express grant to an easement of light and air. Whatever right he may have to prevent his neighbor tenant from obstructing his window must be founded upon an implied grant of an easement in the use and enjoyment of light and ventilation over the adjoining land of his landlord at the time of his lease. There is much conflict in the American cases on the question of implied grant of these easements. In many jurisdictions it is held that a lease of land upon which is a building depending for its light and air on windows therein, which overlook adjoining land of the landlord, does not include any right of light and air through such windows, unless expressly granted in the lease. *Myers v. Gemmell*, 10 Barb. 537; *Kelper v. Klein*, 51 Ind. 316; *Keating v. Springer*, 146 Ill. 481, 84 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175. Other courts lay down the doctrine that there is an implied grant in a lease of the right to light and air from the adjoining land of the landlord, where the situation and habitual use of the demised premises is such that the right to light and air is necessary to the beneficial enjoyment of the leased premises. *Case v. Minot*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536. See note to this case in 22 L. R. A. 536, where many of the cases are collated. The question of an implied grant of easement of light and air was before this court in *Turner v. Thompson*, 58 Ga. 288, 36 Am. Rep. 297. In that case it was held that "where an executrix sold half a lot of land, with a tenement thereon having windows opening upon the other half lot, and bought the other half herself at the same sale, she will be estopped from obstructing the passage of light and air through such windows, if those windows were necessary to the admission of sufficient light and air for the reasonable enjoyment of the tenement which she sold; aliter, if sufficient light and air can be derived from other windows opened, or which could conveniently be opened, elsewhere in the tenement to make the rooms reasonably useful and enjoyable." The principle deduced from this decision has been incorporated in Civ. Code 1895, § 3046, as follows: "A right to the easement of light and air over another's land through ancient lights or windows is not acquired by prescription; but where one sells a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land then belonging to the same owner, the easement of light and air over such vacant lot passes as an incident to the house sold, because necessary to the enjoyment thereof." The principle here stated is equally applicable

to a case where the owner of two adjoining lots leases one upon which there is a dwelling house dependant upon a window overlooking the adjoining lot for light and air. Indeed, the reason for the rule is more cogent in a case of tenancy than of purchase. Where one purchases a tenement depending for light and air upon a window overlooking the adjoining land belonging to his grantor, in order to prevent closing the window, he must show that he cannot get light and air elsewhere over his own land; that it is a real necessity that he get it at this easement; that he cannot get other lights to his own building over his own property at a reasonable cost. *Thompson v. Turner*, 69 Ga. 223. A tenant, without his landlord's consent, cannot change and alter the demised tenement in any material respect. Certainly he is under no duty to alter the demised tenement to meet any exigency produced by the act of his landlord to escape its consequences. The tenant is entitled to the use of the tenement with such necessary privileges accruing from its situation to adjoining land of his landlord at the time of the demise, and the landlord cannot deprive him of the enjoyment thereof by changing the situation in such a material way as practically to make the tenement unfit for use.

We have thus far discussed the matter as if the complaint of the tenant were against his landlord, instead of against a tenant who subsequently rented from his landlord. It is not charged in the petition that the common landlord consented, expressly or impliedly, to the commission of the acts complained of, nor connived thereat. From the doctrine that a landlord is not responsible for the acts of strangers, it would follow that a tortious act done by one tenant to another tenant of a common landlord, without the authority, consent, or connivance of the landlord, is not the latter's tort, but the tort of him who does the act. *Perry v. Wall*, 68 Ga. 70. However, if the common landlord cannot use his adjoining land in such a manner as to shut out necessary light and air from a dwelling house which he has rented, one who thereafter rents the adjoining land has no greater right or privilege in respect thereto than his landlord possessed. It follows, therefore, that the defendant cannot justify its act under the lease.

The petition should not have been dismissed on general demurrer for another reason. It was alleged that the lumber was piled in such a way as to cause the rainwater to be thrown through the window of the plaintiff's bedroom, "thereby wetting petitioner's bedroom floor and his bedding and bedroom furnishings, and rendering petitioner's said house and bedroom especially damp, close, stuffy, unwholesome, and unhealthy, and exceedingly uncomfortable, to his great annoyance, and to the disturbance and violation of his right to the full, free, comfortable, and reasonable enjoyment of his said dwelling house and home." Here is charged

a distinct physical invasion and interference with the plaintiff's possession, which is a positive tort. Although a tenant has no estate in the land, he is the owner of its use for the term of his rent contract, and can recover damages for any injury to such use resulting from a physical invasion of his possession. See *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

There were several special demurrers to the petition. One was directed to the allegations respecting the plaintiff's condition in life, and the nature of his vocation. Simply that the plaintiff is a poor man, and his employment is that of a night watchman, which requires him to sleep in the day, would not make the defendant liable in damages for the interference of his slumbers caused by the noises incident to the operation of a lumber yard. Hence the sixteenth and twentieth paragraphs were subject to the special demurrers aimed at them. The allegations that the plaintiff had previously occupied the same house as a tenant for many years in the past, and was attached to the same, was entirely irrelevant, and properly stricken on demurrer.

The allegation in the seventeenth paragraph, that the plaintiff had renewed his lease for another term, does not aid his case. When he renewed the lease, he took the premises as he found them, and cannot complain of conditions existing at the time of the renewal of his lease contract.

The twenty-second paragraph of the petition declared that the various acts and deeds set forth and complained of, both in themselves and in the intent with which they were done, constitute aggravating circumstances entitling petitioner to additional damages for which he sues. The mere wrongful obstruction of the plaintiff's light, without more, would not make the defendant liable in punitive damages. But if, as charged in the petition, the lumber was piled so as not only to exclude light and air from the plaintiff's dwelling, but also to throw the rainwater into his bedroom, and this was done by the defendant for the purpose of harassing the plaintiff with a view of causing him to abandon his lease, that the defendant might get possession of the property, it would be in the province of the jury to allow punitive damages.

The other special demurrers to which no special reference has been made should have been overruled.

Judgment reversed. All the Justices concur.

(129 Ga. 53)

ANDREWS CO. et al. v. NATIONAL BANK OF COLUMBUS.

(Supreme Court of Georgia. Aug. 10, 1907.)

1. CORPORATIONS — INDEBTEDNESS — NOTE OF PRESIDENT.

Where A. obtains money from a bank and gives therefor a note under seal, signed by A. individually, and pledges, as collateral security

for the payment of said note, stock in a corporation, which stock is the property of A., the debt represented by the note is the individual debt of A., and cannot be enforced against the corporation, of which A. is the president; and this rule is not affected by general recitals in the petition that the money so obtained was for the use and benefit of the corporation, and was so understood at the time, and that the same was placed to the credit of the corporation on the books of the bank.

2. SAME — RIGHTS OF PLEDGEE OF STOCK.

A pledgee of stock has the right to maintain an action, and to invoke the application of appropriate equitable remedies for the preservation of the assets of the company, and the prevention of their passing out of the hands of the corporation under terms of a sale which was the result of a "combination and confederation" to destroy the value of the stock of the corporation, and a fraud on the rights of the pledgee.

3. EQUITY — BILL — MULTIFARIOUSNESS — MISJOINDER OF PARTIES.

The petition was not open to attack by demurrer upon the grounds that it was multifarious, and that there was a misjoinder of parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 340-379.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; H. H. Swift, Judge pro. hac.

Action by the National Bank of Columbus against the Andrews Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The National Bank of Columbus filed an equitable petition against the defendants Andrews Company, a corporation, Ernest Andrews, Lane, Bagley, and others, as individuals, seeking to obtain judgment against them on certain promissory notes, and against these and other defendants, Schuessler and Roberts, to have an alleged fraudulent sale of the assets of the Andrews Company to the last two named defendants set aside, and to have a receiver appointed to take charge of the assets of said company; and praying, also, that Ernest Andrews, Schuessler, and Roberts be required to account for all sales of goods belonging to said Andrews Company made by them since the date of the alleged fraudulent transfer to said Schuessler and Roberts. The material allegations of the petition are as follows: That about the 27th day of August, 1900, Ernest Andrews, president of the Andrews Company, obtained from petitioner the sum of \$2,500, as a loan. He "asked the officers of petitioner to take his individual note for this sum, \* \* \* but petitioner states that, although said note was taken from said Ernest Andrews individually, the same represented a debt of the Andrews Company." In September, 1900, said Andrews obtained from petitioner an additional loan of \$2,500, "and petitioner avers that, although the said Ernest Andrews gave his individual note for the said last-mentioned sum, the same was also a debt of the said Andrews Company." In both of these instances the notes given to plaintiff were under seal, and signed by Ernest Andrews individually; and in each case he

"deposited with petitioner \$10,000 of the capital stock of said Andrews Company, which had been issued to him, as collateral security" for said loans. Again, in August, 1902, Ernest Andrews applied to petitioner for an additional loan of \$5,000; but "petitioner already held the notes of the said Ernest Andrews for \$5,000, as above stated, and was unwilling to take his note for any additional amounts, and he [Andrews] then stated to petitioner that the money was for the Andrews Company, but that he did not want to increase its indebtedness, and that he would therefore procure the notes of certain employes of the corporation," to wit, Lane, Bagley, and three others, "for the sum of \$1,000 each, which notes would be indorsed by him, and that he would deposit, as security therefor, stock in the Andrews Company to the amount of \$5,000, which had been issued to said parties." In pursuance of this agreement, petitioner advanced \$5,000, and took the notes of said employes, Lane, Bagley, and others, each of said parties giving 44 notes for the sum of \$25, and one note for the sum of \$24. All of said notes were under seal, and signed by said parties individually, and indorsed by Ernest Andrews, and \$5,000 of stock in the Andrews Company, which had been issued to said parties, \$1,000 each, was deposited as collateral security for said notes. In May, 1903, said Andrews represented to petitioner that the assets of the Andrews Company amounted to \$57,000, and that the liabilities were about \$24,000, but that \$10,000 of this indebtedness was due to W. T. Roberts, one of the directors of the Andrews Company, and that Roberts was willing to take \$10,000 of preferred stock in said company in settlement of said debt; "the said Andrews stating at the time that the company would increase its capital stock to \$40,000, including said preferred stock, and that the only effect of said preferred stock would be to entitle the holder thereof to an 8 per cent. dividend before any dividends or profits were paid to the other stockholders." And petitioner thereupon surrendered the certificates of stock held by it as collateral, and other certificates were delivered to it in lieu of those surrendered, the new certificates being marked "Common," and the stock of said company was increased to \$40,000. Subsequently Andrews paid petitioner \$500 on the notes signed by him, and petitioner surrendered \$2,000 of the stock held by it as collateral, leaving \$23,000 of the stock in the Andrews Company in the hands of the petitioner as security for the balance due on said notes. In the summer of 1903 Ernest Andrews entered into negotiations with certain creditors who held claims against the Andrews Company for merchandise, and sought and obtained a settlement of about \$10,000 of the indebtedness of the company for about \$5,000 or \$6,000, which amount was paid out of the money of the Andrews

Company. Petitioner alleges that the total indebtedness of the firm for merchandise was about \$16,000, and that, after the settlement above referred to, only \$6,000 remained unpaid. "Yet the said Ernest Andrews, for the purpose of holding said indebtedness against the assets of said corporation, and of defrauding petitioner, \* \* \* procured the creditors holding said claims to transfer and assign the same to B. A. Schuessler, a sister of said Andrews, intending thereby that the said Schuessler should hold said claims for the full amount of the face thereof against said Andrews Company." In November, 1903, all of said defendants "combined and confederated for the purpose of defeating petitioner in the collection of its debts, by depreciating and utterly destroying the value of the securities held by it, and, in pursuance of said confederation, the said Ernest Andrews and the Andrews Company made a pretended sale of all the stock of goods and other assets of the Andrews Company to the said Schuessler and Roberts. \* \* \* No money was paid by said parties in said purchase, \* \* \* but it was agreed between them that the purchase price thereof should be the \$10,000 of settled accounts which were held by the said Schuessler, and the \$10,000 of preferred stock in said company held by said Roberts, and the assumption of the \$6,000 of unsettled indebtedness against said Andrews Company. \* \* \* Petitioner avers that the \$10,000 of preferred stock held by said Roberts did not entitle him to any priority in the distribution of the capital or assets of said corporation, but only to a dividend of 8 per cent. upon stock before any dividends or profits were paid to the other stockholders," that the value of the assets of the company was about \$44,000, "and that there was really no consideration for said sale, except the assumption of the \$6,000 of the indebtedness of said corporation." And "petitioner further shows that by said pretended sale the said Ernest Andrews and the other stockholders of said company, well knowing that your petitioner held said \$23,000 of stock in said company as collateral security, and that the same would be thereby rendered worthless, and intending thereby to destroy the security held by petitioner and to defeat petitioner in the collection of its just debt, prevented the said Andrews Company from continuing its said business, although the same has been since conducted by the said Ernest Andrews in the same manner as before, as hereinbefore stated," viz., in the name of Schuessler and Roberts. The insolvency of Ernest Andrews, Lane, and Bagley, and the other signers of the notes is also alleged. The plaintiff amended its petition by amplifying the allegations of fraud. The defendants filed several demurrers on various grounds, among others that the petition is multifarious, and that there is a misjoinder of parties defendant. The



court overruled each of the demurrers, and the defendants excepted.

Goetchius & Chappell and C. B. Battle, for plaintiffs in error. J. H. Lewis, J. H. Martin, and A. W. Cozart, for defendant in error.

BECK, J. (after stating the facts as above).

1. When all of the allegations in the petition, relative to the creation of the debt represented by the notes attached to the petition, are considered together, no doubt remains that the debt is one from Ernest Andrews, Lane, and the other makers of the notes, individually, and not the debt of the Andrews Company, the corporation, to the bank. This conclusion is not to be affected by the general recitals that the debt was one of the Andrews Company, and that the money obtained, which was the consideration of the notes; was for the use and benefit of the Andrews Company, and was placed to the credit of that company on the books of the bank. There are facts alleged in the petition of more weight and significance than these mere general allegations. In the first place, the bank took the notes of Ernest Andrews, Lane, and the other stockholders individually, and these notes are under seal; and, again, the shares of stock of the corporation were deposited as collateral security for the payment, not of the debt of the company to the bank, but for the payment of these notes. And in one paragraph of the petition it distinctly appears that after the notes of Ernest Andrews, to the amount of \$5,000, had been taken, and that additional funds were needed, the bank "was unwilling to take his [Ernest Andrews] notes for any additional amount; and he then stated to your petitioner that the money was for the Andrews Company, but that he did not want to increase its indebtedness, and that he would, therefore, procure the notes of certain employees of the corporation, to wit, Lane, Bagley, and others, for the sum of \$1,000 each, which notes would be indorsed by him, and that he would deposit as security therefor stock in the Andrews Company to the amount of \$5,000, which had been issued to said parties." Here again it appears that the notes of Lane, Bagley, and others were taken under seal, signed by them individually, and that these notes were taken because the bank was unwilling to take Ernest Andrews' notes "for any additional amounts," and that "he did not want to increase [the corporation's] indebtedness." The authorities cited by the plaintiffs in error upon the point now under consideration contain nothing contrary to the conclusion which we have reached. In the case of *Merchants' Bank v. Central Bank*, 1 Kelly (Ga.) 418, 44 Am. Dec. 665, it was said that: "It may be stated generally that where it appears on the face of the paper that the credit is not given to the agent, and the name of the principal is disclosed at the

time of the transaction, and the act is within the powers of the agent, the principal is bound. The question whether the agent is bound does not affect this question, for there are many cases where both principal and agent are bound. Now, it is apparent on this bill of exchange [the paper sued on] that it was the intent of the parties to bind Scott Cray's principal; else, why make it payable to him as agent, and why take his indorsement as agent? It is still more manifest that he does appear to act as agent. The testimony upon the trial, too, is that the name of his principal was disclosed to the Central Bank at the time the bill was discounted." If this excerpt from the opinion in the case last cited is not sufficient to show an entirely different state of facts from those set forth in the case at bar, the reading of the entire case will make the difference clear and distinct.

It is unnecessary to discuss the cases cited by the plaintiffs in error in detail. The case last above referred to, and the case of *Third National Bank v. Van Haagen Mfg. Co.*, 141 Pa. 214, 21 Atl. 598, 12 L. R. A. 223, seems to be most confidently relied upon by counsel. The latter case lays down merely the broad ruling that a loan of money to a corporation will render it liable for the debt, although the note of an individual, instead of the note of the corporation, was taken therefor, because supposed to be better security. In the case at bar we hold as a matter of law, under the allegations in the petition, that the loan of money was not to the corporation, but to the individuals. The other cases cited on the brief of counsel for the plaintiffs in error are easily distinguishable from the instant case. And while we do not put our ruling upon the question immediately under consideration, upon the fact that the notes given by Ernest Andrews, Lane, and others were under seal, it is not to be concluded that we regard that feature of the case as unimportant. In the case of *Merchants' Bank v. Central Bank*, supra, it is said: "The inference drawn from the paper is that Scott Cray acted as agent for some person, or corporation; but who, or what, does not appear. The name of his principal does not appear. The general rule is this: In order to bind a principal, on a contract made by an agent, it must purport on its face to be the contract of the principal, and his name must be inserted in it. It is not enough that the agent be described as such in the instrument. *Story on Agency*, § 147; *Paley on Agency*, by Lloyd, 180, 181, 182; 2 Kent (3d Ed.) 629. This rule applies, more particularly, to solemn instruments under seal, and as to them, to use the language of Judge Story, it is 'regularly true,' but not universally true in all its extent; for, so far as regards instruments under seal, there are some exceptions to some of the requirements of the rule. Although the rule is thus strict as to sealed instruments, yet a more liberal rule

obtains as to unsolemn instruments, especially commercial and maritime contracts." See, also, *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S. E. 582, and authorities there cited.

2. Having reached the conclusion that the debt represented by the notes was the individual debt of the signers of these notes, we have now to decide whether the payee and holder of these notes, who was the pledgee of a majority of the shares of stock of the Andrews Company, was in a position to invoke the equitable relief against the corporation to prevent it and other parties from consummating a fraudulent sale and transfer of the assets of the corporation, whereby the stock pledged would be rendered valueless. Reference to the statement of facts will make it appear how this sale and transfer was to be effected. That the transaction between the corporation on the one side, and Schuessler and Roberts on the other, was not only tainted, but saturated with fraud, is undeniable if the allegations of the petition are true; and they are to be so taken as against the demurrer. It is not necessary for us to decide what might have been the rights and remedies of the petitioner had it been a stockholder of the Andrews Company, or had it been a creditor of the same. Had it been a stockholder, owning a majority of the shares of stock, and having a voice in the control and direction of the affairs of the corporation, it might possibly have been compelled to resort to a different procedure more peculiarly adapted to the righting of the wrong about to be inflicted upon a stockholder by an unauthorized act of the corporation, tending to impair and destroy the value of his shares of stock, or, if the bank had been a creditor of the corporation, it might not have been able to proceed against the corporation, or the parties to whom the corporation made a pretended sale of all its assets, until after its claim was reduced to judgment, unless it was proceeding under the provisions of Civ. Code 1895, § 2716, and had put itself in a position to invoke the remedies provided thereby. But it is neither a creditor nor a stockholder in the full sense of that word. In both the briefs for plaintiffs and defendant in error it is considered as a pledgee of stock, holding the shares of stock as collateral security for the payment of a debt. And it is as bearing this relation to the corporation, the validity of whose acts are attacked, that we are to treat it, and to decide whether or not it is entitled to the aid of a court of equity in setting aside a sale alleged to be fraudulent, and charged to have been the result of a combination and conspiracy "for the purpose of defeating petitioner in the collection of its debts by depreciating and utterly destroying the value of the securities held by it."

Counsel for plaintiffs in error contend that, if it appears that petitioner is neither a stockholder nor a creditor of the Andrews

Company, it must follow that it is not entitled to maintain the present action. But, as we view it, the fact of its being neither a stockholder nor a creditor of the corporation removes all doubt as to its right to equitable relief at this time. Had it been a stockholder, it might, as we have said, have had some voice in the control and direction of the affairs of the corporation. Had it been a creditor, it might have reduced its claim to judgment, and proceeded against the purchasers under the fraudulent sale of the assets of the corporation; but being merely pledgees of the stock holding debts against individual stockholders, it cannot have adequate relief except in an action of this nature against the corporation, the stockholders, and the parties who "combined and confederated" with them to depreciate and destroy the value of the stock pledged. Any kind of a proceeding at common law would have required a multiplicity of suits and a circuitry of action. "Pledgee of stock has the right to maintain an action for the preservation of the assets of the company." 22 Am. & Eng. Enc. Law (2d Ed.) 907; 10 Cyc. 648. "Pledgees of shares of stock have such interest in the corporation as to entitle them to object to the act of their pledgors in turning property of the corporation over to another stockholder in payment of shares of stock." *St. Louis Stoneware Co. v. Partidge*, 8 Mo. App. 580; 12 Cent. Dig. par. 573e. This doctrine is applied by the Supreme Court of Minnesota in the case of *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, 276, where it is said: "The holders of the stock, whether holding as general owners or as pledgees, are therefore interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the corporation. Stockholders do not have an 'interest' in the corporate real estate, in the sense in which the word 'interest' is commonly used in that connection; for such real estate is the property of the corporation. For this reason, we think that the court below has used the word 'interest' in this finding inaccurately. But this is not important. Upon the facts found, and the preceding conclusions of law, the plaintiffs, as holders of the stock, are interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the corporation. If this is so, they have a right to take legal means to preserve the property, to prevent it from being lost to the corporation, or its value from being impaired."

\* \* \* It is also contended by the defendant's counsel that the plaintiffs have no standing in court, because a stockholder, as such, could not sustain an action of this kind. It is an answer to this to say that, as remarked by the counsel in another part of his brief, the plaintiffs, though they hold the stock, are not stockholders, but pledgees merely, and therefore they cannot exercise the control over the association which stock-

holders can. What the stockholders may compel the association to do they cannot compel it to do. They cannot, therefore, be required to act through the association, but they may bring an action on their own account, and in their own names to protect their rights and interests as pledgees."

If we have stated the correct doctrine as to the right of pledgees of stock in cases like that stated in this petition, the court did not err in overruling the demurrers of any of the defendants, which were general in their nature though it must follow as a matter of course from what we have said in this opinion that the plaintiff is not entitled to a judgment upon its notes against the Andrews Company and so much of the prayer of the petition as seeks this particular relief against the corporation must be unavailing however righteous the other demands in the petition may be.

3. But the mere fact that a part of the remedy and relief sought is not appropriate does not have the effect to render the bill multifarious. Nor was there a misjoinder of parties. The corporation whose assets were transferred by the fraudulent sale resulting from a wrongful "combination and conspiracy," its stockholders, and the other parties to the alleged pretended and wrongful sale were all proper parties. And especially W. T. Roberts and Mrs. Schuessler should have joined as parties defendant; and, if they have so misappropriated and wasted any of the assets obtained by the alleged wrongful sale the petitioner would be entitled to an accounting as against them. The respective rights of Mrs. Schuessler and Roberts as creditors of the corporation, and of Roberts as a creditor or holder of the preferred stock, if he be one, and of petitioners, may be all adjusted according to the priorities of their claims upon the final winding up of the business of the corporation, and the distribution of its assets.

Judgment affirmed. All the Justices concur.

(128 Ga. 324)

#### SEWELL v. NORRIS et al.

(Supreme Court of Georgia. Aug. 9, 1907.)

#### 1. FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION AS BETWEEN PARTIES.

Where two parties confederate for the purpose of defrauding the creditors of one of them, and in pursuance thereof the debtor executes and delivers a deed conveying land to the other, neither law nor equity will help him to cancel such deed or to avoid its effect by showing that it was fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 523.]

#### 2. SPECIFIC PERFORMANCE—EXECUTORY CONTRACT—FRAUD.

If the parties make a contract for the purpose of defrauding a creditor or creditors of one of them, such contract, while executory, cannot be enforced by either against the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 176.]

#### 3. ESTOPPEL—CLOTHING ANOTHER WITH APPARENT TITLE—REAL PROPERTY.

If one who held the legal title to land, though unrecorded, represented that the title was in another person, who appeared from the record to be the owner, and that such other person had the right to sell, and make a bond for title to the land, and thus induced an innocent purchaser for value, in reliance on such representation, to accept a bond for title from the other person, to give notes for the purchase money, and to pay some or all of them, the person so acting would be estopped from denying the title of such third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 218.]

#### 4. SAME.

But if the whole agreement of sale was fraudulent, and a mere sham to defeat creditors of the real owner, whose deed was unrecorded, and the taker of the bond participated in such scheme and knew the real facts, no equitable estoppel would arise in his favor, so as to prevent the holder of the legal title from asserting it, if he could do so without relying on or taking advantage of the fraudulent transaction.

#### 5. SAME.

If the owner had a legal title untainted by the fraud, his right to recover possession on it against the holder of the bond for title from the third person would not be defeated, if his case did not involve the setting up of the fraud, but the defense was compelled to set up the fraudulent transaction for the purpose of establishing an equitable estoppel or affirmative equitable rights.

(Syllabus, by the Court.)

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action by J. R. P. Sewell against J. O. Norris and another. Judgment for defendants, and plaintiff brings error. Reversed.

J. R. P. Sewell brought an action of complaint against J. R. Grubbs and J. O. Norris, seeking to recover a tract of land containing 42½ acres. The defendants denied that the plaintiff was the owner of the land, and Norris alleged that he was the lawful owner and in legally acquired possession. He also pleaded that he bought the property from Mrs. E. J. Sewell, receiving a bond for title from her; that at the time of the purchase the plaintiff represented that the title was in her, and assisted in conducting the sale; that he induced this defendant to accept the bond, and also wrote the notes given for the purchase money, four of which have been paid; and that he was thereby estopped from claiming title. The plaintiff conveyed the land to his mother, Mrs. E. J. Sewell, by a deed dated May 6, 1893, and she reconveyed it to him by deed dated May 15th of the same year. She made to G. L. King a bond for title dated August 24, 1898, and this was transferred by King to Norris on April 12, 1902. The defendants sought to show that Sewell negotiated the trade with King, and stated that the title was in his mother because he owed her some money; that upon his representation King accepted a bond for title from Mrs. Sewell, the mother, and gave notes, which had been paid off; that he was in possession; that the trade was made in good faith on his part; and that the bond was transferred to Norris,

who also took in good faith. The evidence on behalf of the defendants themselves indicated that they knew that Sewell had separated from his wife and was hid in a little tenant's house; that King and Norris knew that he was in trouble and wanted to sell his land, and was thus dealing with the land in controversy, although the title was in his mother. The evidence for the plaintiff tended to show that the whole transaction with King and Norris was a fraud, and merely colorable; that they knew the title was in the plaintiff, though his deed was unrecorded; that Sewell had separated from his wife, and, to avoid a claim for alimony or some similar claim, the bond for title from his mother to King was executed and the purchase-money notes made, though it was understood that they were never to be paid; and that all the parties participated in this. The plaintiff denied that he ever received any payment of the notes. The brother of the plaintiff testified that on behalf of his mother he tendered back to King the amount which had been paid on the notes, and that the latter refused it. The jury found for the defendants.

The plaintiff moved for a new trial on the general grounds, and also on certain grounds which were added by amendment. One of these complains of the following charge of the court: "If you believe from the evidence in the case that the alleged sale of the property in controversy, and the alleged purchase of the same by King, was a fraudulent purchase and sale, and that the bond for titles and notes given pursuant to said sale were a part thereof, and were fraudulently executed and delivered by the respective parties—that is to say, that if you believe all this was done to defraud any creditor of the plaintiff, and that the defendant King and Norris were parties to this fraudulent scheme, and that the whole thing was a fraud and known to all the parties thereto—then all the parties are bound by their fraudulent conduct, and the law will leave them where it finds them. Courts will not lend their aid to relieve any one from the consequence of his own fraudulent conduct. This rule of law applies to executed contracts, and not to contracts that are executory in their nature. Whether it is an executed contract or an executory contract is a question which the jury will decide from the evidence in the case." It was alleged that this was error, because the court should have charged that the contract referred to was an executory contract, that the law found Sewell with the legal title, which would authorize a recovery unless he had lost the right, and that his right to recover on his legal title would not be defeated by showing a subsequent fraudulent contract resulting in the giving of a bond for title and possession by the defendant, and that the court in a previous part of the charge, in stating the contentions of the de-

fendants, told the jury that they contended that the law found them in possession, and the law would leave them where it found them, and that, taking this in connection with the charge quoted, it was calculated to confuse the jury as to where the parties were found by the law in the legal sense of that expression. The judge declined to certify two grounds of the motion, but certified that he did not charge that, notwithstanding there might have been a fraudulent scheme on the part of the parties to the litigation to defeat the collection of a debt against the plaintiff, and the bond and notes were given in pursuance of the scheme, the plaintiff was entitled to recover, unless it was necessary to invoke the aid of the fraud to make out his case. The motion was overruled, and the plaintiff excepted.

Skelton & Swilling and J. N. Worley, for plaintiff in error. J. B. Jones and W. R. Little, for defendants in error.

LUMPKIN, J. (after stating the facts as above). It is to be regretted that parties should bring such a transaction as is here involved before the courts. That Sewell was endeavoring to avoid some legal liability appears beyond question. If King and Norris were innocent purchasers for value and without notice, they would be protected. If they were participants in the fraudulent effort of Sewell to conceal his property, and were in pari delicto with him, they would stand no better in such transaction than he does. Where parties are equally at fault, neither law nor equity will help either of them to enforce a contract the object of which was to defraud others, if executory, or to set it aside, if executed. The rule is often expressed by saying that in such cases the law "will leave the parties where it finds them." Civ. Code 1895, § 3937. In *Bump on Fraudulent Conveyances* (4th Ed.) 445, it is tersely and forcibly said that "there is no obligation upon any one to extricate a rogue from his own toils. On any other principle a knave might gain, but could not lose, by a dishonest expedient, and inducements would be furnished to unfair dealing, if the law were to repair the accidents of an unsuccessful trick. A fraudulent grantee, therefore, is allowed to retain the property, not for any merit of his own, but for the demerit of his confederate, in accordance with a wise and liberal policy, which requires that the consequence of a fraudulent experiment shall be made as disastrous as possible. The law endeavors to environ a debtor with all possible perils, and make it appear that honesty is the best policy." *Fouche v. Brower*, 74 Ga. 251, 267. Legally speaking where does the law find the parties to this case? It finds the plaintiff with the legal title to the property in him, placed there several years before the transaction with the defendants, and apparently having no connection

with the fraud or the dealing with them. If the maxim, "*Ex dolo malo non oritur actio*" ("From fraud no cause of action arises"), or the other like maxim, "*Ex turpi causa non oritur actio*" ("From a base transaction a cause of action does not arise"), be applied to this case, it does not appear that the legal title in the plaintiff was tainted with the fraud which the evidence indicates entered into the subsequent agreement between him and the defendants. He did not have to invoke the unlawful agreement or transaction in order to assert that title. Thus, then, so far, at least, as this record discloses, the law found him with a legal title on which he could recover without resort to or reliance upon any illegal agreement, unless he were prevented from recovering by some legal defense.

Under the doctrine expressed in the maxim, "*Ex turpi causa non oritur actio*," it has been said that no court will "allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal." *Scott v. Brown*, 2 Q. B. Div. 724, 728. *Lindley, L. J.*, said: "Under the circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced. But his illegal contract confers no rights on him." In *Simpson v. Bloss*, 7 Taunt. 246 (17 Rev. Rep. 509), it was said that "the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case." In *Ingram v. Mitchell*, 30 Ga. 547, it was said that, whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover. And see *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Howell v. Fountain*, 3 Ga. 182, 46 Am. Dec. 415; *Adams v. Barrett*, 5 Ga. 404; *Garrison v. Burns*, 98 Ga. 762, 26 S. E. 471. But *Lord Mansfield* said: "If, from the plaintiff's own statement or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted." *Holman v. Johnson*, Cowp. 343; *Holleman v. Bradley Fertilizer Co.*, 106 Ga. 156, 32 S. E. 83; *Tompkins v. Compton*, 93 Ga. 520, 21 S. E. 79. The illegality of a contract which is sought to be enforced, or in respect to which relief is prayed, may appear from the plaintiff's case or may be set up by way of defense. *Bugg v. Towner*, 41 Ga. 315. The deed on which it was attempted to recover possession in that case was void under a statute of this state.

Where money is paid or personal property

is delivered under such a fraudulent or illegal contract, nothing more is necessary to pass title thereto. The contract is executed, and there can be no recovery of such money or property if the parties are in *pari delicto*. In regard to real estate, the mere allowing a person to take possession, or even placing him in possession, does not convey title or operate as a complete execution of a contract to make a title. A conveyance of real estate or of an interest therein must be in writing. A contract of sale in *parol*, with full payment of the purchase money and delivery of possession, may take the sale without the provisions of the statute of frauds. But, as already noted, the written contract here was not between the owner and the person who took possession, but between such person and a third party, and as against the owner it was necessary to invoke the doctrine of equitable estoppel.

Where did the law find the defendants? They were in possession, or one of them was so. But they have no title, and possession alone would not defeat a recovery under a superior legal title. Something else must be shown. "If the owner or a person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired an interest in the property; and generally where a person by word or conduct voluntarily induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." *Equitable Mortgage Co. v. Butler*, 105 Ga. 555, 560, 31 S. E. 395. In order to be benefited by this rule, the purchaser must have relied on the representations or conduct of the person sought to be estopped. He must have been induced to act on the belief in the existence of a state of facts, by reason of the representations or conduct of the other party. He must have acted in ignorance that the state of facts on which he claimed to rely was not the true state, and the purchase must have been a *bona fide* purchase, not a mere sham to avoid creditors, participated in by both parties. If the transaction was merely a trick or device to defeat a creditor or creditors of Sewell, and King and Norris knowingly took part in it, no equity could arise in their favor by reason of it. The law declares it to be wrong to seek to defraud creditors; and, if parties combine together to commit such a wrong, no equity will arise in favor of either against the other, nor will an equitable estoppel arise in favor of one of such parties as against the other from such a transaction. *Deen v. Williams*, 57 S. E. 427.

The bond for title was not made by Sewell, but by his mother. Whatever money was paid on the trade was not paid to him, but to her. The plaintiff does not rely upon this

transaction either to recover the land or to set aside any contract of his. The defendants have not title, and must set up the transaction, whatever it was, in support of their claim. This being so, if the thing on which they must rely for some affirmative right is in law contrary to public policy and good morals, their claim must fail. In cases where parties conspire together to defeat creditors of one of them, if they subsequently fall out among themselves, the law will not enforce the contract between them if it is executory, and will not set it aside if it is executed. Whichever party has to resort to setting up the illegal transaction, in order to establish or support an affirmative claim of right, must lose. If the debtor has made and delivered a deed conveying property, he can get no aid to set aside such a deed because of his own fraud. The deed becomes an executed contract, and places the title in his grantee, and if the grantee sues him for possession of the land so conveyed, neither law nor equity will help the grantor to defeat a recovery by setting up that the transaction was entered into in order to defraud his creditors; and, on the other hand, if one holds the legal title not affected by the fraudulent transaction, if there was one, and brings suit to recover the land from the possession of another who has no title, the latter cannot defend successfully by setting up that he is without legal title, but that he was placed in possession under a contract or arrangement to defeat the creditors of the owner. This would be in effect to enforce a contract or agreement which the law declares fraudulent and contrary to public policy. It would be equivalent to setting aside the legal title, or granting specific performance in favor of the holder of the bond for title, under a fraudulent agreement, or of recognizing equities as growing out of such transactions.

We do not know what facts may be developed on the trial, whether it may appear that the purchasers were bona fide and without notice of any wrongful purpose in the transaction, or whether they were participants in an effort to defeat a creditor or creditors of Sewell. But we do not think that our excellent brother of the circuit bench clearly placed before the jury the doctrine of executed and executory contracts, the question whether the plaintiff had a legal title unaffected by the fraud involved in the transaction, if there was any, and, if there was such a fraudulent transaction in which both parties participated, whether the defendant Norris had title outside of it, or must invoke the fraudulent transaction to establish some affirmative right or equity on his part. See *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068, where the case of *Harrison v. Hatcher*, 44 Ga. 638, decided by two judges, was overruled; *Beard v. White*, 120 Ga. 1018, 48 S. E. 400.

Judgment reversed. All the Justices concur.

(129 Ga. 49)

# SMALLWOOD et al. v. KIMBALL et al.

(Supreme Court of Georgia. Aug. 10, 1907.)

## 1. ERROR, WRIT OF—DISMISSAL—GROUNDS FOR.

An action of ejectment was brought in the name of four plaintiffs. Before the trial one of them entered a retraxit, upon which judgment was entered by the court in favor of the defendant against such plaintiff and he was dismissed from the suit. The case proceeded to trial, which resulted in a verdict for the defendant. Thereafter a motion for new trial was filed by the plaintiffs, which being overruled, a bill of exceptions was sued out, in which all four of the original plaintiffs were described as plaintiffs in error. A pauper affidavit was filed by the three plaintiffs who remained parties to the suit. When the case was called in the Supreme Court, attention was called to the fact that one of the plaintiffs in error—that is, the one who had filed the retraxit in the court below—had filed no pauper affidavit. Counsel for the plaintiffs in error then moved to strike the name of this plaintiff in error from the bill of exceptions wherever it occurred. *Held*, that such motion will be granted, and the fact that the plaintiff in error thus stricken has failed to file a pauper affidavit will not work a dismissal of the writ of error.

## 2. EVIDENCE—OFFICIAL RECORDS—AUTHENTICATION.

When there is no clerk of a court of ordinary, the judge is ex officio clerk. A certificate of the ordinary, purporting to certify a copy of marriage license appearing of record in his office, does not render the copy admissible in evidence, unless it is made affirmatively to appear that there is no clerk other than the ordinary. *Sellers v. Page*, 127 Ga. 634, 56 S. E. 1011 (3); *Lay v. Sheppard*, 112 Ga. 111, 37 S. E. 132.

## 3. NEW TRIAL—GROUNDS—RECEPTION OF EVIDENCE.

A material issue in this case was whether a certain alleged marriage was lawful, and the improper admission of the marriage license in evidence is sufficient cause for the grant of a new trial.

## 4. ERROR, WRIT OF—REVIEW.

There are a number of assignments of error which are so indefinite as to render it doubtful whether under the rulings of this court they may be considered; but they, as well as all other objections to the judgment refusing to grant a new trial, relate to such matters as probably will not occur in the same way upon another trial, and we will not rule upon any other question than those dealt with in the preceding headnotes.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action between B. N. Smallwood and others and C. M. Kimball and others. From the judgment, Smallwood and others bring error. Reversed.

J. S. James, for plaintiffs in error. R. G. Griggs and W. A. James, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(126 Ga. 836)

# ASHLEY et al. v. COOK et al.

(Supreme Court of Georgia. Aug. 9, 1907.)

## ACTION—MISJOINDER—PARTIES DEFENDANT—NONJOINDER.

A declaration against A., B., and C., alleging that the plaintiffs own several parcels of land subject to the superior right of D., a

holder of an outstanding deed to secure a debt; that upon default of payment the debt was sued to judgment, and execution issued thereon; that two of the several parcels of land were exposed to public sale by the sheriff, and one sold to A. and the other to B.; that both sales were void; that A. and B. were both subrogated to the rights of D., the plaintiff in *fi. fa.*; that A. received a large amount of rents and other profits from the land, and sold it to C., who took with notice of the plaintiffs' equities, and afterwards received a large amount of rents and other profits therefrom; that B. received a large amount of rents and profits from the tract purchased by him; that the rents and profits received by A., B., and C., added to a certain sum paid in cash upon the execution by the defendant therein named, overpaid the debt—and the prayer being for an accounting, and that the debt and lien be decreed satisfied, and the title be decreed to be in the plaintiffs, and that the sheriff's deeds be canceled as clouds upon the plaintiff's title, *held*:

(a) The suit was not multifarious.

(b) In the absence of an allegation that D., the holder of the security deed, had been fully paid, D. is to be regarded as retaining, in common with A., B., and C., an interest in the security, and is a necessary party to the action.

(c) A. was at all times a necessary party, and the fact of his death and an omission to obtain administration upon his estate, after the filing of the suit and before the hearing of the demurrer, did not dispense with the necessity of making his estate a party to the action.

(d) The sheriff was not a necessary party.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by Augustus Ashley and others against W. J. Cook and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Augustus Ashley, Lulu Kreutz, and J. M. Ashley instituted suit against W. J. Cook, W. R. Cook, and Daniel Cummings, alleging, in substance, that in 1884 P. A. Ashley executed a deed conveying 720 acres, more or less, of land, composed of a number of separate tracts as follows: Being parts of lots Nos. 36, 14, 15, and 16 in the Second land district, and parts of lots Nos. 391, 392, and 393, in the Twenty-Second land district—the conveyance being made to Kate Ashley, the mother of plaintiffs, for life, with remainder over to her children, which deed was not recorded within the time prescribed by law; that in 1893 Kate Ashley died, leaving the plaintiffs and their brother, J. H. Ashley, as her only children; that afterwards J. H. Ashley died, leaving the plaintiffs as his only heirs at law; that after the execution of the aforesaid deed P. A. Ashley on April 13, 1885, executed a deed to secure a debt, to Mary L. Floyd Jones, conveying the same property, the amount secured being \$800, and said Jones taking the said security deed in good faith, without notice of the previous unrecorded deed to Kate Ashley and her children; that afterwards Mary L. Floyd Jones sued to judgment the notes so secured, and caused execution to issue thereon for \$800 principal, \$214.28 interest, \$101.45 attorney's fees, and

\$9.85 costs of court, and on March 5, 1891, she caused said execution to be levied by the sheriff upon the property described in the deeds, and on February 2, 1892, the sheriff, G. M. Howard, exposed for sale at public outcry lot No. 14 of the Second district, containing 202½ acres, more or less, which was purchased by W. J. Cook for \$750, which price was paid to the sheriff, whereupon he executed to the said Cook his deed conveying the property so described; that said sale was void, for the reason that Mary L. Floyd Jones did not execute and file and have recorded in the office of the clerk of the superior court, prior to the time of levy, a deed of reconveyance to P. A. Ashley, but W. J. Cook, the purchaser, became subrogated to all the rights of Mary L. Floyd Jones, and his interest acquired by subrogation was superior to the interest acquired by Kate Ashley and her children under the first deed from P. A. Ashley; that on the same date of sale the sheriff also, by virtue of the same execution, sold 140 acres of lot No. 36 in the Second district to Daniel Cummings (the amount of the purchase price not being alleged), which sale was void for the same reason as that averred touching the sale to W. J. Cook; that the sheriff executed a deed to Daniel Cummings, who became subrogated to the rights of Mary L. Floyd Jones with respect to the property so purchased by him; that Kate Ashley, on February 3, 1892, paid on the execution the \$360, and that sum was credited thereon (it not being otherwise alleged what disposition was made of this money); that W. J. Cook enjoyed the rents, issues, and profits of the land purchased by him from February 2, 1892, to March 8, 1898, of the yearly value of \$100 and during said time he cut and took from the land a large amount of timber, of the value of \$500 or other large sum, and on March 8, 1898, he conveyed to W. R. Cook the part of the land so purchased by him, but Cook took the land with full knowledge of petitioners' equities in the premises, and entered upon the land, and enjoyed the rents, issues, and profits thereof, of the yearly value of \$100, from March 8, 1898, to the time of the filing of the suit, April 24, 1900; that Daniel Cummings has enjoyed the rents, issues, and profits of the land purchased by him, of the yearly value of \$100, from the 2d day of February, 1892, to the date of the filing of the suit, and has also taken from said premises a large amount of timber, of the value of \$300; and that the rents, issues, and profits of lot No. 14, collected by W. J. Cook and W. R. Cook, together with the value of the timber cut by W. J. Cook, and the rents, issues, and profits of said part of lot No. 36 collected by Daniel Cummings, together with the timber cut from lot of land 36 by him, and the amount paid on the *fi. fa.* by the said Kate Ashley, have long since paid off said executions in

favor of Mary L. Floyd Jones, to whose rights W. J. Cook and Daniel Cummings are subrogated in said void sale.

It will be observed that while it is alleged that the security deed executed by P. A. Ashley to Mary L. Floyd Jones conveyed the same premises as described in the deed from P. A. Ashley to Kate Ashley and her children, it was not alleged that any part of the lands were sold at sheriff's sales, except lot No. 14, containing 202½ acres, more or less, and 140 acres of lot No. 136. Deducting this acreage from the 720 acres would leave, according to the allegations, 377½ acres vested in Mary L. Floyd Jones under the security deed, concerning which neither W. J. Cook nor Daniel Cummings ever asserted any claim. It was prayed: (1) That W. J. Cook, W. R. Cook, and Daniel Cummings be required to account for the rents, issues, and profits received by them, and the timber cut by them from said lands, and if said amounts have paid off said executions, with interest, petitioners be decreed to have title to the land, and that the defendants' deeds be delivered up and canceled. (2) That in the event it is found, on accounting, that said amounts have not paid up said execution, the petitioners be allowed to pay the defendants such amounts as may be decreed to be equitably due them, and thereupon that petitioners be decreed to have title to the premises, and that the deeds be delivered up and canceled. (3) That in the event it be found, on accounting, that said sums have more than paid the execution, then that petitioners may have judgment against each of the defendants separately for the amounts that may be found equitably due each of them.

After the suit was filed W. J. Cook died, and on January 26, 1903, his death was suggested of record. On the same day the court passed an order reciting the suggestion of record of the death of W. J. Cook, and that there was no administration on his estate, and ordering, upon motion of plaintiffs' counsel, that W. J. Cook be stricken as a party defendant. To the petition as amended the defendants demurred upon the ground, among others, that there is a nonjoinder of necessary parties, to wit, Mary L. Floyd Jones and G. M. Howard, sheriff, and that there is a misjoinder of causes of action.

John M. Stubbs, D. M. Roberts, and Akerman & Akerman, for plaintiffs in error. Hines & Jordan and T. L. Griner, for defendants in error.

ATKINSON, J. (after stating the facts as above). The court having placed the decision only upon the questions of misjoinder of causes of action and nonjoinder of necessary parties, we will deal only with those questions. The allegations of the petition in effect charge that Mary L. Floyd Jones by virtue of the security deed acquired a title to all the prop-

erty as security for the debt which was superior to the title of the plaintiffs. It follows that the lien of the judgment upon which execution issued, which was admittedly valid, was also superior to the title asserted by the plaintiffs. If the sale by the sheriff to W. J. Cook and the sale by the sheriff to Daniel Cummings were both void, as alleged, neither of these acquired any title whatever to the land which the sheriff conveyed to them, respectively. But it is alleged that each of them was subrogated to the rights of Mary L. Floyd Jones. See *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89. If they were subrogated to anything, it was to the security which she held. A mere security was the greatest interest which she held in the land. The greatest right which they acquired under the equitable right of subrogation was a right to participate in common in the control of the unsatisfied security for their reimbursement. If, in the course of collection by lawful sale or otherwise, they should make a new arrangement by which they would acquire lawful right to the identical property attempted to be sold to them, respectively, by the sheriff, that would be a different matter altogether. So far as the allegations go, Mrs. Mary L. Floyd Jones also has an interest in the security in common with W. J. Cook and Daniel Cummings, because it is not alleged that she has been fully paid. It is alleged that W. J. Cook, who did not have title, conveyed the land bought by him to W. R. Cook, who did not acquire title, but only took the right of subrogation theretofore held by W. J. Cook. That is not alleged in so many words, but it is necessarily implied from a fair construction of the declaration. If that be true, W. R. Cook had no other right than, in common with others, to have the security deed enforced for his benefit to satisfy any interest in the security to which he might be entitled by force of the alleged equitable assignment by W. J. Cook. It is thus seen that, under the theory by which it is sought to recover, all of the defendants are obliged to resort to the enforcement of the same security for whatever rights they may have, and that their several equities must be satisfied from a common security. The security will be enforced for the benefit of all, as their interests may appear. Under these conditions, there are no separate and distinct causes of action united in one suit and the action is not multifarious. See, in this connection, *White v. North Georgia Electric Co.*, 128 Ga. 539, 58 S. E. 83.

From what has been said it is manifest that under the allegations Mary L. Floyd Jones has an interest in the security, and also that the estate of W. J. Cook is substantially interested. The security as a whole could not be decreed satisfied, nor could a complete accounting be had, without making them parties. Their respective interests ex-



tend to every feature of the case. The facts of the demise of W. J. Cook and omission to have administration upon his estate between the time of filing the suit and the hearing of the demurrer do not render it the less necessary that his estate be made a party. It is sought to make his estate account for rents and profits, and also to bring about conditions which could render it liable upon a warranty of title. Neither of these things could ever be done without an opportunity afforded to be heard. Neither Mary L. Floyd Jones nor the estate of W. J. Cook was a party, and in the absence of proper amendments the court was authorized to dismiss the petition upon demurrer raising the point that they should be parties. The sheriff is a mere nominal party, without any real or actual interest, and the failure to make him a party was not cause for dismissing the petition. See, in this connection, 15 Enc. Pl. & Pr. 600, and citations; Beall v. Blake, 16 Ga. 119; Smith v. Pate, 51 Ga. 246. The judgment of the court dismissing the case, because of the omission to make Mary L. Floyd Jones and the estate of W. J. Cook parties, was authorized. Nothing in the judgment now rendered will operate as a bar to another suit, with all the proper parties thereto.

Judgment affirmed. All the Justices concur.

(129 Ga. 111)

**MILLEDGEVILLE WATER CO. et al. v. FOWLER.**

(Supreme Court of Georgia. Aug. 15, 1907.)

**DAMAGES—BREACH OF CONTRACT—EVIDENCE.**

This being an action to recover for a breach of a contract, the burden of proving the amount suffered through the alleged breach rested upon the plaintiff; and, there being no evidence whatever to show the amount of damages suffered, the verdict for substantial compensatory damages in favor of the plaintiff was unauthorized, though he might have been entitled to nominal damages upon proof merely of the breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 502.]

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by S. B. Fowler against the Milledgeville Water Company and another. Judgment for plaintiff. Defendants bring error. Reversed.

Fowler brought suit against the Milledgeville Water Company and Hanes, superintendent, to recover damages alleged to have been sustained by reason of the failure and refusal of the defendants to furnish water for the plaintiff's residence in the city of Milledgeville. He alleged, in substance, that said water company is under a contract "with the mayor and aldermen of said city, for and in behalf of the citizens of said city, whereby it agrees to furnish water to the residents of said city upon terms therein fully set out"; that in pursuance of said con-

tract the defendants had furnished him with water up to September 1, 1904, at which time Hanes, general manager of the defendant company, demanded of him the payment of water rental for the preceding six months, which he had already paid; that he refused to pay said back rental, but paid the rental for the next ensuing six months ending March 1, 1905. "Nevertheless said Hanes retained said money, sent your petitioner a receipt purporting to be for the half year ending September 1, 1904, and immediately cut off said water from his said residence." As to the damages sustained in consequence of being deprived of the water the plaintiff testified: "I had no other supply of water besides the hydrant. I did not have a well. I got my water from the neighbors, or some street well. \* \* \* This certainly necessitated additional work. The hydrant was so located that my wife could draw all the water that she wanted. \* \* \* I used this water for bathing, and it was very convenient. \* \* \* The water remained cut off until March 1, 1905." The defendant denied the material allegations in the petition, and contended that the plaintiff was in arrears with his dues, and that the water was cut off because the rental was not paid. The jury found in favor of the plaintiff \$150. The defendants moved for a new trial, which was denied, and they excepted.

Hines & Vinson, for plaintiffs in error.  
Allen & Pottle, for defendant in error.

BECK, J. (after stating the facts as above). The plaintiff's case, as stated in his petition and as made by his evidence, was plainly one arising from a breach of a contract. The relation of the parties to the action was plainly contractual. The defendant, under the terms of the contract, was under obligation, upon the payment in advance of a certain sum by the plaintiff, to furnish water to plaintiff at his residence. The plaintiff contended, and submitted proof to show, that he had performed his part of the contract by payment in advance of the requisite amount, and that the defendant had failed and refused to perform his part. Counsel for the plaintiff in their brief and argument insist that, under the pleadings and facts of the case, a right of action as for a tort had been shown. And while the movant does not except to any portion of the charge, and the charge itself is not in the record, the case must have been submitted to the jury on that theory; otherwise, we cannot account for the verdict.

Mere breach of a contract cannot be converted into a tort by showing that failure to perform upon the part of the one committing the breach had resulted in great inconvenience, trouble, annoyance, and hardship to the other party to the contract. Civ. Code 1895, § 3807, provides that: "A tort is a legal wrong committed upon the person or

property independent of contract. It may be either: (1) A direct invasion of some legal right of the individual. (2) The infraction of some public duty by which special damage accrues to the individual. (3) The violation of some private obligation by which like damage accrues to the individual. In the former case, no special damage is necessary to entitle the party to recover. In the two latter cases, such damage is necessary." Section 3810, contained in the chapter on "Torts," provides that: "Private duties may arise either from statute, or flow from the relations created by contract, express or implied. The violation of any such specific duty, accompanied with damage, gives a right of action." And in *L. & N. Railroad Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968, it was decided that: "In arriving at a correct understanding of the meaning of section 3807, the words 'independent of contract' must be understood as applying to each one of the three subdivisions embraced in that section. Accordingly, the third subdivision means the same as if it read: 'The violation of some private obligation, independent of contract, by which like damage accrues to the individual.' And section 3810, in so far as it refers to private duties flowing from 'relations created by contract, express or implied,' means the same thing. Every person who makes a contract of any kind is, of course, under a duty of performing it; but it would never do to hold that every breach of a civil contract, though necessarily in a sense involving a breach of the duty thereby imposed, would give rise to an action *ex delicto*." Judge Cooley says, after pointing out certain exceptions to the rule: "The rule is general that, where contract relations exist, the parties assume toward each other no duties whatever besides those the contract imposes." 1 Cooley on Torts (3d Ed.) 160. If one seriously doubts whether this is an action *ex contractu*, the doubt will disappear upon reading the *Spinks* Case, *supra*, and the authorities cited.

There is an important and vital point of difference between the instant case and that of *Freeman v. Macon Gas & Water Co.*, 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917. In the latter case it was held that the petition as amended set forth a cause of action sounding in tort, and the particular tort there alleged was a willful breach by the defendant company of a public duty which it owed to the plaintiff as a consumer of the water it undertook to supply to the inhabitants of the city. The contract was merely alleged by way of inducement for the purpose of establishing the nature and scope of the duty and liability of the company relatively to the general public. And the corporation against which the suit was brought was in the exercise of a franchise granted by the municipality pursuant to a statute, which conferred upon it the right to use the streets

of the city on condition that it would therein lay its mains and furnish the municipality and its inhabitants with a supply of water at a fixed toll. In the case at bar the defendant is not shown to have owed the plaintiff any duty independent of the contract with him. So far as it appears from the record, the defendant company was not in the exercise of any franchise granted by the municipality, nor was it in any way obligated to serve the public at large, nor the plaintiff as a member thereof.

The plaintiff's action being one *ex contractu*, as we have seen, upon proof of a breach thereof he would be entitled to at least nominal damages; but in order to recover substantial, compensatory damages, such as were awarded in the present case by the jury, there must be some evidence of actual damages, and the amount thereof. It is even admitted in the brief of counsel that there is no evidence showing that there were "any damages sustained in money," and, that being true, the plaintiff has failed entirely to carry the onus of proving the amount of his damages; a burden which the law imposes upon the plaintiff in every such action as the present one. *Clark v. Telegraph Co.*, 112 Ga. 633, 37 S. E. 870; *Grier v. Ward*, 23 Ga. 145; *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741.

Judgment reversed. All the Justices concur.

(129 Ga. 104)

#### ROBINSON-HUMPHREY CO. v. WILCOX COUNTY.

(Supreme Court of Georgia. Aug. 13, 1907.)

##### 1. TRIAL—DISMISSAL—DISCRETION OF JUDGE.

As a general rule it is better that the judge should not suggest to counsel how to try their cases; but, if the plaintiff's petition alleges such facts as to show that in law he is not in any event entitled to recover, it is not an abuse of discretion for the judge to raise the question and entertain the motion to dismiss the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 368.]

##### 2. COUNTIES—CONTRACTS—ACTION FOR BREACH.

There is no authority of law for a county to enter into an executory contract for the sale of bonds which at the time of the contract the county is not authorized to issue. For a breach of such an undertaking an action for damages will not lie against the county.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Action by the Robinson-Humphrey Company against Wilcox county. Judgment for defendant, and plaintiff brings error. Affirmed.

Eldridge Cutts, D. B. Nicholson, and J. H. Gilbert, for plaintiff in error. J. L. Bankston, for defendant in error.

ATKINSON, J. The plaintiff's petition as amended alleges that the plaintiff entered into a written contract with the county of

Willcox by the terms whereof the county agreed to sell the plaintiff certain bonds at their face value, which the county contemplated issuing for the purpose of building a courthouse; that as evidence of good faith the plaintiff deposited with the treasurer of the county a certified check for \$1,000; that it was contemplated by the parties that an election should be held, under authority of the state Constitution (Civ. Code 1895, § 5893), to determine whether bonds should issue; that the contract was to be binding only in the event there were a sufficient number of votes cast for bonds to authorize the issue. It was further contemplated that after the election the county should cause the bonds to be validated according to the statute (Van Epps' Code Supp. § 6074), and final delivery to be made for the agreed price, to be paid in cash; the purchaser furnishing at his own expense the bonds in blank, properly lithographed. An election was called, but before the day of the election there was a special meeting of the commissioners of roads and revenues of Willcox county, called at the request of the plaintiff, which was attended by a representative of the plaintiff. At that meeting the commissioners determined not to comply with the written contract, and so notified the plaintiff. It was further alleged that afterwards the election was held, and that a sufficient number of votes in favor of the issue of bonds was cast at such election to authorize the commissioners to issue the bonds; that the plaintiff tendered the price which he agreed to pay for the bonds, and that the same was declined; that afterwards the county sold the bonds to another person at the same price at which the plaintiff had agreed to buy; that the bonds were worth to the plaintiff, on open market, \$5,000 more than the price at which the county had contracted to sell; and that by reason of the failure to obtain the bonds the plaintiff had been damaged in the sum of \$5,000. The prayer was for a judgment for damages. There were also allegations to the effect that before the execution of the contract the county authorities had levied a special tax sufficient to pay for the courthouse, which was to be effective only in the event there was not sufficient votes cast at the contemplated bond election to authorize the issue of bonds. The court ruled that the contract made between the county and the plaintiff was void, and that the county incurred no liability to the plaintiff for a breach thereof. Exception was taken to that ruling and the question is here for review.

2. A county cannot incur a liability by a contract, unless it has statutory authority therefor. The authority may be express or implied—express, where the statute by express terms authorizes the contract; implied, where the statute makes no express reference to the contract, but authorizes certain things to be done, or raises certain duties, in the performance of which it is neces-

sary to make a contract. There is no statutory authority, either express or implied, for the making of the contract involved in this case. The contract is executory for the sale of the bonds, which at the time were neither issued nor authorized to be issued. No election had been held under the provisions of Pol. Code, §§ 377-381. Nor had the bonds been validated under the provisions of Van Epps' Code Supp. § 6074. Under those conditions, the contemplated bonds were not authorized to be sold. It could not from any standpoint be said that the commissioners at that time were under duty or necessity of making such a contract. If the commissioners were without authority to contract in the manner indicated, it follows that their effort was futile, and no liability in damages against the county would arise by reason of a failure to perform. Nor does it affect the case that the commissioners had levied a tax (to be collected under certain conditions) for the purpose of raising funds to construct a courthouse. There was no relation between the contract in question and the tax levy. The tax levy could not raise a duty or necessity to sell the bonds. The tax levy may have been important, if the contract had been for the building of the courthouse, but not so where the contract is for the sale of bonds.

Judgment affirmed. All the Justices concur.

(129 Ga. 99)

DYKES et al. v. JONES et al.

(Supreme Court of Georgia. Aug. 12, 1907.)

PARTITION—SALE—PETITION TO SET ASIDE—PROCESS—APPEARANCE.

The application to set aside the partition sale contained allegations sufficient to render it an equitable petition, good as against a general demurrer, to set aside the sale for fraud on the part of those conducting the sale and the bidders who became purchasers thereat. That the petition contained no prayer for process, and that no process was attached thereto, were defects which might have worked dismissal upon proper motion; but, no motion to dismiss upon those grounds having been made, these defects were cured by the defendant's appearing and pleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 365, 367; vol. 39, Pleading, § 1355.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by W. H. Jones and O. H. Jones against Dollie Dykes and others to partition certain real estate. After partition and sale, defendants filed objections, and prayed that the same be set aside. From an order sustaining a demurrer to the petition, Dykes and another bring error. Reversed.

W. H. Jones and O. H. Jones filed their application for partition of certain lands in Pulaski county. The petition alleges that because of improvements on the land a just and equitable division by metes and bounds is impracticable, and prays for the sale of

the lands. The plaintiffs in error, Dykes and Mullis, were minors interested in the lands, and the court appointed a guardian ad litem to represent them, who accepted the appointment and filed a written consent that the lands be sold as prayed for in the petition. Before passing the order for sale, the court heard proof that all the parties at interest had been duly notified of the application for partition; and, as no objections were made, the sale was ordered, and three commissioners were appointed to conduct it. The land was sold by said commissioners at public sale, and purchased by W. H. Jones and O. H. Jones. After the sale had been made, Dykes and Mullis, by their next friends, filed certain "objections" to the sale and to the partition proceedings, and prayed that the sale be set aside and declared null and void, and that the order for such sale be set aside and revoked. There was no prayer for process, and no process was served upon the opposite parties; but at the hearing W. H. Jones and O. H. Jones, the guardian ad litem, and the commissioners who conducted said sale appeared and demurred generally to the "objections." The court sustained the demurrer and refused to hear evidence in support of the objections urged by Dykes and Mullis. To this ruling they excepted.

W. L. & Warren Grice, for plaintiffs in error. J. B. Mitchell and Fort & Grice, for defendants in error.

BECK, J. (after stating the facts as above)  
1. The application to set aside the sale made under the order of the judge upon the partition proceedings is certainly open to the criticism, made upon it by counsel for the defendants in error, that it is "unusual in form." It is divided into 24 paragraphs, and these paragraphs are by the pleader characterized as "objections to certain partition proceedings." It is unnecessary to discuss these objections in detail. It appears upon a reading of them that the objections embraced in paragraphs Nos. 1-16 are either entirely immaterial, or that they seek to attack the order or judgment of the court ordering the sale for defects and irregularities in the proceedings which were amendable and cured by the judgment, and which cannot be urged after judgment by parties who had been served with due and legal notice before the filing of the application for partition, but that portions of the objections embraced in the paragraphs not referred to above contain allegations sufficient in substance to render it an equitable petition, ancillary to the motion to set aside the sale of the lands referred to, and therefore we feel authorized to refer to and treat these "objections," considered in their entirety as an equitable petition brought for the purpose of having said sale set aside. This conclusion is clearly justified by a brief statement

of the substance of the petition as contained in paragraphs 17, 22, 23, and 24, wherein it is alleged, in substance, that no effort was made by those in charge of the sale to get the highest price for the land, but everything was done to enable the petitioners in the partition proceedings to purchase it below its value; that the purchasers of the land, who were also the petitioners in the partition proceedings, went to prospective purchasers before the sale and requested them not to bid for the land, telling them that the heirs had agreed to buy it, and wanted to get it as cheaply as they could; and that by reason of "these false and fraudulent statements purchasers were deterred from bidding, and the land was sold \* \* \* for \$1,560, when it was worth at least \$2,500, and would have brought that sum if competition had been fair, and no effort had been made to stifle the bidding."

Whether the allegations of fraud on the part of the defendants in error, and of their acts and doings, which are alleged to have been a fraud upon the rights of the plaintiffs in error, are sufficiently definite and clear to have withstood an attack by special demurrer, it is unnecessary for us to decide, inasmuch as no such attack was made. If this criticism, "Nor do the allegations of paragraph 23 clearly and distinctly allege fraud," was intended as a special demurrer, it is itself too indefinite and general to be available for the purpose intended. The demurrer to so much of these objections as constitute an ancillary equitable petition being general, it is only necessary for us to decide whether or not that petition contains "good matter for equity to deal with." If it does, then it follows that this general demurrer should have been overruled, and the petition retained, and the petitioners given an opportunity to sustain their allegations by evidence, if they can produce it. It was said in the case of *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765, that "the prevention of bidding at a master's sale on foreclosure, by the mortgagor's announcement of an intention to bid for herself, and of the fact that she was a widow dependent upon the land for support, will require the sale to be set aside, although there was no misrepresentation or concealment of facts." And in the note to the above case in 20 L. R. A. 545, it is said: "The general principle of law applied to all sales at auction is that any act of the auctioneer, or of the party selling, or of third parties, as purchasers, which prevents a fair, free, and open sale, or which diminishes competition, and stifles or chills the sale, is contrary to public policy, and renders the sale null and void." See, also, 17 Am. Eng. Enc. Law (2d Ed.) 980; *Van Dyke v. Martin*, 53 Ga. 221; *Barnes v. Mays*, 88 Ga. 696, 16 S. E. 67. As was said by the Supreme Court of Missouri, in a case where it was decided that

a partition sale should be set aside because of improper acts and practices upon the part of the purchasers: "It is of importance that these sales in partition should be preserved free from all influences which may depreciate the value of the land sold. Such sales rarely take place but where infants are interested and they are too frequently prompted by a desire to obtain their inheritance, and that, too, at a sacrifice. Under such circumstances, courts cannot be too vigilant in guarding every avenue to improper practices in conducting them." *Wooten v. Hinkle*, 20 Mo. 290. This is wholesome doctrine; and we hold in the present case that the equitable petition, which charges that the purchasers of the land "went to prospective purchasers before the sale and requested them not to bid for the land," and, by falsely and fraudulently representing that "the heirs had agreed, to buy it, and wanted to get it as cheaply as they could, deterred such prospective purchasers from bidding at the sale," and thereby caused the land to bring less than its real value, and less than it would have brought "if no effort had been made to stifle the bidding," was good as against a general demurrer, and that the petitioners should have been allowed to submit evidence in support of their contentions.

2. As this petition originally stood, there appears one fatal defect, which would have prevented the court from entertaining it as an equitable petition brought for the purpose stated; and that is, there was no process nor prayer for process. But this defect was cured by the action of the defendants in error themselves, by appearing and pleading; for, upon the call of the case for the purpose of disposing of the objections, they appeared and demurred generally thereto. "Demurring generally to the plaintiff's petition is pleading to the merits. \* \* \* The omission of a prayer for process is amendable, and is waived by appearance and pleading." *Lyons v. Planters' Loan & Savings Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155. "The absence of process is immaterial, where the defendants have appeared and demurred generally to the merits of the petition." *Savannah Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010.

Judgment reversed. All the Justices concur.

(129 Ga. 106)

# CENTRAL OF GEORGIA RY. CO. v. NORTH.

(Supreme Court of Georgia. Aug. 15, 1907.)

## 1. RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS.

Upon a careful consideration of the charge of the court and the several requests to charge which were refused, we do not think there was any error in refusing to grant a new trial upon the exceptions thereto urged in the motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1121.]

## 2. SAME—EVIDENCE.

The verdict was supported by the evidence, and no reason appears for interfering with the discretion of the trial court in refusing to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1138.]

Fish, C. J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by H. G. North against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. F. Wall and Hall & Cleveland, for plaintiff in error. Arnold & Arnold, for defendant in error.

ATKINSON, J. The main inquiry is upon the general grounds. The homicide of the plaintiff's husband, committed about 1 o'clock in the afternoon by the servants of the defendant in the operation of its locomotives, cars, and other machinery, was proved by a witness who was walking along Church street, going in the direction of the crossing upon which the deceased was killed, and who was about 125 feet from the place of the catastrophe, but did not see the plaintiff's husband until he was struck, and knocked about 30 or 40 feet up into the railroad cut, while the train was running at a high rate of speed. The plaintiff then proved her relation to deceased, and his physical condition and earning capacity, and rested. This made a prima facie case. It was attempted to overcome the prima facie case, and defeat a recovery altogether, by proving that the injury was the result of the negligence of the plaintiff's husband. Civ. Code 1895, § 2322. The defendant's evidence was focused upon this contention. In order to sustain this defense the burden of proof was upon the defendant to make it affirmatively appear that the injury was the result of the negligence of the plaintiff's husband. The jury found against the defendant; and if it appears that there was any plausible theory, arising either out of a conflict of evidence or an insufficiency of evidence offered in support of the plea, upon which the verdict could have been rendered, it is our duty to decline to interfere with the discretion of the court below in refusing to grant a new trial.

The witness Lyons testified, without contradiction, that when the train was "away up the road," in his opinion about 1½ miles away, and when he and the plaintiff's husband were about 150 yards away from the crossing, he heard the whistle of the engine and asked plaintiff's husband what train it was, and was informed that it was the "fast train"; the plaintiff's husband saying that he had been informed, earlier during the day, that it was an hour or two late. Lyons testified, further, that as they walked on he heard a repetition of whistles from the en-

gine and noise of the train, and finally came in full view of the train as he started to leave the awning, and was in full view of the train when he stopped in the street half way between the sidewalk and the crossing; that he then called Dr. North's attention to the approaching train, touched him, and said, "Doc, let us stop here until the train passes"; that "he paused a little bit, and walked on off," without making any answer to Lyons, or indicating in any other way that he did or did not hear the warnings or see the train. After reaching the spur track on the north side of the crossing, Lyons said North jumped over a little mudhole between the rails and then started in a run diagonally across the tracks, and kept running until he was struck. After he commenced to run, Lyons commenced to call to him, loud enough, he thought, to be heard; but North paid no attention to him. While Lyons may have heard and seen the train, and may have addressed Dr. North in the manner indicated, it does not affirmatively appear that North either saw or heard the train, or heard the suggestion of Lyons to stop and let the train pass. The circumstances were such that the jury could have found that he did hear and see, but not such as to demand such finding. It will not be presumed that North was negligent. The presumptions are the other way. His conduct upon leaving Lyons in the street was consistent with either having seen the train or heard the warning, or with not having seen or heard. Whether he did, or not, was for the jury, and it is sufficient to support the finding of the jury upon that point that one view of the evidence was consistent with the finding. Lyons and North were followed along the street by Donnehue, who was about 50 yards behind them, and, according to the maps introduced in evidence, had about as good opportunity to see and hear the train as Lyons and North had. Yet he testifies that he did not see or hear the train, or know it was coming, until it ran opposite him. Donnehue says there was a hard rain and wind blowing from the northeast, the direction from which the train was coming, and that North held his umbrella in such position as would have obstructed the view of the train. Donnehue also says that there were certain freight cars on the intermediate switch track, which for a part of the time would have obstructed the view. All of this was consistent with North's failure to see or hear the train. Lyons says that North approached the spur track in a walk, and immediately after jumping the mudhole between the rails of the spur track started in a run in a diagonal direction from the northeast to the southwest corner of the crossing, the point where he was killed. This course would have placed his back partly to the approaching train, and would have carried him in a straight line to the post office, right near the crossing. Lyons does not say that North saw the train when he started to run, or that

he looked in the direction of the train. It may be that he was running to the post office for shelter from the rain, and unaware of the rapid approach of the train, or it may be that he was aware of the approach of the train and was running to get over before it reached the crossing. These were questions for the jury. If he was struck upon the crossing, where he had a right to be, without knowledge of immediate danger from the train, the case would not be at all extraordinary, and there would be ample precedent for a recovery. *G. C. & N. Ry. Co. v. Matthews*, 116 Ga. 424, 42 S. E. 771.

Under the peculiar surroundings of this case, the manner in which deceased went upon the crossing, and the speed of the train and its distance from the crossing at the time it is claimed that North left Lyons on the street and started towards the crossing, all are very important matters. Yet the defendant's witnesses are not entirely in harmony with respect to them. Sullivan, the telegraph operator, who was in his office, 150 or 200 yards distant from the crossing, testified substantially that he saw the two men together leave the awning and move towards the crossing. As the train came in sight they moved up closer to the crossing and stopped. As the train came still closer one of the men moved out and stopped again. He had an umbrella over him. He moved off further from the other man and looked towards the train, and as the train got very close to him he threw his umbrella over him and started on the track as fast as he could go, in a run. Donnehue, a witness for the plaintiff, who had followed North and Lyons up the street, testified that he saw North as he went towards the crossing, and that he was holding his umbrella down to avoid the wind and rain, and that he was just going in a "common walk." He did not see him stop or run at all. Lyons, the witness for the defendant, testified that they walked right out from the awning, and that he (Lyons) stopped, but that North "paused a little bit" and walked on without stopping, and that when he jumped the hole on the spur track he commenced to run and kept running. Lyons also testified: "When Dr. North left me on the final move, he did not stop until he got hit." Another witness for the defendant, Mr. Wells, testified that he saw the men from his front window at a distance, and said: "They crossed the walk and came to the middle of the street, and then Dr. North made a dash like he was going to run across ahead of the train." He does not seem to agree with Lyons that North walked to the spur track before commencing to run. Emerson, the engineer of the train, testified that he saw the two men before they separated. He says that when he first saw them they were within 40 feet of the track, and that he was 70 yards from the crossing. He says, further, that they were walking along leisurely, like they were going to walk a reasonable distance, and stopped

within 30 feet of the track. "Mr. Lyons stopped plumb still, and Dr. North hesitated just a second, and stepped out 4 or 5 feet ahead of him, ducked his head down, drew his umbrella over between him and the engine, and started to run over." Lyons, though looking at North, did not remember seeing the umbrella used as Emerson relates, and places the train, at the time North left him in the street, at the old switch, about 600 or 700 yards from the crossing, which is quite different from the 70 yards, as related by the engineer. The engineer seems to differ with Donnehue, also, as to what was done with the umbrella and the manner in which North approached the crossing. If Donnehue was correct about the presence of the freight cars on the side track, it is altogether probable that the engineer did not have as good a view of North and Lyons while walking together, or of North after leaving Lyons, as he thought. Upon the whole, the evidence offered by the defendant was not so contradicted and convincing as to demand a finding that the plaintiff's husband knew of his danger at the time he went upon the track of the defendant. If the train was 600 or 700 yards off, as Lyons testified, and North went in a run from the spur track, and could not cross the main line, about 33 feet distant, before being struck by the approaching train, the speed must have been so great as to render it very questionable whether North could have saved himself after discovering, or after opportunity to discover, the existence of the defendant's negligence. While the train was more than 400 yards from the crossing, a recovery would not necessarily be defeated because the injured person did not anticipate that the defendant's servants would disobey the blow post law. *Oomer v. Barfield*, 102 Ga. 485, 31 S. E. 89.

Under the facts of this case, we think it is controlled by the reasoning in *Williams v. Southern Ry. Co.*, 128 Ga. 710, 55 S. E. 948. In *W. & A. R. Co. v. York*, 128 Ga. —, 58 S. E. 183, there was a conflict of evidence as to whether the deceased knew of the near approach of the train, although, had he taken precaution to look, he could have seen the train 250 yards away and before walking on the track. As to whether, after the negligence of the defendant came into existence and was discoverable by the exercise of ordinary care, York by the exercise of ordinary care could have avoided the injury to himself, was the controlling question in the case. The jury having found in favor of the plaintiff, and the verdict having met the approval of the presiding judge, this court declines to interfere with the discretion of the trial court in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., who dissents.

FISH, C. J. (dissenting). The positive and uncontradicted evidence, as set out in the record, to my mind conclusively shows that

plaintiff's husband, miscalculating the time in which he could safely cross the railway company's track, ran on the same at a public crossing, immediately in front of a locomotive which he knew was rapidly approaching the crossing, and was struck by the locomotive and killed. His death was, therefore, directly attributable to his own negligence, and a verdict for the defendant was demanded, notwithstanding its negligence in violating the statute (Civ. Code 1895, § 2222) and a town ordinance regulating the speed of trains where the homicide occurred. See *Hopkins' Pers. Inj.* § 77; *Central R. v. Smith*, 78 Ga. 694, 3 S. E. 397; *Southern Railway Co. v. Blake*, 101 Ga. 217, 29 S. E. 288; *Blake v. Southern Railway Co.* 108 Ga. 764, 33 S. E. 396; *Hopkins v. Southern Ry. Co.*, 110 Ga. 85, 35 S. E. 307; *Georgia R. Co. v. Sawyer*, 112 Ga. 346, 37 S. E. 380; *Id.*, 123 Ga. 251, 51 S. E. 321; *Atlanta Ry. Co. v. Owens*, 119 Ga. 833, 47 S. E. 213; *Thomas v. Central Ry. Co.*, 121 Ga. 38, 48 S. E. 683.

(129 Ga. 303)

#### ALLEN v. STATE.

(Supreme Court of Georgia. Aug. 9. 1907.)

#### CRIMINAL LAW—APPEAL—NEW TRIAL.

The verdict is amply supported by the evidence, and is approved by the trial judge. No error of law is alleged to have occurred in the trial of the case. Under such circumstances a new trial will not be ordered by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Charlie Allen was convicted of crime, and brings error. Affirmed.

H. A. Peebles and R. O. Jackson, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., R. L. Williams, Jr., and Jno. O. Hart, Atty. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(129 Ga. 108)

#### MATHEWS et al. v. GELDERS.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. EXECUTION—AFFIDAVIT OF ILLEGALITY.

By an affidavit of illegality a defendant may resist an execution, which has been issued against him upon the foreclosure of a chattel mortgage and levied upon the mortgaged property, upon the ground that the mortgage debt had been fully paid and satisfied before the execution was issued. Civ. Code 1898, § 2765.

#### 2. SAME — INJUNCTION — ENFORCEMENT — REMEDY AT LAW.

When an execution is proceeding in the manner hereinbefore indicated, the defendant has a complete remedy at common law by affidavit of illegality. Where the defendant in *fa.* does not file an affidavit of illegality, but seeks to enjoin a sale by the levying officer upon the ground that the mortgage debt had been paid, and the petition alleges that the execution is in process of enforcement in the manner in

dictated, and expressly waives discovery, and where, in response to such application, the defendant demurs upon the ground that the plaintiff has a complete remedy at common law by affidavit of illegality, it is erroneous for the judge to grant an injunction. *Roney v. McCall*, 128 Ga. 249, 57 S. E. 503; *Rogers v. Atkinson*, 1 Ga. 12; *Mitchell v. Cooper*, 73 Ga. 796.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 497.]

(Syllabus by the Court.)

Error from Superior Court, Early County; J. H. Martin, Judge.

Action by Isador Gelders against Thomas Mathews and others. Judgment for plaintiff, and defendants bring error. Reversed.

Drew W. Paulk and E. Wall, for plaintiffs in error. E. W. Ryman, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(129 Ga. 170)

#### BAGWELL v. STATE.

(Supreme Court of Georgia. Aug. 8 1907.)

##### 1. CRIMINAL LAW — MISTRIAL — FORMER JEOPARDY.

In a prosecution for a felony, the accused has the right to be present at every stage of the trial; and where the court in such a case, without the consent of the accused and during his enforced absence, he being confined in jail, ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the former jeopardy of the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 331.]

##### 2. SAME.

The case of *Lester v. State*, 33 Ga. 329, wherein the decision, as applied to the facts, is contrary to the above ruling, being under review, is overruled.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Footo Bagwell was convicted of murder, and brings error. Reversed.

Blalock & Culpepper and W. R. Daley, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. On his trial, under an indictment for murder, Footo Bagwell pleaded, in substance, that at a former term of the court he had been put on trial under the same indictment, and after the case had been submitted to the jury the court, without his consent and in his absence, he being at the time confined in jail, and in the absence of his counsel, discharged the jury without a verdict on the ground of their inability to agree. This plea was stricken on demurrer, to which ruling the accused excepted pendent lite. There was a verdict of guilty, with recommendation to life imprisonment. The case is before this court on writ of error sued out

by the accused, assigning error upon his exceptions pendent lite and upon the overruling of his motion for a new trial.

"No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." Const. art. 1, par. 8; Civ. Code 1895, § 5705. In *Oliveros v. State*, 120 Ga. 237, 47 S. E. 627, it was held, in effect, that a mistrial declared, not for legal cause, but, as in that case, erroneously, is a bar to another trial. And in *Lovett v. State*, 80 Ga. 255, 4 S. E. 912, Chief Justice Bleckley said: "It is not disputed that, where a mistrial has been properly declared, the prisoner may be again tried"—citing *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281, and the Constitution of 1877, as above quoted. In Judge Bleckley's language there is a clear intimation that, where a mistrial has been improperly declared, the prisoner cannot be again tried. In this state it has been settled, as far back as Williford's Case in 23 Ga. 1, that the court may, over the objection of the accused, order a mistrial on account of the inability of the jury to agree, and that the discharge of the jury on that account does not amount to an acquittal. The question now before us is: Can the court, even for good cause, legally order a mistrial in the enforced absence of the accused and without his consent; and, if it cannot, has the accused, where a mistrial has been so ordered, been placed in jeopardy, which he may plead when again put on trial? It has been frequently held by this court that it is the right of the accused charged with a felony to be present at every stage of his trial, including his arraignment or waiver thereof (*Wells v. Terrell*, 121 Ga. 368, 49 S. E. 319), reading to the jury notes of the evidence taken by the court (*Wade v. State*, 12 Ga. 25), the argument of counsel for the state (*Tiller v. State*, 96 Ga. 430, 23 S. E. 825), during the charge of the court (*Hopson v. State*, 116 Ga. 90, 42 S. E. 412, and citations, *Id.*), and at the rendition of the verdict (*Nolan v. State*, 53 Ga. 137; 55 Ga. 521, 21 Am. Rep. 281; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743).

In *Wade's Case*, supra, the court, after the jury had retired to consider the case, had them recalled to the courtroom and read over to them, in the absence of the accused, the written testimony as taken down by the court. In the opinion rendered Judge Warner said: "This was clearly error. The court has no more authority, under the law, to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence, than it has to examine the witnesses in relation thereto in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be present, and see and hear all the proceedings which are had against him on the trial before the court. It is said the presumption must be that the court read



over the testimony correctly, and read over all that was delivered against the defendant, and therefore he was not injured. The answer is that it was the legal right and privilege of the defendant to have been present in court when this proceeding was had before the jury in relation to the testimony delivered against him, and he is to be considered as standing upon all his legal rights, waiving none of them." In *Hopson v. State*, supra, it was held: "Recalling a jury in a criminal case, who had retired to consider of their verdict, and, in the absence of the accused and his counsel, and without their consent, giving a second charge, is cause for a new trial, even though this charge be the same, in substance, as that which had been delivered in the first instance." Mr. Presiding Justice Lumpkin, in the opinion rendered in that case, said: "Nor does the fact that the 'recharge' was, in substance, the same as the original charge, dispense with the necessity for ordering a new trial. The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice." In *Oliveros v. State*, supra, where the trial judge discharged the jury from the consideration of the case, because in giving his reasons for admitting certain evidence he expressed an opinion as to its effect and weight, this court held that such discharge was not authorized over the protest of the accused, and, when arraigned before a second jury, his plea of former jeopardy was good. Chief Justice Simmons said in that case: "But it is said, also, that it would have been a farce for the judge to have continued the trial after this expression of opinion, and consumed the time of the court and country in going on with a trial, when he knew that he would have to grant a new trial in case of conviction. That is a commercial argument, which amounts to nothing in the administration of law, especially when the life or liberty of a citizen is in danger."

In the case of *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719, it was held that where the court, on the trial of the accused for murder, discharged the jury because of their inability to agree, in the absence of the accused and without his consent, he being then confined in jail, such discharge might be pleaded in bar of further prosecution. Chief Justice Biddle, in the opinion rendered, said: "What the prisoner, in the case before us, if he had been present, might have offered to the court to show why the jury should not be discharged, or whether anything, indeed, it is impossible for us to know; but we are unwill-

ing to adopt a rule which would deny him the right to offer whatever was in his power." This was followed by the Court of Appeals of Texas in *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717; it being there held that "It is beyond the legal authority of the trial court to discharge the jury in the absence of the accused." To the same effect are *State v. Sommers*, 60 Minn. 90, 61 N. W. 907, and *Vela v. State* (Tex. Cr. App.) 95 S. W. 529. In *State v. Vaughn*, 29 Iowa, 286, and *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, it was held that the discharge of the jury, in the enforced absence of the accused and without his consent, because of their inability to agree, is not a bar to his subsequent trial; for, while the accused has the right to be present when the jury is discharged for such cause, yet, if present, he could only object, and, since such objection would necessarily prove unavailing, no prejudice can result to him by reason of his absence.

In *Lester v. State*, 33 Ga. 329, the headnote is: "A discharge of the jury in a capital case, because they are unable to agree on a verdict, does not operate as an acquittal of the accused." In that case the point now under consideration was necessarily decided, although the fact that at the time the jury was discharged the accused was in jail and did not consent to such discharge was not mentioned in the opinion. The facts of that case, as they appear from the record of file in this court, were that during the June term, 1862, of Dougherty superior court, when Lester was put upon trial for murder, he pleaded that at the December term, 1861, of that court, "he was put upon his trial upon the same bill of indictment and the same accusation, a jury was impaneled, and the cause fully submitted, but the jury was discharged by the court from the consideration of said case, after retiring to their room to make up a verdict, without his consent thereto; he being in jail at the time, and without knowledge of the act." This plea was stricken on general demurrer, and Lester was convicted of manslaughter. Whether the plea was properly stricken was the only question dealt with by this court. All that was said in the opinion on the subject was: "We are clear that the decision of the court below was right. Whenever the jury in a criminal case like this is discharged by the court from the further consideration of the cause, because of the impossibility of the jury's agreeing on a verdict, or on account of illness of a juror, the prisoner, or the court, such discharge is an absolute necessity, and does not and cannot operate as an acquittal of the accused." Cases were cited, among them *Williford v. State*, 23 Ga. 3. The court then said that the case of *Reynolds v. State*, 3 Ga. 53, had no analogy to the one under consideration. Lester's Case is now under review. After a very careful consideration of the question involved, we are of opinion that the

better view, both on authority and principle, is that the court cannot legally order a mistrial in a case of this character, in the enforced absence of the accused and without his consent, because of the inability of the jury to agree on a verdict, and that, where a mistrial is so ordered, the accused, on a subsequent trial, may plead former jeopardy. The ruling in *Lester's Case*, supra, contrary to this conclusion, is therefore overruled, and the judgment striking the plea in the present case is reversed.

It is unnecessary to deal with the assignments of error in the motion for a new trial.

Judgment reversed. All the Justices concur.

(129 Ga. 67)

### GODWIN v. GODWIN.

(Supreme Court of Georgia. Aug. 10, 1907.)

#### 1. WILLS—PROBATE OF COPY.

There is no law for probating a copy of a will, except where the will has been lost or destroyed after the death of the testator, or without his consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 514.]

#### 2. SAME—PETITION FOR PROBATE.

Where a petition was filed in the court of ordinary of one county, which on its face did not purport to offer the original will for probate, but affirmatively showed that the will had been propounded in the court of ordinary of another county by the person named as executor, and did not show that the proceedings thus begun had been terminated, or that the court in which the original will was propounded had been determined to be without jurisdiction, the petition was demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 586.]

#### 3. SAME—JURISDICTION—RESIDENCE OF DECEASED.

The residence of the testator at the time of his death gives jurisdiction to the ordinary of that county to probate his will. A legatee cannot have it probated in another county merely because the property devised is in the latter county and all of the parties in interest reside there.

(Syllabus by the Court.)

Error from Superior Court, Grady County; R. G. Mitchell, Judge.

Application of Bedie Godwin for the probate of a will. W. B. Godwin contested the probate. From a judgment refusing to probate the will, petitioner brings error. Affirmed.

Bedie Godwin presented to the ordinary of Grady county a petition alleging as follows: Mary C. Godwin died on January 19, 1905, leaving an estate disposed of by will; petitioner being a legatee therein. The will has been offered for probate in common form in the court of ordinary of Decatur county by W. B. Godwin, who is named as executor, and all of the parties at interest are residents of that county. The petitioner desires the will to be probated in solemn form, and prays that citation issue and that the will be probated. A copy of the will is attached.

A demurrer was filed on the grounds that the petition had only a purported copy of the will attached, with no facts shown which would authorize the establishment of a copy of the lost or destroyed original; because no statement of facts was made which would authorize the use of an established copy, if such copy existed; and because the original will has been propounded by the executor named therein for probate in the court of ordinary of Decatur county. The ordinary sustained the demurrer, and an appeal was taken to the superior court, where other grounds of demurrer were added, to the effect that the petition was not accompanied by the original will, that no properly authenticated copy of the probated will was attached to the petition, and that the will had been offered for probate in the court of ordinary of Decatur county, and was not, therefore, within the jurisdiction of the courts of Grady county. Objection was made to this amended demurrer, on the ground that it was not an amendment, but a new demurrer, and could not be made on appeal. The objection was overruled, the demurrer was sustained, and Bedie Godwin excepted.

A. E. Thornton and J. O. Smith, for plaintiff in error. M. L. Ledford, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The bill of exceptions recites that the defendant offered an amended demurrer, to which objection was taken, but that the court overruled the objection and allowed the amendment; and, while the added demurrer did not in express terms state that it was an amendment, it was presented to the presiding judge as such, and allowed. But it is unnecessary to deal with the pleadings with technical nicety. Whether the original demurrer be considered alone (omitting some of it which is objectionable as "speaking"), or whether it is considered in connection with the amendment, which developed the grounds of the demurrer more clearly, in either event the court did right to dismiss the petition for probate. There is no law for probating a copy of a will, except in cases of establishing a will lost or destroyed after the death of the testator, or without his consent. Civ. Code 1895, § 3289. Here the petition showed on its face that the will was not lost or destroyed, but had been offered for probate in another county by the executor named therein. If the court where the executor offered the will for probate was without jurisdiction, the proper proceeding would have been to make that point and have it adjudicated. If the objection was well founded, and was determined in favor of the objector, the will could be tendered for probate in the proper county. But while proceedings were pending in one county, or after the merits had been there adjudicated, the law furnishes no author-

ity for probating a copy of the will in another county.

Moreover, the petition shows no jurisdiction in Grady county. It alleges that the property devised by the will is situated in Grady county, and that all parties at interest reside there; but it fails to show the jurisdictional fact that the testator resided there at the time of her death. Civ. Code 1895, § 3279. Grady county was created in 1905. A portion of the territory included in it was taken from Decatur county. But the larger part of Decatur county was left unaffected, including the county site. It was not alleged that the testatrix resided, at the time of her death, in that part of Decatur county which was cut off and became a part of the new county; nor was any transfer of the case pending in Decatur county sought to be made to the proper court of the new county. A party in interest cannot oust a court of its jurisdiction, and transfer a case to another court which has no jurisdiction, at his mere option, by filing a petition in the latter court.

Judgment affirmed. All the Justices concur.

(129 Ga. 60)

#### PENDLEY v. POWERS et al.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. LIMITATION OF ACTIONS—WHO MAY PLEAD BAR.

Where an equitable petition was filed by creditors of a decedent against his administrator and others, showing that the estate was insolvent, that there were complications and conflicting claimants, and that it was necessary to appoint a receiver, have an accounting taken, and administer the estate through a court of equity, and where a receiver was appointed and the case was referred to an auditor for an accounting and report, each of the creditors, who was a party claiming payment from the assets of the insolvent estate, was interested in preventing them from being diminished, and consequent loss accruing to him by the payment of a claim barred by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 657, 658.]

#### 2. SAME.

Under the circumstances above recited, the general rule that the right to set up the defense of the statute of limitations is a personal privilege did not prevent other creditors from contesting the claim of one who was seeking to obtain judgment and payment of a note barred by the statute of limitations.

#### 3. SAME—NECESSITY OF PLEA.

Where the creditor who held such a note was made a party defendant, and in his answer set out the note which he sought to have paid, and which appeared on its face to be barred by the statute of limitations, but the creditor alleged that the claim was relieved from the bar by reason of certain acknowledgments or new promises, on the hearing before the auditors it was not necessary for the other creditors, in order to contest such claim, to file a plea setting up the statute of limitations.

#### 4. SAME—NOTE.

Under the evidence the finding of the auditor, approved by the presiding judge, to the ef-

fect that the note was barred, was not without support, and will not necessitate a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 722-726.]

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action between H. I. Pendley and H. M. Powers and others. From the judgment, Pendley brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Thos. W. Milner & Sons, Paul F. Akin, Joe M. Moon, T. C. Milner, G. H. Aubrey, J. T. Norris, and John W. & Paul F. Akin, for defendants in error.

LUMPKIN, J. Pendley had a promissory note against Harris, deceased. On its face it appeared to be barred by the statute of limitations. Under a bill to wind up the administration a receiver was appointed, and Pendley, who was one of the defendants, in his answer set up that he was entitled to a judgment and to share in the distribution. He sought to avoid the effect of the bar of the statute by reason of certain acknowledgments, which he claimed to exist from the receipts, entries, and a memorandum, which claim was set forth in his pleading. The auditor to whom the case was referred held that the note was barred by the statute of limitations. On exception the judge of the superior court sustained this finding, and this is the error assigned. Three questions arise in this case: (1) Was the right to set up the defense of the statute of limitations a personal privilege, which was confined to the administrator of the deceased maker of the note; or could it be set up by another creditor of the insolvent estate? (2) Was it necessary for the plaintiffs, who brought the petition under which the receiver was appointed and the reference to the auditor had, to file a regular plea setting up the bar of the statute of limitations; or could they, when Pendley sought to relieve the note from the effect of the statute by allegation and proof as to acknowledgments or new promises, contest the question of whether such relief had been effected, in connection with the determination of the debts against the estate and their legal priority? (3) Under the evidence was the finding of the auditor, approved by the presiding judge, that the note was barred, erroneous?

1, 2. It is well recognized as a general rule that the right to plead the statute of limitations to a suit is a personal privilege. A plea is the ordinary mode of setting up the defense. In some jurisdictions, although the note or cause of action sued on may appear on the face of the plaintiff's pleading to be barred by the statute of limitations, this is not a good ground for a demurrer; and it has there been held that the defense should be set up by plea, and, if this is done, a claim that the bar has not attached, by reason of a new

promise, is then a matter of replication. In Georgia the practice of filing a replication by the plaintiff has been abolished. He sets out his cause of action, the defendant answers, and this makes the issue, without replication. From this difference in practice, doubtless, have arisen certain differences in rulings. In this state, if the petition of the plaintiff shows on its face that the cause of action is barred by the statute of limitations, advantage may be taken of it by demurrer. *Lang v. Camp*, 113 Ga. 1011, 39 S. E. 474; 9 *Michie's Dig.* 88. If the plaintiff desires to show that he is within any exception to the statute, it is incumbent on him to state it in his petition. This has long been held in equity cases. *Worthy v. Johnson*, 8 Ga., 236 (12). And under our present system of pleading it is equally true in common-law cases. *Martin v. Broach*, 6 Ga. 21 (6), 50 Am. Dec. 306; *Jesup v. Epping*, 66 Ga. 334. But the new promise may be added by amendment to the petition. *Shumate v. Ryan*, 127 Ga. 118, 56 S. E. 103. The present case is within the equitable jurisdiction of the court.

Without discussing at present the mode of procedure, the rule that the right to set up the defense of the statute of limitations is a personal privilege is not to be limited to a narrow and literal construction; or, if so, it is not without exceptions. An administrator or executor may plead the statute of limitations as to a liability of the decedent, a transferee may set up the defense when it is sought to subject the property transferred to him, and other instances might be cited. Where an insolvent estate has been placed in the hands of a receiver for administration and distribution, each creditor is interested to see that only existing claims against the deceased share in the distribution. The administrator, who is no longer in possession or control of the estate, which has been taken in charge by the court, cannot be allowed to favor one creditor and prejudice another by pleading the statute of limitations as to some claims and not as to others, and denying to the interested creditors the right to make the defense, on the ground that it is a personal privilege. It may sometimes be his duty on behalf of the estate to raise the point; but, if he does not do so, creditors may avail themselves of the statute as to their claims. It has been said that a creditor who comes in under the original bill cannot attack the claim on which it was founded as barred. But that question is not involved here. The rule as to usury is similar. The plea is a personal privilege; but creditors of an insolvent estate may set it up against other creditors who seek to lessen the common fund by claiming usury. *Pope v. Solomons*, 36 Ga. 545; *Stone v. Georgia Loan Co.*, 107 Ga. 524, 530, 33 S. E. 861. In *Shewen v. Vanderhorst*, 1 Russ. & Myl. 347, it was held that "under the common decree in an administration suit," where the

executors refused to set up the bar of the statute of limitations to a debt, a residuary legatee could do so. It was said that "it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors." "The common decree," or, as it is also referred to in some cases, "the usual decree," in creditors' bills against an executor or administrator, was (to use the common Latin expression) "quod computet"; that is to say, it directed the master to take the accounts between the deceased and his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts, and to take an account of the personal estate of the deceased to be applied on payment of the debts and other charges in a due course of administration. In *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419, it was held that any creditor interested in the fund might interpose the bar of the statute of limitations. *Werdenbaugh v. Reid*, 20 W. Va. 588; 1 *Story's Equity Jur.* (13th Ed.) § 548; *Woodyard v. Polsley*, 14 W. Va. 211 (7).

3. Under the English equity procedure, after the common decree had been entered and the case had been referred to a master, the practice was not entirely uniform as to the extent of the proof required of persons filing claims. Where one creditor desired to set up the bar of the statute of limitations against the claim of another, no very strict pleading appears to have been required. 1 *Daniell's Chan. Pl. & Pr.* \*655; 2 *Daniell's Chan. Pl. & Pr.* \*1210; *Green v. Snead*, 30 Beav. 231; *Woodyard v. Polsley*, supra. It is not necessary in this case to go to the extent of adopting in full the English practice before the master. *Pendley*, as a person claiming to be a creditor of the decedent, was made a defendant to the original petition. He set out his claim in his answer. On its face it was barred by the statute of limitations, unless relieved therefrom by reason of acknowledgments or new promises. He alleged and undertook to prove that it was so relieved from the bar. The whole case was referred to an auditor for a proper accounting and report. *Pendley*, therefore, went before the auditor, undertaking to show that he had a claim which was apparently barred, but which, for certain reasons, was not really so. The other creditors could contest this fact; and there was no necessity for a formal plea by them setting up the statute of limitations. In *Willis v. Sutton*, 116 Ga. 283, 42 S. E. 526, it was held that where an action was brought upon an administrator's bond, and he filed a plea setting up that there was existing, at the time of the death of his intestate, a partnership between him and the defendant, and seeking to discharge himself as administrator from liability on account of demands which he had as surviving part-

nier against the estate of his deceased partner, the plaintiff could reply to the claim so set up that the items thereof were barred by the statute of limitations, without filing a written plea to that effect, when there was no order requiring such plea to be in writing.

4. Under the evidence on the subject of the note held by Pendley, was the finding of the auditor, which was approved by the presiding judge, so erroneous as to require a reversal by this court? In the early case of *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 306, it was held that "an acknowledgment or promise, to take a case out of the statute of limitations, must specify or plainly refer to the particular debt, or demand, or cause of action which is sought to be revived." And this ruling has since been followed. *Sedgwick v. Gerding*, 55 Ga. 264; *Dobson v. Dickson*, 62 Ga. 639; *Gartrell v. Linn*, 79 Ga. 701, 4 S. E. 918; *Paille v. Plant*, 109 Ga. 247, 34 S. E. 274; *Kirven v. Thornton*, 110 Ga. 276, 34 S. E. 848. In *Walker v. Griggs*, 32 Ga. 119, the headnotes state that: "Where the promise relied on refers to notes generally, without specifying amounts, dates, etc., the promise is insufficient. If the plaintiff, to identify the note sued upon as the subject of the written promise, introduces other proof which fails to satisfy the jury on this point, this court will not interfere to control their finding, although the court may be of the opinion that the allunde testimony preponderated against the conclusion of the jury." Under these rulings, the auditor might well have found that the note held by Pendley was not relieved from the bar of the statute of limitations. The entries of credits upon it were unsigned, and not shown to have been in the handwriting of the debtor. The receipts which were relied on as acknowledgments or new promises were found among the papers of the decedent. They were signed by Pendley, the payee, although the body of some of them were in the handwriting of Harris, the maker of the note now sought to be enforced. They refer only in a vague way to the receipt by Pendley from Harris of certain amounts "on note," and one of them "as credit on his note." It does not appear whether there had been any other note or notes made by Harris to Pendley. The calculation which was introduced to aid in the identification does not coincide accurately with what Pendley claimed to be due on the note now brought forward. The evidence of the witness by whom it was sought to identify the receipts with the note and the calculation was quite uncertain and showed differences between him and Pendley in regard to the amount due. Upon the whole we cannot say that there was any error in the finding which requires a reversal.

Judgment affirmed. All the Justices concur.

(129 Ga. 176)

McSWAIN et al. v. RICKETSON, Sheriff, et al.

(Supreme Court of Georgia. Aug. 8, 1907.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW.

A return of appraisers setting apart a year's support, which does not purport to embrace the entire estate of the decedent, but merely designated items of property, which contains, as one item, the following: "175 acres of land, more or less, of lot of land No. 49 in the 6th district"—is, as to such item, too vague and uncertain to be capable of enforcement.

2. JUDGMENT—RES JUDICATA.

Where a mother and her children are in possession of a tract of land, which was the property of a deceased husband and father at the time of his death, a judgment in a proceeding to eject the mother as an intruder is not binding upon the children, when it appears that they are not her tenants, do not claim under her, but are asserting, independently of her, their title as heirs at law of their deceased father.

3. ESTOPPEL—ACCEPTANCE OF BENEFITS—KNOWLEDGE.

The judge erred in not granting the injunction as prayed for.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by Elizabeth McSwain and others against David Ricketson, sheriff, and another. Judgment for defendants. Plaintiffs bring error. Reversed.

Elizabeth McSwain and others brought a petition in equity against Ricketson, sheriff, and J. J. Jowers, alleging that the plaintiffs were the children and heirs at law of Elijah Jowers, four of them being sui juris, and five of them being minors; that their father died seised and possessed of 150 acres of land, situated on the west side of lot No. 49 in the Sixth district of Coffee county, Ga., known as the "home place" of Elijah Jowers; that there was no necessity for administration upon his estate, and no administration was had; that plaintiffs are in possession of the land; that in 1906 J. J. Jowers made an affidavit to eject Sarah Jowers, their mother, from the land as an intruder; that she filed a counter affidavit, and the papers were returned to court, and, the defendant not appearing, judgment was entered that a writ issue directing the sheriff to dispossess the defendant; that in 1907, under such writ, Sarah Jowers was dispossessed; that since that time J. J. Jowers has insisted that the plaintiffs be also dispossessed under the writ, and the sheriff has stated that, unless restrained by law, he will dispossess them. It is alleged that, unless the sheriff is enjoined, the plaintiffs will be dispossessed and irreparably damaged. The prayers of the petition were that J. J. Jowers and the sheriff be enjoined from interfering with the possession of plaintiffs, for general relief, and for process. By amendment it was alleged that, if the plaintiffs were dispossessed, they would be forced to

get homes, either by renting or purchasing, elsewhere, and if J. J. Jowers is placed in possession he will cut the timber, and such conduct on his part will be a continuing trespass, and work irreparable damage, and cause a multiplicity of suits. The answer of J. J. Jowers denied that three of the plaintiffs, who were *sui juris*, were in possession. It admitted the averments as to the suing out of the warrant to eject Sarah Jowers as an intruder, and the proceedings thereafter following, and also admitted that it was the purpose of the defendant to cause the sheriff to dispossess the plaintiffs, but denied the averments in reference to the irreparable damages. In the answer to the amendment the defendant averred that all of the timber suitable for sawmill and cross-tie purposes, as well as cypress timber, had been cut off the land, and that the timber thereon was not sufficient for plantation purposes, and that the plaintiffs were, notwithstanding, selling and cutting the same. The defendant J. J. Jowers also filed a demurrer, alleging that the plaintiffs had an adequate remedy at law and that there was no equity in their bill.

At the hearing it was established by evidence that Sarah Jowers had been dispossessed in the manner described in the petition. The evidence was conflicting as to whether some of the plaintiffs, who were *sui juris*, were in possession; but there seems to have been no conflict as to the fact that the minors were in possession of the land. The defendants offered in evidence a certified copy of the proceedings before the ordinary of Coffee county setting apart a year's support to Sarah Jowers out of the estate of her husband. The return of the commissioners did not purport to set apart the entire estate, but certain property was set apart by description. One item of the return was in the following language: "175 acres of land, more or less, of lot of land No. 49 in the 6th district." The plaintiffs objected to this evidence for various reasons, among them being that the description of the land therein was so vague and indefinite that no title or right passed under the judgment setting apart the year's support, so far as it related to the land. The evidence also disclosed various transactions between Sarah Jowers and J. J. Jowers, in which she seems to have dealt with the land in controversy as if it was her own property and she had a right to sell and convey the same. It appeared from the evidence that the land in controversy was all of the land owned by Elijah Jowers at the time of his death. There was evidence tending to establish that, in the different transactions with J. J. Jowers, Sarah Jowers was attempting to secure a more suitable home for herself and her minor children; but it does not appear that the minor children had directly received any benefit from these transactions. On the contrary, there was positive evidence that no part of the consideration

of the deed from Sarah Jowers to J. J. Jowers was used either for the support of herself or her minor children. There was evidence that a part of the consideration of the deed was the payment of a mortgage made by Elijah Jowers in his lifetime upon a mule, which was also set apart as a year's support. The judge refused the injunction so far as it sought to restrain the sheriff from dispossessing the plaintiffs, and granted it so far as to restrain the defendant from cutting the timber on the land in controversy. The plaintiffs excepted.

Lankford & Dickerson, for plaintiffs in error. O. A. Ward and E. Willis Dart, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. Land may be set apart as a year's support, and the effect of the judgment is to vest the widow with such title or interest in the land that she may, in order to raise money for the purpose for which the year's support is set aside, convey the same in her own name and divest all interest of herself and her minor children therein. The judgment setting apart the year's support being, in effect, a conveyance to her of the interest of her deceased husband in the property, the description of the property must be such as to render it capable of identification. If the description is so vague and indefinite that the property cannot be identified, the title to the estate is not divested by the judgment setting apart the year's support. That certainty which is required in a deed or other conveyance is also required in a judgment setting apart a year's support, certainly so far as land is concerned. If the judgment now in question had purported on its face to have set apart all of the property, or all of the lands, of the deceased, parol evidence would have been admissible to show what lands were owned by the deceased. But there is nothing in the judgment to indicate that it was the intention of the commissioners to set apart the entire estate. They dealt with the property intended to be covered by items, certain articles of personal property being designated, and then what purports to be a description of a tract of land is inserted. The title to the estate is not divested, unless this description is sufficient to identify the land. The only description is 175 acres, more or less, in a lot of a given number in a given district. It does not appear, from the description, in what county the land is located, nor, so far as that is concerned, in what state. It might be inferred that it is in the state of Georgia; but can we infer that it was necessarily in Coffee county? The law does not require that a year's support should be set apart in the county in which the land is located. The year's support is set apart in the county in which the decedent died, and the property set apart may be located

in another county. And, even if it be conceded that lot No. 49 in the sixth district of Coffee county was referred to, what portion of that lot is set apart? Even the number of acres is not definitely stated. The words of indefiniteness, "more or less," are used. The shape of the tract is not referred to, nor can it be, by any implication arrived at. If the description had been a definite number of acres in a given corner of the lot, the land could have been identified. *Payton v. McPhaul*, 128 Ga. —, 58 S. E. 50. The description of the land was so vague and indefinite that the judgment setting apart the year's support, so far as this item was concerned, was absolutely void. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691; *Lee v. English*, 107 Ga. 152, 33 S. E. 39. This case is distinguished from the case of *Moore v. Moore*, 126 Ga. 735, 55 S. E. 950, and the cases there followed, for the reason that the return of the appraisers did not purport to set apart the entire estate.

2. The children of Sarah Jowers were not parties to the proceeding to eject her as an intruder. They were not her tenants. They did not claim under her. Their claim of title rests upon ownership by their father at the time of his death. They were not bound by the dispossessory proceedings against their mother. The sheriff has no authority to dispossess them under that proceeding.

3. The judgment setting apart the year's support not having the effect to divest the title of the heirs, the transactions entered into by the mother, in which she dealt with the same as if she had acquired title in the proceeding setting apart the year's support, did not estop the heirs from asserting their title to the property, unless it appears that they have received some benefit from the transactions which she has entered into, with a full knowledge of the fact that she was dealing with their property. While there is evidence to indicate that the mother was looking after the interests of the minor children and seeking to acquire a more desirable home, it does not definitely appear that the minor children have received, directly or indirectly, any benefit from these transactions. Nor does it appear that the adult heirs have received any benefit therefrom. The evidence was not sufficient to make out a case of estoppel, either against the adult heirs or the minor children. The facts developed at the final hearing may show a different condition of affairs; but, so far as indicated by the present record, there was no estoppel upon any of the plaintiffs as to their right to assert their title as heirs at law to the land in controversy. There was a conflict of the evidence as to whether some of the adult heirs were in possession, but there was no dispute that the minor heirs were in possession of the property. They were rightfully in possession. J. J. Jowers has shown no right to dispossess them, and the judge

should have granted the injunction as prayed for.

Judgment reversed. All the Justices concur.

(129 Ga. 89)

#### TURNER v. NEWELL et al.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. ERROR, WRIT OF—BILL OF EXCEPTIONS—PARTIES.

Where, in a suit against two codefendants, the verdict and judgment is adverse to the defendants, and one of them makes a motion for a new trial which is overruled, the movant can except to the judgment overruling his motion and bring the case to the Supreme Court without making the other defendant a party to the bill of exceptions; and a failure to do so will not work a dismissal of the writ of error. *Ruffin v. Paris*, 75 Ga. 653; *Jordan v. Gauden*, 73 Ga. 181.

#### 2. REFORMATION OF INSTRUMENTS—VOLUNTARY DEED.

As a general rule equity will not, upon petition brought by the grantee in a voluntary deed, reform and correct the same. There are cases which constitute an exception to this rule, but the case at bar does not fall within the exceptions; and the general demurrer of the judgment creditor, whose judgment was obtained after the execution of the deed and before the filing of the petition to reform it, and who had been made codefendant with the grantor, should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by Fannie E. Newell, for herself and as next friend, against W. L. Newell and R. F. Turner. Judgment for plaintiff, and Turner brings error. Reversed.

Fannie E. Newell, for herself and as next friend for several named minor children, filed an equitable petition against W. L. Newell, the husband of petitioner, and R. F. Turner. The petition alleges that on the 31st day of March, 1899, W. L. Newell executed to petitioner and said minor children a deed to a certain tract of land, but that, owing to a mistake on the part of the scrivener, the land which was sought to be conveyed by the parties to the deed was not correctly described therein; that subsequently to the execution of the deed, and possession of the property by the plaintiff, W. L. Newell became indebted to R. F. Turner, and on the 24th day of July, 1902, the latter recovered a judgment against W. L. Newell upon said indebtedness, and, a *fi. fa.* having been issued upon said judgment on the 18th day of August, 1902, the same was levied upon the land claimed by plaintiff under the above-mentioned deed. Petitioner prayed that the deed from W. L. Newell to her and the minor children be so reformed as to properly describe the property sought to be conveyed thereby, and that R. F. Turner be restrained and enjoined from proceeding with the levy of said *fi. fa.* on the land. The defendant Turner filed a general demurrer to the petition, and also demurred on the ground that

the consideration of the deed referred to in the petition is not alleged or set out. The defendant Newell did not demur or plead. The court overruled the demurrer, and Turner filed exceptions *pendente lite*. It appears from the deed which the plaintiffs sought to have reformed that it was a voluntary conveyance, the only consideration being "the natural love and affection which he [the grantor] has for his wife and three children." On the trial the jury returned a verdict finding in favor of the plaintiffs, that the deed be reformed as prayed for, and that the land was not subject to the fl. fa. Turner made a motion for a new trial, which was overruled, and he excepted. The defendants in error moved to dismiss the writ of error, because W. L. Newell was not made a party to the bill of exceptions.

W. F. Brown, for plaintiff in error. S. Holderness, for defendant in error.

BECK, J. (after stating the facts as above).

1. The question of practice raised by the motion to dismiss is ruled in the first headnote.

2. But one question made by the record in this case need be discussed, and that is whether equity will reform a voluntary deed upon proceedings therefor brought by the grantee; and the principle controlling that question seems to be well settled by the adjudication of this and other courts, and to be so recognized by text-writers. That principle is set forth in Story's Eq. Jur. § 987: "The general principle is established that in no case whatsoever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of wife or child"—quoted and applied by the Supreme Court of Michigan (*Shears v. Westover*, 110 Mich. 505, 68 N. W. 286), following another case decided by the same court. See, also, the cases of *Walt v. Smith*, 92 Ill. 385, *Eaton v. Eaton*, 15 Wis. 259, *Enos v. Stewart* (Cal.) 70 Pac. 1005, and *Gwyer v. Spaulding*, 33 Neb. 573, 50 N. W. 681. In the case of *Powell v. Powell*, 27 Ga. 36, 73 Am. Dec. 724, it was said: "Is there anything to take his case out of the general principle? It is said that there is. It is said in the first place, that the case of a voluntary conveyance in favor of a wife or children is an exception to that principle. But we are not prepared to admit this proposition. The English decisions seem to be against it. See 1 Story Eq. § 176, and cases cited; *Adams' Equity*, 78." Jackson, C. J., speaking for the court in the case of *Prater v. Sears*, 77 Ga. 28, touching the question of the reformation of a voluntary deed, said: "On the face of the accepted conveyance, it is a mere voluntary deed. On the contract sought to be set up, it is a binding deed for value. The other side to it is dead. If a mere voluntary conveyance, a

mistake in it will not be corrected against heirs, which is the case here; nor will a specific performance of it, when corrected, be decreed."

Counsel for defendant in error insisted that, as the grantees had gone into possession of the lands the description of which is sought to be corrected and reformed, the contract was executed, and that therefore they are entitled to the relief prayed, and rely upon the case of *Wyche v. Green*, 16 Ga. 49, in which the court held that "if a voluntary contract, however, be actually executed, then a court of equity will enforce all of the rights growing out of the contract against anybody." But a clear distinction is pointed out in *Powell v. Powell*, *supra*, between the case of *Wyche v. Green* and cases like the *Powell Case* and the one at bar. Such a mistake as that alleged in the petition "is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to perfect." *Adair v. McDonald*, 42 Ga. 506. The fact that the recipients of the bounty had enjoyed the benefits thereof for a period of several years gives them no stronger equitable claim upon the grantor than if they had never enjoyed them at all. If both the grantors and grantees were in the same position relatively to this as they were when the deed was executed, and the grantor was consenting thereto, we could produce authority for holding that the deed might be reformed and corrected by a court of equity; but before the proceedings were instituted to reform the instrument in question a judgment had been obtained by the plaintiff in error against the grantor, which created a lien in favor of the former upon all the property of the latter. For the grantor to consent to the correction and perfection of an incorrect or imperfect voluntary conveyance is an act of liberality or generosity, an act similar in its nature to the bestowal of a bounty. Such an act he is not free to perform, if it tends to interfere with the rights and just demands of a judgment-creditor. We find in this salient fact a strong reason for holding that the present case is not entitled to be listed among the exceptions to the general rule that equity will not interfere to reform a voluntary deed because of mistake; and the general demurrer invoking the application of that rule should have been sustained.

Judgment reversed. All the Justices concur.

(129 Ga. 115)

#### CENTRAL OF GEORGIA RY. CO. v. BRANDENBURG.

(Supreme Court of Georgia. Aug. 16, 1907.)

#### 1. RAILROADS—INJURY TO PERSON ON TRACK—ACTION—PETITION.

When this case was before the Supreme Court on a former occasion (*Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465), it was held that the petition was good as against a general demurrer, but that the special demurrer should have been sustained. Before the remitti-



tur was entered, the plaintiff offered an amendment to the petition, attempting to cure the defects pointed out in the special demurrer originally filed, as well as in the amendment to the special demurrer, which was filed to the petition as amended. While the amendment cured some of the defects, the petition as amended was still subject to some of the objections raised in the special demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1331, 1337.]

(Syllabus by the Court.)

**2. SAME.**

The petition as amended was not subject to any of the objections set out in the special demurrer. (Per Cobb, P. J., and Atkinson, J., dissenting.)

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action by Mrs. Kemp against the Central of Georgia Railway Company. Pending the action, plaintiff intermarried with one Brandenburg, and the action was continued in the name of A. K. Brandenburg. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Kemp brought suit for damages resulting from the homicide of her husband. The petition alleged that the defendant, by the operation of its locomotive and cars in a careless, negligent, and improper manner, ran over and killed her husband, in the county of Bulloch, at a point between Parish and Metter stations; that the killing was done by a passenger train going west, upon a straight track, and occurred on the 12th day of February; and that the conduct of the agents and employes of the railroad on the occasion in question was wrongful and wanton. It alleged that her husband was 26 years of age, able-bodied, and well educated, and was a farmer, merchant, and school teacher, and earning an annual income of \$1,000. To this petition the defendant filed both general and special demurrers. These demurrers were overruled, and the defendant excepted. The judgment overruling the general demurrer was affirmed by this court, and the judgment overruling the special demurrer was reversed. *Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465.

Before the remittitur was entered in the trial court the plaintiff offered an amendment alleging, in substance, that the defendant was negligent at the time and place in question, in that it ran its cars at a high rate of speed, greater than was necessary or usual, or was required to make the schedule upon which the train was run; that this amounted to recklessness; that at the place where the husband of plaintiff was killed the public generally were accustomed to use the roadway of defendant as a path or passageway, and the servants in charge of the train had reason to anticipate that there would be persons passing at this point, and they negligently failed to keep a lookout for such persons; that the locomotive was not equipped with a proper headlight, and the headlight was not burning on the occasion in

question; that the company failed "to equip said train with brakes, or air brakes, and other appliances necessary and requisite for the safe operation" of the train, and without which the servants in charge thereof could not stop the train, even after having become aware of the presence of the plaintiff's husband upon the track; that the servants and agents in charge of the train were careless and negligent in failing and refusing to stop the train after they had notice of the presence of the plaintiff's husband on the track and in imminent danger of being killed; that the locomotive and cars of the defendant were old, worn out, improperly equipped, and not suited for the purpose for which they were used; that the servants in charge of the train failed and refused to give any signal at the crossing near which the husband of plaintiff was killed, and to slacken the speed of the train on approaching the crossing, thereby failing to give him notice of the approach of the train in time for him to have saved himself; that the train was run in a reckless and wanton manner, without regard to the safety of the persons traveling along the highway; that the servants in charge of the train, after the presence of plaintiff's husband on the track was known to them, failed and refused to reduce the speed of the train, to give any signal, or perform any other act required to avoid the killing of her husband, and, even after the presence of plaintiff's husband became known, ran said train in a reckless and wanton manner, without regard to his life, striking and killing him; that the engineer in charge of the locomotive was an old man, with failing eyesight, who could see but a short distance, and was therefore an incompetent and unfit person for the duty required to be discharged; that the engineer and fireman failed and refused to keep a lookout, although they were running on a straight track, with nothing to obstruct their view for half a mile or more; and that the husband of plaintiff "was entirely free from any fault on his part."

The defendant filed both a general and special demurrer to the petition as amended. The special demurrer raised the objections that the petition did not show any duty or diligence on the part of defendant to the plaintiff's husband; that there was nothing in the allegations which would amount to wantonness on the part of the defendant; that it appears, from all of the averments, that the husband of plaintiff, by the exercise of ordinary care, could have avoided the consequences of the alleged negligence of the defendant; that it did not appear, from the averments, how the alleged acts of negligence caused or contributed to the injury of plaintiff; that it does not aver in what respect the locomotive and cars were improperly equipped; that it does not appear what degree of diligence was due by the defendant to the plaintiff's husband; that it does

not appear that the plaintiff's husband was at or upon any public road crossing, or so near thereto as to render the failure of the defendant to observe the statutory signal for public road crossing negligence relatively to the plaintiff's husband; that it was not alleged in what respect the engineer was an incompetent or unfit person, nor does it appear in what manner the plaintiff's husband was free from fault, nor what care or diligence was exercised by him to avoid the injury, nor by what right or in what capacity he was upon the track at the time of the injury, nor how near he was to a public road crossing, nor does it appear whether he was walking, sitting, standing, or lying upon the track, and the allegation that he was free from fault was merely the conclusion of the pleader.

The demurrer was overruled, and the defendant filed exceptions *pendente lite*. The case proceeded to trial, and resulted in a verdict in favor of the plaintiff for \$5,000. The motion for a new trial, filed by the defendant, was overruled, and in its bill of exceptions it assigns as error each of the rulings just stated. The plaintiff, while the suit was pending, intermarried with Brandenburg, and the suit is now proceeding under the name so acquired by her.

Lawton & Cunningham and H. W. Johnson, for plaintiff in error. A. Herington, H. B. Strange, and Evans & Evans, for defendant in error.

COBB, P. J. (after stating the facts as above). The special demurrer to the petition, as amended, raises numerous questions. We all agree that some of the grounds of the special demurrer were not well taken. We are not agreed as to the proper decision of the other questions raised by the demurrer. Those matters upon which we are agreed, and which require special notice, will be first dealt with. The special demurrer raises objection that the mere allegation that the deceased was free from fault is too general, and that the facts which show such freedom from fault should have been set out. In *Allen v. Augusta Factory*, 82 Ga. 76, 8 S. E. 68, Mr. Chief Justice Bleckley said: "The allegation that the deceased was without fault is too general, and too much in the nature of a legal conclusion, to serve as a substitute for the proper allegation of his want of knowledge." It is to be noted that in that case freedom from fault depended largely upon want of knowledge on the part of the plaintiff, and, of course, this was a matter peculiarly within the knowledge of the plaintiff himself, and therefore he should not be allowed to place himself behind merely a general allegation, when it was so easy for him to make a specific averment. In the cases of *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. 1020, and *Georgia R. Co. v. Rayford*, 115 Ga. 937, 42 S. E. 234, it was

held that, as against a general demurrer, an allegation that the plaintiff was without fault was sufficient. See, in this connection, *Pierce v. Seaboard Air Line Ry.*, 122 Ga. 664, 50 S. E. 468. It is to be noted that in all of these cases the suit was by an employé or the widow of an employé against the master. Where a servant brings suit against a master to recover on account of an injury resulting from defective machinery, it is necessary to allege and prove that the defect was known to the master, or should have been so known by the use of ordinary care, and that it was unknown to the employé, and that he had not equal means of knowing the danger. Civ. Code 1895, § 2612. If the suit is by a railroad employé for a personal injury arising from the acts of fellow servants, negligence on the part of the other employés and freedom from negligence on his own are both necessary, and these must be alleged. Civ. Code 1895, § 2323.

In these cases absence of knowledge or negligence is a part of the plaintiff's case, and must be alleged as such. But generally, in other cases, where suit is brought by one against a railroad company to recover for a personal injury, the plaintiff is not bound to allege his own freedom from fault. Want of ordinary care on his part is a matter of defense. Its negation is not essential to setting out the plaintiff's case. This being so, if the plaintiff does not allege that he was free from fault, such allegation is not subject to demurrer on the ground that it is too general, and fails to set out how and wherein he was not negligent. If a cause of action is duly alleged against the defendant, entire freedom from fault is not necessary to a recovery. It is only a failure to use ordinary care, where by such use the consequences of the defendant's negligence could have been avoided, which will prevent a recovery. If entire freedom from fault on the plaintiff's part is alleged, it is not necessary to prove it to make out a case in his favor. If, under the evidence, he is guilty of some negligence, but not enough to bar a recovery under the rule above stated, there may be a recovery; but the damages would be diminished in proportion to the negligence attributable to each. The allegation of the greater (entire freedom from fault) includes the less (partial freedom from fault). It is not necessary, therefore, to allege in detail how, why, and wherein the plaintiff was entirely free from fault. Besides, when it is alleged that one is guilty of no negligence whatever, this negatives all possible negligence; and it is not necessary, to recite in detail all possible acts of negligence which he might have committed, and then deny that he did each of such acts separately. To allege that one did nothing negligent is enough. It is not necessary to describe all possible negligence, merely to deny that he committed it. So, if I should say that I did nothing, this would mean that

I did not do anything or everything. It would not be any more complete if I should describe anything or everything, and then add that I did not do it.

In the present case the allegation that the deceased was free from fault was an unnecessary averment. As it was unnecessary, the defendant certainly had no right to require any elaboration of the averment, or any more detail in reference to the unnecessary allegation than the plaintiff saw fit to offer. If the case had been of a character where the averment was a necessary part of the plaintiff's case, then the defendant might have been entitled to more information as to the matter. The office of a special demurrer is to call for information which the defendant is entitled to have under the law. If the plaintiff makes an unnecessary allegation, the right of the defendant is generally either to have it stricken or require it to be proved, if the averment is of such a character as to be descriptive of the transaction in question. The amendment to the petition contained a paragraph which alleged that the defendant was negligent "in failing to equip said train with brakes, or air brakes, and other appliances necessary and requisite for the safe operation of such a train of cars, and without which the employes and servants of such railway company could not have stopped said train after having become aware of the presence of the plaintiff's husband upon said track in sufficient time to have stopped said train of cars, had they been properly equipped." This was sufficient to put the defendant on notice that the negligence claimed was the failure to equip its train with proper appliances for stopping the train, whatever those appliances might have been. It was notified that it would be required to defend this allegation of negligence in such way as to prove that the train was equipped with such appliances as reasonable diligence required them to use. Taking all of the averments together, the effect of the charge of negligence against the defendant was that the train was equipped in such way that it could not be controlled and managed in an emergency such as faced it at the time that the presence of the deceased upon the track was discovered. The averments were sufficient to put the defendant on notice of what it was to answer; and, if the train was equipped in the manner that the diligence required by law demanded, it could easily meet the charge of negligence referred to. The manner in which the train was equipped was more peculiarly within its own knowledge than the knowledge of the plaintiff, and the details as to the equipment come more properly from it in response to the charge of negligence than it would from the plaintiff in the specification of negligence.

On the remaining questions which will be specially dealt with we are not agreed; and the views of the majority of the court will be stated, as well as the views of the dis-

senting members. The special demurrer to the petition as amended raises the question that it did not show whether the deceased was walking, sitting, standing, or lying upon the track; nor did it show any duty of diligence on the part of the defendant to the plaintiff's husband, nor what degree of diligence was owed; nor did it appear that the plaintiff's husband was at or upon a public road crossing, or so near thereto as rendered the failure on the part of the defendant to observe the statutory signals required at such places negligence on its part relatively to the deceased; nor did it show by what right or in what capacity the deceased was upon the track at the time of the alleged injury. The views of the majority of the court on these matters are thus stated by them:

In the second paragraph of the original petition it was alleged that the plaintiff's husband was killed by the careless and negligent running of the locomotive and cars of the defendant company, and in the fourth paragraph thereto it was alleged that he was wrongfully and wantonly run over and killed by the locomotive and cars of the defendant company. On the first trial of the case the special demurrers to the petition were overruled by the trial judge, and his judgment, in this respect, was reversed by this court in *Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465, because the petition did not show (1) whether the deceased was an employe, licensee, or trespasser; (2) whether the homicide was at a public crossing, or at a point distant therefrom; or (3) whether the deceased was walking, standing, or lying on the track, and, if the latter, whether he was there voluntarily or because of some sudden access of sickness. In the amendment to the petition, filed before the remittitur was entered in the trial court, it was alleged that the homicide of the plaintiff's husband was caused by the negligent, reckless, and wanton acts of the agents and employes of the defendant company in the running of its locomotive and cars, which acts were, in a loose and general way, sought to be set out in the amendment. It is clear to our minds that the plaintiff did not intend, by the various allegations of negligence set forth in the amendment, to limit her alleged right to recover to a case wherein she relied solely upon the alleged wanton homicide of her husband; but she evidently endeavored to set out acts of negligence on the part of the defendant and its employes which caused the death of her husband, and which did not amount to wantonness, and upon which she relied for recovery. This being true, the amended petition was as much subject to special demurrer as the original petition, for failing to show by what right, or in what capacity, the plaintiff's husband was at or upon the defendant's railroad track at the time he was killed, whether the homicide was at a public crossing, and whether he was walking, standing, or lying upon the track.

The rulings made in this case when it was formerly before this court are the law of the case and must control it.

Mr. Justice ATKINSON and I cannot agree to this view. In our opinion the petition is not subject to the objections referred to in the views of the majority above set forth. In the petition as it originally stood, it was material for the defense that there should be some information given by the pleader as to the position of the deceased on the track, but under the amendment this becomes no longer material. It is distinctly alleged that the servants in charge of the train had notice that the deceased was upon the track and that by the exercise of ordinary care they could have avoided killing him. The effect of the allegations is that they knew of his presence and used no effort whatever to prevent injury to him. If this was true, his death was the result of a wanton act. *Forrest v. Ga. R. Co.*, 128 Ga. 77, 57 S. E. 98, and citations. If the allegations of the petition as to the manner in which the deceased was killed are true, the defendants would be liable, without reference to his position upon the track at the time of his death. The petition, in effect, charged that the agents and servants of the railway company wantonly and willfully killed the deceased after they knew that he was upon the track in a place of danger. To say that this allegation is defective, for the reason that it did not allege whether he was walking, standing, or lying down, would be the equivalent of holding that an indictment for murder, which charged that the accused with malice aforethought did kill and murder a named person, was subject to special demurrer upon the ground that it did not appear whether he was walking, standing, or lying down at the time he was slain.

The amendment alleged that the defendant was negligent because "the locomotive and cars of said defendant company, which ran over and killed the plaintiff's husband, were old and worn out and improperly equipped, and not suited for the purpose for which they were used by said company, rendering them incapable of being managed or controlled in a way calculated to maintain the safety of the public, and in such a way as to have saved the life of the said Kemp, even when his presence on the track and his imminent danger of being killed became known to the servants of said company on said train, and sufficient time before he was struck to have saved his life, had said locomotive and cars been such as were reasonably suited for the purpose for which they were used, namely, that of a passenger train." We do not agree as to the proper construction of this paragraph. The majority of the court are of the opinion that, properly construed, the paragraph contains a general allegation that the defendant was negligent in reference to the entire equipment of the train, and that, when so construed, the allegation is too general

under the former rulings of this court. See *Hudgins v. Coca Cola Co.*, 122 Ga. 695, 50 S. E. 974, and citations; *Seaboard Air Line Ry. v. Olsen*, 123 Ga. 612, 51 S. E. 591; *Louisville & Nashville R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429; *Russell v. Central Ry. Co.*, 119 Ga. 705, 46 S. E. 858. Mr. Justice ATKINSON and I are of the opinion that the paragraph, properly construed, is not an allegation of negligence as to the equipment generally, but that it is a specific allegation that the train was not equipped with appliances necessary to stop the same. The majority think that the special demurrer should have been sustained; but Mr. Justice ATKINSON and I are of contrary views, for the reasons stated.

The numerous other grounds of special demurrer do not require any special notice. We are all of the opinion that they are without merit.

Judgment reversed.

FISH, C. J., and LUMPKIN and BECK, JJ., concur. COBB, P. J., and ATKINSON, J., dissent. EVANS, J., disqualified.

(129 Ga. 187.)

YOW et al. v. SULLIVAN et al.

SULLIVAN et al. v. YOW et al.

(Supreme Court of Georgia. Aug. 8, 1907)

1. COUNTIES—TAXATION—INDEPENDENT LEVY.

The order of the county authorities of Franklin county of July 4, 1906, providing for a tax levy for the expenses of the county for 1905, properly construed, is not a new and independent tax levy during the year 1906, but is an amendment to the tax levy of September 9, 1905, making the same conform to the law as laid down in the decision when this controversy was before this court on a former occasion.

2. SAME—CREATION OF NEW COUNTY—LIABILITIES UNDER TAX LEVY.

A new county was created by an act approved August 18, 1905, and was organized on December 6, 1905. The authorities of the county from which a portion of the territory of the new county was taken, on September 9, 1905, made a tax levy which embraced amounts necessary to pay for the erection of new bridges, contracts for which were entered into after the date of the act creating the new county. *Held*, that the property owners in the new county are not liable for that portion of the tax levy necessary for the purpose of erecting such bridges.

3. SAME—JUDGMENT—REVERSAL.

No sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action by T. R. Yow and others against R. F. Sullivan, tax collector, and another. From the judgment, both parties bring error. Affirmed.

Yow and others, including the Southern Railway Company, filed a petition against the tax collector and the sheriff of Franklin county, alleging: That all of the plaintiffs, except the railway company, were residents in that portion of Stephens county which was formerly Franklin county, and the com-

pany is a foreign corporation, with a line of railway through those two counties, nine miles of its line being in that portion of Stephens county above referred to. That on August 18, 1905, an act was passed creating the county of Stephens, and the county was organized on the — day of December, 1905. That, notwithstanding the creation of the new county, the ordinary of Franklin county, on September 9, 1905, undertook to levy a tax upon the property of the plaintiffs, who filed petition to enjoin the collection of the tax, and an order was passed granting the injunction, which ruling was affirmed by the Supreme Court. On July 4, 1906, the ordinary of Franklin county, with the advice of the county commissioners, undertook to levy a tax for the year 1905; such levy being in the following words: "Georgia, Franklin County. July 4, 1906. Whereas, the ordinary of Franklin county, on the 9th of September, 1905, did pass an order assessing county taxes on all property and every species of value or specifics which is taxed by the state and which was subject to taxation for the year 1905; and whereas, an equitable petition was filed in the superior court of Franklin county on the 20th day of December, 1905, by T. R. Yow et al., praying for an injunction against R. F. Sullivan, tax collector of Franklin county, and on the 30th of December, 1905, his honor, R. B. Russell, judge of the superior court of Franklin county, granted an injunction, and enjoined said tax collector from collecting taxes due the county of Franklin by petitioners, and said decision having been affirmed by the Supreme Court of Georgia, declaring the order of the ordinary of Franklin county, levying said taxes for said county, to be void, because the order failed to specify the percentage levied for each specific purpose enumerated therein: Therefore, the ordinary of said county, in pursuance of the laws of this state, which require the ordinary of Franklin county, with the advice of the county commissioners of roads and revenues of said county, to levy a percentage tax on all taxable property sufficient to meet the requirements thereof for county taxes for the year 1905, and it is ordered by the ordinary of Franklin county 'that there be and hereby is levied a tax of \$15.10 on each thousand dollars of taxable property for the year 1905, returned by each taxpayer and upon the tax digest of said county of Franklin for 1905,' which is subject to taxation ad valorem, and which tax is levied for the following purposes, to wit: \$1.10% on each hundred dollars, to build and repair courthouses and jails, bridges, and ferries, and other public improvements according to contract; 10% cents on each hundred dollars, to pay sheriff's, jailer's, and other officers' fees that may be legally entitled to out of the county; eighty-four one-hundredths of 1 cent on each hundred dollars, to pay coroners all fees that may be due them by the county for hold-

ing inquest; 2½ cents on each hundred dollars, to pay expenses of the county for bailiffs at court, nonresident witnesses in criminal cases, fuel, servant hire, stationery, and the like; 8 cents and 4½ mills on each hundred dollars, to pay jurors a per diem compensation; 8 cents and 4½ mills on each hundred dollars, to pay expenses incurred in supporting the poor of the county, as prescribed by the Code; 8 cents and 4½ mills on each hundred dollars, to pay expenses of working the roads under the alternative road law; 2½ cents on each hundred dollars, to pay any other lawful charge against the county. It is also further ordered that the tax collector of Franklin county collect said taxes as provided by law, and pay the same to the county treasurer of Franklin county," —signed by the county commissioners and by the ordinary. Pursuant to this tax levy the tax collector has issued executions against all of the plaintiffs, except the railway company, and will, unless restrained, proceed to collect the same. The Comptroller General has issued execution against the railway company, based on such levy, which has been levied by the sheriff. By an act passed in 1906, the county affairs of Franklin county were taken out of the hands of the ordinary and commissioners, as the board existed on July 4, 1906, and were vested in a new board of commissioners; this act taking effect October 1, 1906. It is alleged that the tax levy of July 4, 1906, is illegal, for the reason that it violates that provision of the Constitution which requires that all taxes shall be levied and collected under a general law, and no authority has been given to collect any tax under such a levy from a resident of Franklin county as it now exists; that the levy cannot be the basis for an execution against the railway company, for the reason that the levy is, by its terms, limited to property "upon the tax digest" of the county for 1905; that it is void, for the reason that it purports to levy a tax of \$15.10 on the thousand, while the aggregate of the different percentages is \$15.16 on the thousand, and the first item does not specify what per cent. is to be used to build and repair courthouses, jails, bridges, ferries, and other public improvements, and there was no contract outstanding to build or repair courthouses, jails, bridges, etc., at the time that the original levy was made in 1905, nor at the time of the levy of July 4, 1906. The county authorities had determined to build a new courthouse, but thereafter a bond election was held for the purpose of raising money for this purpose, and the people assented to the issuance of the bonds. The plaintiffs are owners of property now embraced in Stephens county, and are not liable for the tax to erect a courthouse or other public improvements in Franklin county; the tax, as originally levied, and the contract for the courthouse being made after the passage of the act creating the county of Stephens.

The prayer is that the tax collector and sheriff be enjoined from proceeding to collect the executions.

The defendants answered that the tax was levied to raise the necessary funds to meet the expenses of the county, and that at the time the first levy was made there was a contract outstanding to build a bridge at a cost of \$2,500; but it was not alleged that the contract was outstanding at the time Stephens county was created. The answer avers that the county authorities are not proceeding to collect any taxes on the second levy from those taxpayers who paid their taxes under the first levy, and there is no taxpayer in the county who is not required to pay the tax for the year, and there is no attempt to exempt any individual from his taxes; that it was the duty of the county authorities to meet all the necessary expenses during the year beginning September 1, 1905; that the bridges in the county had been neglected several years, were nearly all out of repair, and many of them were in such condition as to require the building of new bridges, and the levy was made for that purpose, which is alleged to be a part of the current expenses of the county; that the courthouse was in need of repair, as well as the jail, and the levy was intended to embrace these expenses; that there had been built, under contract made before the tax levy, four large new bridges, and a number of smaller and less expensive bridges, at a cost of more than \$10,000, and the repairs on the bridges and jails have cost more than \$1,300, and it is necessary to rebuild the bridges; that contracts for other bridges were made before the tax was levied, and the whole amount is necessary for this purpose; and that the county of Franklin has to maintain not less than 50 bridges over rivers and creeks. It is contended that the levy, in its entirety, is merely for the purpose of meeting the ordinary current expenses of the county for the year 1905.

At the hearing the only evidence introduced in behalf of the plaintiffs was an affidavit showing that the county of Stephens was organized on December 8, 1905; and the only evidence on behalf of the defendants was the affidavit of two persons in reference to the bridges of Franklin county and the cost of repairing and rebuilding them. The judge ordered an injunction against the collection of the tax provided for in the first item of the levy, for the purpose of building and repairing courthouses, etc., and directed that the county authorities ascertain what amount of that levy embraced the building of new bridges, and eliminate the same therefrom, and, when this is done, that the executions proceed for the collection of so much of that item as is necessary for the repairing of the courthouse, jails, etc. The order recites that it is necessarily to be inferred, from the allegations of the petition and the answer, that Stephens county was created before any of

the indebtedness for new bridges was incurred, except as to the bridge over North Broad river, and that it was admitted at the hearing that the contract to build this bridge was made after the creation of Stephens county. The injunction was refused upon on all the grounds other than that stated. The plaintiffs excepted; because that the court erred in not granting the injunction generally and restraining the entire tax levy; and the defendants except, because the court erred in enjoining the tax levy so far as it related to the erection of new bridges.

J. B. Jones, Fermor Barrett, and John J. Strickland, for plaintiffs in error. J. H. Skelton and W. R. Little, for defendant in error.

COBB, P. J. (after stating the facts as above). 1. The original tax levy of September 9, 1905, was before this court in the case of Sullivan v. Yow, 125 Ga. 326, 54 S. E. 173. It was then held that the collection of the tax under such levy was properly enjoined, for the reason that the order levying the tax did not comply with the provisions of the law requiring that the levy should specify the per cent levied for each specific purpose. It was said: "The order of the ordinary levying the tax not conforming to the plain requirements of the law, all proceedings under the tax levy in its present shape were properly enjoined. \* \* \* All proceedings under the tax levy were properly restrained until the county authorities make the levy conform to the requirements of the law. In the light of what has been said, the county authorities may readily make the levy comply with the requirements of the law, as to the statement of the percentage of each item," etc. This court did not, in terms, direct that the tax levy should be amended; but the language in the opinion clearly indicates that this could be done. The order was held unenforceable in its then shape; but there was no ruling to the effect that the order was void in the sense that it could not be amended or completed by supplying the omissions which rendered it unenforceable in its then condition. After the decision in that case the county authorities passed an order which is set forth in the statement of facts. It is contended that this order is, in effect, a new levy, and that, being made in 1906, it is a nullity, and no taxes can be collected thereunder. The argument is that county taxes must be levied each year, and that, if no levy is made during the year, the county authorities have no power, in a subsequent year, to make a levy, as such action is retroactive in its nature. It would certainly be a great hiatus in the law if this is true. County authorities might negligently or willfully fail or refuse to make a levy before the end of the year, and, if the contention of counsel is correct, persons having claims or demands against the county would be without a remedy. We will not undertake to determine this question under the

present record; for, when the order of July 4, 1906, is properly construed, we think it is merely an amendment of the levy of September 9, 1905, made in conformity with the suggestions which were thrown out when the controversy was before this court on the former occasion. The order recites the former case, and the decision of this court, and then proceeds to make a levy in exact conformity with the ruling of the court in reference to the various items therein contained. It is true it does not use the word "amend," or any similar expression; but, when the order is construed in its entirety, no other reasonable conclusion can be reached than that the county authorities were attempting to carry into effect, in reference to the levy of September 9, 1905, the law as laid down in the decision of this court.

2. The judge held that the property owners of that portion of Stephens county which was originally Franklin county were liable for the usual, ordinary, and current expenses of the county, as embraced in the tax levy made after the county was created, but during the year of its creation. He also held that the cost of the erection of new bridges was not a usual, ordinary, and current expense of a county, and that the property owners in the new county were not liable to be taxed for the same, unless there were outstanding contracts at the time that the new county was created; that the property owners in the new county could be justly charged with their proportion of the ordinary expenses of the county for the current year in which the county was created, but they could not be justly charged for permanent improvements made under a contract which was entered into after the new county was created. This decision is in accord with the reasoning in the decision of *Pope v. Matthews*, 125 Ga. 341, 54 S. E. 152. In that case it was held, where a contract for a new courthouse was entered into after the new county was created, but before it was organized, that the property owners in the new county were not liable for this unusual expense, but were liable for all usual and ordinary current expenses for the year in which the county was created. This decision was based upon the theory that the new courthouse was a new permanent improvement to the county, which necessarily had not been and would not be of any benefit to the property owners of the new county, and therefore the entire expense must be borne by the property owners of the old county. The repairing of public buildings, bridges, and like structures, brought about by the use of the same in past years, would be an expense properly chargeable against the taxpayers of the county as it existed, and it would not be inequitable or unjust to require the property owners in the new county to bear their proportion of the expenses of this character that had to be borne during the year in which the new county was created.

3. It is contended that the execution issued against the railroad company is invalid for the reason that the tax levy purports to levy a tax only upon the property in the county as it appears upon the tax digest of the county, and that therefore there is no basis upon which the Comptroller General can issue an execution. The county authorities are authorized to levy a tax upon all taxable property in the county and, when levied, it may be collected in the manner prescribed by law. The law requires the ordinary to certify to the Comptroller General the amount of the tax levy of the county, and then the Comptroller General, using this as a basis, ascertains the amount of taxes due by the railroad company by applying the rate to the returns of the railway company in his office. County authorities have no power to exempt the property of a railroad company from taxation, and it will never be presumed that such was their intention. The rate of tax is fixed by the order of the county commissioners. That portion of the order which relates to the tax digest of the county will be construed to refer to the taxes which are to be collected by the tax collector. The order of the county authorities was sufficient to authorize a certificate to the Comptroller General of the amount of the tax levy for the year, and with that certificate before him he had authority, under the law, to ascertain the amount of taxes due by the railroad company, and, upon its failure to pay, to issue execution therefor. The decision in *Georgia Railroad Co. v. Hutchinson*, 125 Ga. 762, 54 S. E. 725, dealt with an act of the General Assembly authorizing the levy of a tax, and not with the order of the county authorities levying the tax under existing laws. In that case it was held, where an act limited the authority to levy a tax to property upon the digest of the county, that no tax could be collected upon property of a railway company. The general law of the state levies the tax for county purposes on railroad property, and the mere fact that the county authorities, in the order providing for the collection of taxes, apparently limited the tax to property upon the digest of the county, does not prevent the rate therein fixed from being the basis for the Comptroller General to fix the amount due by the railroad company.

It is also contended that the levy was illegal, for the reason that it is stated to be a levy for \$15.10 on the thousand in the aggregate, while the various items, added together, amount to \$15.16. The law requires that the different percentages shall follow each item, and the aggregate, as indicated by the addition of these different percentages, would be the valid tax levy, and any other statement in the order conflicting therewith would be treated as simply surplusage. The difference between the amount stated in the preliminary part of the order and the aggregate of the percentages was evidently due to a

clerical error; but, even if not, the aggregate indicated by the true addition of the different percentages would be the lawful levy. It was not necessary that the first item of the levy should specify the amount to be used for each of the purposes therein indicated. The levy was in the language of the Code. See *Gaines v. Dyer*, 128 Ga. 585, 38 S. E. 175.

Counsel for the county authorities, in their bill of exceptions, complain that the effect of the order, so far as the new bridges are concerned, is to prevent the collection of the tax from the Southern Railway Company on that portion of its property which is located in Franklin county as that county now exists. We do not think that this is a proper construction of the order of the judge. The purpose of the petition was to restrain the county authorities of Franklin county from collecting what was alleged to be illegal taxes upon the property located in Stephens county, and the order is to be construed in the light of the case as made by the pleadings. The county authorities are, under the order, required to eliminate from the levy, so far as the property owners in Stephens county are concerned, all amounts to be used in the erection of new bridges; and, when this is eliminated from the executions, they can proceed for the balance. The property owners of Franklin county as it is now constituted, whether individuals or railway companies, are liable for the entire amount fixed in the levy. The original levy of September 9, 1905, being defective, and this court having held that proceedings thereunder were properly enjoined until it was made to conform to the law, the taxpayers should have been given a reasonable time, after the levy was amended, to pay the taxes before executions were issued. There is no complaint that a reasonable time has not been allowed for this purpose. The action of the county authorities is attacked as being invalid, and not furnishing a basis for the collection of taxes at all. In the case as presented to the trial judge, we see no error in any of his rulings.

Judgment on each bill of exceptions affirmed. All the Justices concur.

(2 Ga. App. 286)

**SCHOFIELD v. LITTLE.** (No. 306.)

(Court of Appeals of Georgia. July 10, 1907.)

**1. ERROR, WRIT OF—PRESENTATION AND RESERVATION OF ERROR—EXCEPTIONS TAKEN PENDENTE LITE.**

A plaintiff in error who has excepted in a proper bill of exceptions to the denial of his motion for a new trial may, at the hearing in this court, assign error on exceptions taken pendente lite to the overruling of his demurrer to the plaintiff's petition, though no mention of this interlocutory matter was made in the final bill of exceptions. Such exceptions pendente lite, if transmitted in the record, having once been certified, need not be certified again.

**2. SAME.**

When exceptions are made pendente lite to the ruling of the trial court, and error is not assigned thereon in the main bill of exceptions, error must be assigned, as to such interlocutory exceptions, before the beginning of the argument in this court, or, if there is no such argument, error may be assigned in the brief.

**3. WORK AND LABOR—IMPLIED PROMISE.**

There was no error in overruling the demurrer. The petition set forth, as a cause of action, a contract of employment, with an implied assumption for the reasonable value of the plaintiff's service.

**4. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

The extracts from the charge of the court to which exceptions are taken, numbered 1 to 6, when considered in connection with the entire charge, are not erroneous.

**5. ERROR, WRIT OF—REVIEW—ABANDONMENT OF ALLEGED ERROR.**

The charge of the court that "it is admitted by the defendant in this case that he [the defendant] owed the plaintiff for the trip to Milledgeville and attention to his brother while in jail" does not require a new trial, in view of the subsequent agreement of counsel for both parties that the defendant did make the admission as stated by the court. The admission is an abandonment of the contention of plaintiff in error on this point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

**6. CONTRACTS—ACTION FOR SERVICES—INSTRUCTIONS.**

To charge the jury that "a party to a contract has a right to recover when he has performed his service in pursuance of such agreement and contract" is equivalent to instructing the jury that the services must have been such as were called for by the contract, and must have been performed according to the terms of the contract. Both ideas are included in the words "in pursuance of."

**7. WRIT OF ERROR—REVIEW—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

The jury having returned a verdict finding for the plaintiff without naming an amount, it was not error for the court to instruct the jury, before they retired to perfect such verdict, that their verdict in favor of the plaintiff should be "for such a sum as the evidence shows the services rendered by the plaintiff in the case were reasonably worth." Such instructions were harmless, as, by reasonable intendment, the verdict announced by the jury was a finding in favor of the plaintiff for the full amount sued for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

**8. TRIAL—INSTRUCTIONS—SUFFICIENCY.**

Where the court in its charge fully defines to the jury the meaning of the contract and fully and fairly explains to them the contentions of both parties, as embodied in their respective understanding of its contents, the omission to further instruct the jury specially that they must determine what the contract was, its exact terms, the consideration, and the respective obligations, liability, and undertakings of each of the parties thereunder was immaterial. The evidence for the plaintiff clearly establishing all of the essentials, and the evidence for the defendant explicitly denying the same, the recital of the contentions of each party, fully and fairly, and appropriate instructions to the jury as to their finding in either event, dispensed with any statement that the jury should determine exactly what the contract was. If they believed the defendant, there was no contract as to the major portion of plaintiff's demand. If they believed the plaintiff, the court's rehearsal supplied the proper instructions.



## 9. WITNESSES — FEES — EXPERT — ADDITIONAL COMPENSATION.

While no statute in Georgia allows or prohibits fees to expert witnesses, and while there can be no charge beyond the legal fees of ordinary witnesses for attendance on the court in obedience to subpoena, still, as a physician cannot be required to make any examination or preliminary preparations, or to listen to the testimony, in order the better to give his opinion as an expert, he may for such services demand extra compensation.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action between J. S. Schofield and W. J. Little. From the judgment, Schofield brings error. Affirmed.

Miller & Jones, for plaintiff in error. M. Felton Hatcher and Richd. Curd, for defendant in error.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 395)

## TALLEY v. STATE (No. 537.)

(Court of Appeals of Georgia. July 25, 1907.)

### 1. CRIMINAL LAW — TRIAL — EXCLUSION OF WITNESSES.

While section 1017 of the Penal Code of 1895 gives the right to the state and the accused to have the witnesses of the other examined out of the hearing of each other, and directs that "the court shall take proper care to effect this object so far as practicable and convenient," yet this matter is within the discretion of the court, and its exercise will not be controlled unless manifestly abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1549.]

### 2. SAME—DISCRETION OF COURT.

Where the court, at the request of the solicitor and over the objection of the defendant, permitted a witness for the state to remain in court and assist in the prosecution, and said witness was first examined, there was no abuse of discretion.

### 3. SAME—EVIDENCE.

The evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Price Edwards, Judge.

A. C. Talley was convicted of crime, and brings error. Affirmed.

J. S. James and W. A. James, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 421)

## NAPIER v. BROWN. (No. 371.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

### 1. ERROR, WRIT OF—ASSIGNMENTS OF ERROR.

"Where the error alleged is the granting or denying of a new trial, one assignment of error is sufficient to reach all the grounds of the motion on which the grant or refusal is based." The motion to dismiss is therefore overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3037.]

## 2. NEW TRIAL.

The trial judge did not abuse his discretion in granting a new trial.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action between J. M. Napier and J. L. Brown. From an order granting a new trial, Napier brings error. Affirmed.

H. B. Simmons and Shipp & Sheppard, for plaintiff in error. Allen Fort & Son and Dykes & Nisbet, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 448)

## SAPP v. STATE (No. 623.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

### 1. HOMICIDE — VOLUNTARY MANSLAUGHTER — EVIDENCE.

"If upon a sudden quarrel the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is voluntary manslaughter, no matter who strikes the first blow." Gann v. State, 30 Ga. 67. The mutual intention to fight need not be proved directly, but may be inferred by the jury from the conduct of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 86, 478.]

### 2. CRIMINAL LAW—REVIEW.

There being evidence in the record upon which the verdict can legally rest, this court has no power to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3075.]

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Nelson Sapp was convicted of voluntary manslaughter, and brings error. Affirmed.

E. K. Overstreet, for plaintiff in error. Alfred Herrington, Sol. Gen., and H. A. Boykin, for the State.

POWELL, J. The accused shot at one Brannen; and the shot, straying, struck a boy standing by, and killed him. It is conceded that the offense is the same as if Brannen had been killed, instead of the boy; and, indeed, this seems to be the law. A verdict of guilty of voluntary manslaughter was rendered, and the insistence through the present writ of error is that this verdict is contrary to law and without evidence to support it. It appears from the record that, a day or so prior to the homicide, Brannen had ordered one of the defendant's boys out of a mill operated by Brannen's father. On the day of the fatal encounter the wife of the deceased came to the store near by the mill, and remonstrated with Brannen for his having ordered her boy out of the mill, and he made her leave the store. We will give the account of the further details of the transaction leading up to the shooting in Brannen's words, as taken from the record: "I looked out, and about half way between the

storehouse and the mill, which was about 50 yards distant, and I saw this man Sapp and his boy. He was sitting on a work bench, and I saw that he had a gun. I am pretty sure that he didn't have the gun in his hand, but, as well as I can remember, he and his boy were setting on the work bench, and the gun was leaning against an oak tree, about 20 or 30 feet from them; and I reasoned out in my own mind those negroes had been working there, but were not working there that day, and I had just decided that they had come there to attack me. So I picked up my father's gun that was left in the corner of the store, and I cocked it. It looked as if I was going to have trouble. Mr. Andrews says: 'What are you going to do, Harry?' And I says: 'I guess I had better prepare myself to defend myself.' And I started on, and he says: 'No; put the gun down.' And I took the gun and set it down there still cocked, and left it there setting in the corner and started over to my father's. When I got about half way, the negroes were still talking among themselves in a low tone of voice, and looked as if they were mad, and saying what they were going to do if I didn't let their boys have the privilege of going in the millhouse, and such as that; and this Sapp spoke up—the first time that he had spoke to me—and he says: 'Here is my boy now, and he can whip you.' And he says, if I remember right, 'We can fix you.' And he says: 'There is the boy right now.' And I says: 'What have you got to do with it? Shut your damn black mouth.' And he says, 'I will see,' or words to that effect, and jumped down off the bench, and run towards his gun, and I noticed he was making towards his gun. I was only a few feet distant from the store, and I broke and run back to the store and picked up my gun that I had left there, and run out, and, of course, the gun was already cocked, and as soon as I cleared the doorway I saw from the negro's actions that he was going to shoot. I judged that he was, at least, and, of course, I got ready to shoot, and as soon as I did clear the doorway, I did shoot one barrel. He shot also. The two guns—you couldn't distinguish one from the other. I have learned since, from the amount of shot that struck the store, that it was a very full charge at least in the gun." It further appears from the testimony of this witness that the defendant's gun was loaded with large shot. Further relevant portions of the testimony of this same witness are as follows: "I did go back to get a gun to shoot the negro. I did it to defend myself, for he was going after a gun to shoot me with. I started back to the store with the full determination of getting my gun to shoot the negro to defend myself. When I got to the door and got the gun, I immediately fired, and he did too at the same time. I know that my gun didn't fire first. I know that both guns were

fired so close together that you couldn't distinguish which one fired first. I claim that he was about as quick as I was. When I reached the door, the gun was sitting side of the door, and I picked up the gun and fired immediately. I didn't have to go inside of the store to get the gun. I just did clear the door before I fired. I had the gun on my shoulder when I fired. I don't know whether the negro had the gun to his shoulder when he fired or not. I don't know how he had his gun, because I was shooting myself. Before I started back to the store, he didn't have his gun in his hands. It was standing against the work bench. When the negro first accosted me, he was sitting on this work bench, which was I should say about 20 yards from the store, and I had got very near about opposite the work bench on my way to the mill before he spoke to me. I was about 30 feet nearer the store than he was. I didn't have to go straight. I was kinder across from the work bench. I was about 15 yards from the store when I turned and went back to the store. He would have had plenty of time to have shot me, but he didn't have his gun. It was leaning against the end of the work bench, and he was sitting on the other end of it. He jumped down off the bench and started to run. He was within, I should say, 25 feet of his gun. He was nearer his gun than I was to the store, but I don't think it was possible for him to have got his gun and shot me before I got in the store, because he had to get down off the bench and go to his gun and pick it up and cock it, and raise it in a shooting position. I don't know whether his gun was cocked like mine or not. It may have been, I don't know. So far as I know, it wasn't cocked. He would have had to move pretty fast if he had shot me before I got back to the store, because I was moving pretty fast. The reason, one reason I know he was going for his gun, he said: 'We come here prepared for you.' And I was having the argument with him. It was an opinion of mine, a strong belief. When I started out there, Mr. Andrews requested that I leave the gun on the inside, and I left it there. I was expecting a difficulty, and only intending to defend myself. This woman had been in the store and raised this difficulty and went out there; and they were talking among themselves, and when I got a part of the way across the defendant here says, 'We come to fix you,' and then he got down and started for his gun, or started in the direction of it. I don't remember really whether the gun was leaning against the end of the work bench or against a tree nearby. When he turned and started, he went in the exact direction of the gun, and I knew there wasn't anything else for him to be going for. So I went for mine, and when I shot I saw him with his gun to his face; it was just a glance, only a few seconds." The shot

fired by the defendant struck the boy. The defendant by his statement set up a complete case of self-defense. There was other evidence for the state, but since, if there was any theory of the evidence by which the jury could have reached the verdict rendered (and that set out above seems to us to authorize it), we are bound to adopt it and affirm the judgment. There being no other error assigned, we do not deem it necessary to set out more than we have already done. The verdict seems to be warranted upon the theory of mutual combat. The words and conduct of the defendant as detailed above seem to us to have authorized the jury to believe that the defendant was willing to fight the matter out, and that Brannen accepted the implied challenge. "If upon a sudden quarrel the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is voluntary manslaughter, no matter who strikes the first blow." *Gann v. State*, 30 Ga. 67, and citations. This principal case has been frequently cited by our Supreme Court in subsequent cases, and is a clearly recognized principle of our law. It may be true that at the time the defendant actually fired the person at whom he shot was trying to kill him; but, before this fact can be set up in justification under Pen. Code 1896, § 73, which is applicable in cases of mutual combat, "it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." *Stiles v. State*, 57 Ga. 188; *Heard v. State*, 70 Ga. 602. If the testimony of Brannen be true, the defendant, by rushing for a weapon, coupled with a threat and an apparent present purpose of using the weapon, became the assailant, and there is no evidence that he declined any further combat. According to the record, the parties, by their mutual preparations for the encounter, by their quarrel, by their language expressing willingness to fight, by their simultaneous display, and use of deadly weapons, made just such a case of mutual combat as is contemplated by the language used in *Gann's Case*, supra.

Judgment affirmed.

(2 Ga. App. 406)

HARRIS v. STATE. (No. 588.)

(Court of Appeals of Georgia. July 25, 1907.)

1. CRIMINAL LAW—INSTRUCTIONS—HARMLESS ERROR.

Where it appears, without contradiction, in the evidence, that the offense alleged to have been committed, if committed at all, occurred within two years prior to the filing of the accusation, an instruction that the state only has to prove that the transaction "happened two years prior to the date alleged in the accusation," was a harmless error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

2. SAME—RULES OF EVIDENCE.

Rules of evidence, especially addressed to the discretion of the court, are not appropriate subject-matter of instructions to the jury, but those given the jury in this case could not by any possibility be harmful to the plaintiff in error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1877-1882.]

3. SAME.

Where the jury has been properly and fully instructed with reference to the statement of the defendant, it is not necessary, in the absence of a written request, to contrast the statement with the evidence or to give in charge to the jury any theory dependent upon the statement alone. Nor is it error to instruct the jury to take the testimony and the law as given in charge, and apply it to the testimony, and decide whether or not they believe the defendant did commit the offense alleged against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2005.]

4. SAME—WEAPONS—CARRYING WEAPONS—EVIDENCE—REVIEW.

The verdict is authorized by the evidence, and, being approved by the trial judge, it will not be set aside for slight errors which could neither have induced nor have contributed to the finding of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Edward Harris was convicted of carrying a concealed pistol and pointing the pistol at another, and he brings error. Affirmed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

RUSSELL, J. Ed. Harris was arraigned in the city court of Sylvester, at the April term, 1907, upon two accusations; one charging him with the offense of carrying a concealed pistol, and the other charging him with the offense of pointing a pistol at another, both cases growing out of the same transaction. The two cases were tried together, and the jury returned a verdict of guilty in both cases. Harris thereupon filed his motion for new trial in both cases; and, his motions being overruled, he brings writs of error to this court.

The plaintiff in error insists that it is not sufficiently shown by the evidence that the transaction testified to by the witness for the state was within the statute of limitations. This is the only assignment of error based upon the evidence; and we think it without merit, for the reason that, while the witness could not be certain that the occurrence to which she was testifying was in the year 1905, still she swore positively that it was on the third Sunday in February of year before last. As the trial was had in 1907, and the accusation was preferred in 1906, the testimony was amply sufficient to show that the offense was committed within two years prior to the accusation. The remaining exceptions are all predicated upon alleged errors in the charge of the court.

The fourth, fifth, sixth, seventh, and eighth grounds of the motion all relate to the charge of the court on the subject of impeachment. Under repeated decisions of the Supreme Court, it would not have been erroneous for the court to have omitted altogether the charge upon this subject; at least, not such an error as would grant a new trial. We find no error in the instructions as given to the jury upon this subject; and, if a fuller charge was desired, it should have been requested. A brief recapitulation of these grounds convinces us that there was no error in the charge of the court on the subject of impeachment and the credibility of the witnesses that can, under any previous decision, be held to have been harmful to this defendant.

The fourth ground of the motion complains that the court erred in charging the jury that "It is the duty of the jury to make all the witnesses speak the truth, if that can be done, and not impute perjury to any witness." In view of the conflicts in the evidence of the prosecutrix, Margaret Caldwell, and the witness Tison, on the one hand, and J. O. Rogers, on the other, there is no merit in this exception.

In the fifth ground of his motion the defendant assigns the following charge of the court as error: "If there be a conflict between the testimony of witnesses, it is your duty to reconcile the conflicting testimony, and, if this cannot be done, then you are to give credit to those witnesses which, in your opinion from all circumstances of the case, are most entitled to credit; the jury being always the judges of the credibility of the witnesses." The plaintiff in error contends that this charge of the court was not authorized by the evidence; and, further, that it put the jury to seeking a conflict, impressed the fact that the defendant had not brought witnesses to court to contradict the state's witnesses, and, further, that the court, having attempted to give the jury the rules for determining the credibility of the witnesses, did not instruct them with that fulness and clearness required by law. In support of the last statement counsel cites the decision in *Rouse v. State*, 58 S. E. 416, that "reference in the charge to subjects upon which, by law, no charge is necessary without request, requires that the jury be properly instructed on such subjects thus referred to." We think this charge is authorized by the evidence, and that it does not put the jury to seeking a conflict, because one already existed; nor does it, in any sense, contain any intimation, as contended by plaintiff in error, that defendant had not brought witnesses to court to contradict the state's witnesses. In so far as the decision in the *Rouse Case*, supra, is concerned, the charge is not in conflict with the principle therein announced, because the only subject in which reference is made in the excerpt quoted is to the duty

of the jury where there is a conflict in the evidence, and the rule in such event is fully and correctly given by the statement that it is the duty of the jury to reconcile any such conflict, if possible, and that if this cannot be done, the credit is rather to be given to those witnesses which, in the opinion of the jury, are most entitled to credit. This is a very general and absolutely harmless reference of the testimony to the jury, without any reference to any of the rules by which they should measure the credibility of the witnesses. The principle announced in the *Rouse Case* would have been violated if the court had referred to any one or more of the circumstances by which the credibility of the witnesses may be measured, and in the same connection had omitted to mention other circumstances usually referred to the jury to be used by them in weighing the testimony. For instance, if the court had called the attention of the jury to the fact that they might consider the witnesses' manner of testifying, their intelligence, their means and opportunities of knowing the facts as to which they testified, and the nature of the facts to which they testified, it would have been error not also to have called the attention of the jury to the fact that they should consider the probability or improbability of the testimony and the interest or lack of interest of the witnesses, as well as their personal credibility, so far as the same might legitimately appear from the trial. In other words, to use the principle in the *Rouse Case* as it is sought to be applied by counsel for plaintiff in error, the judge would have had to refer to one or more of the circumstances which may tend to affect the credibility of the witnesses. If he had done so, he would have been required to charge fully upon the subject. But as he was not required, in the absence of request, to charge upon this subject, there was no error in not referring at all to any of the rules by which the credibility of witnesses is measured. So far as the conflict in testimony was concerned, the excerpt, taken in connection with the whole charge, was properly given and sufficiently full in the absence of a written request.

The sixth, seventh, and eighth grounds assign error on extracts taken from the charge. That portion of the charge referred to by these three exceptions is as follows: "A witness may be impeached by disproving the facts testified to by him. A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case; but, before contradictory statements can be proved against him, his mind should be called with as much certainty as possible to the time, place, person, and circumstances attending the former statement for laying the foundation before introducing such testimony. A witness may be impeached by evidence of

general bad character. The impeaching witness should be first asked as to his knowledge of the general character of the witness; and, next, as to what that character is; and, lastly, he may be asked if, from that character, he would believe him on oath. The witness may be sustained by similar proof of character." We cannot fully approve this extract from the charge, for the reason that it was not proper to give to the jury rules which are especially addressed to the discretion of the court; but we fail to see how this could have been harmful to the defendant. This case is not similar to that of *R. & D. R. Co. v. Mitchell*, 92 Ga. 83, 18 S. E. 290, to which we are cited. Chief Justice Bleckley in that case says: "We have scrutinized the evidence very carefully, and there is no conflict in it on any material issue, and no charge upon the subject was appropriate. No harm would have been done by an instruction merely to reconcile conflicts in the evidence, if any existed and if the jury could reconcile them; but to put the jury on the lookout for other witnesses, witnesses not introduced or accounted for, was rather a dangerous thing, and every one knows to which of the parties this was dangerous." The charge excepted to in that case was: "If you find, from the evidence, that there is a conflict, \* \* \* and you should find that there is a witness or witnesses accessible whose evidence would throw light upon that issue, and that witness or those witnesses were not introduced or accounted for, that circumstance may be considered by you in passing on that issue." There is nothing similar to this in the case at bar, and there is conflict in the evidence, especially between the prosecutrix and the witness Rogers. In the *Mitchell* case, *supra*, the Supreme Court held that the vice in the charge then under consideration was that the court assumed that by possibility the jury might find a conflict in the evidence. In this case the conflict really exists.

In the ninth ground of the amended motion error is assigned as to the following charge: "The state contends that this defendant did on the occasion alleged in the accusation, or within two years prior to that date—that being all that the state has to do in a criminal case, is to prove the transaction alleged in the accusation or indictment having happened two years prior to the date alleged in the accusation," etc. The charge complained of is not a correct statement of the law. The court should have instructed the jury that the state must prove the alleged offense to have been committed within two years prior to the finding of the indictment, or the filing of the accusation, as the case may be. But no harm could have resulted to the defendant, inasmuch as the evidence was uncontradicted that the offense, if any, was committed within less than two years prior to the date of the accusation. If there

were conflict in the evidence as to this point, it would be so vital as perhaps to require a new trial. There being no dispute as to this phase of the case, the inaccuracy in the charge of the court falls into the category of harmless errors.

Exceptions are taken, in the tenth ground of the motion, to the charge of the court for failure to instruct the jury as to what facts constitute the crime referred to in the accusation; and complaint is made also that the extract therein contained is an intimation by the court to the jury as to the evidence. The charge complained of is as follows: "The state alleges and contends that they have proven that this defendant did have and carry about his person, not in an open manner and fully exposed to view, a certain pistol." Were this extract the only statement of the court upon the subject, we might concur in the argument with the learned counsel for plaintiff in error that the charge is erroneous. But an examination of the entire charge shows that the court defined to the jury, at the very outset of his instructions, and in the very language of the Code, both of the offenses for which the defendant was being tried. In the absence of request for fuller explanation to the jury, the definition afforded in the terms of the statute is sufficient, and the lack of further instruction is not reversible error.

The complaint in the eleventh ground of the motion is that the court eliminated the defendant's statement from the consideration of the jury by concluding with the following injunction to the jury: "You take this testimony, gentlemen, and the law as given you in charge, and apply it to the testimony, and decide whether or not you believe the defendant did commit either offense or both offenses alleged against him." The jury were properly instructed as to the defendant's statement in another portion of the charge. The statement is not in any technical sense evidence; and, the court having already referred properly to the statement, there was no error in the charge above quoted, nor did it eliminate the statement from the consideration of the jury.

Upon a review of the entire charge, with exception of the errors to which we have referred, and which, in our judgment, were clearly harmless, the case was fairly submitted to the jury. With the credibility of the prosecutrix at issue, with the contentions of the defendant as fairly stated as those on the part of the state, with no expression of opinion on the part of the trial judge to induce their finding, we are not prepared to say that the jury erred in their verdict, or that the court erred in sustaining it by overruling the defendant's motion for new trial. Upon first view the assignments of error seemed grave, but, considered in connection with the charge as a whole, they either disappear from sight or become so shrunken as to afford no ob-

struction to administration of the law. As said by Chief Justice Bleckley in *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13: "A charge torn to pieces and scattered in disjointed fragments may seem objectionable, although, when put together and considered as a whole, it may be perfectly sound. The full charge being in the record, what it lacks when divided is supplied when the parts are all united. United they stand, divided they fall."

Judgment affirmed.

#### HARRIS v. STATE. (No. 587.)

(Court of Appeals of Georgia. July 25, 1907.)

##### WEAPONS—CARRYING WEAPONS.

This case is controlled by the decision in the companion case, *Harris v. State*, 58 S. E. 669.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Ed Harris was convicted of pointing a pistol at another, and brings error. Affirmed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(2 Ga. App. 392)

#### NEWSOME v. STATE. (No. 523.)

(Court of Appeals of Georgia. July 25, 1907.)

##### 1. INDICTMENT—TIME OF COMMITTING OFFENSE—ALLEGATIONS—CERTIFYING QUESTION TO SUPREME COURT.

This case is controlled by prior decisions of the Supreme Court, which, in the opinion of this court, are based upon sound reason. No sufficient cause appears for certifying the point involved to the Supreme Court, or for asking that court to review and overrule its previous decision upon the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 253.]

##### 2. SAME—MOTIONS IN ARREST—EXCEPTIONS TO INDICTMENT.

Exceptions which go merely to the form of the indictment or accusation, if not taken before joinder of issue, are considered to be waived. They cannot be reached by a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 629.]

(Syllabus by the Court.)

Error from City Court of Moultrie; R. L. Shipp, Judge.

Ed. Newsome was convicted of an illegal sale of intoxicating liquors, and brings error. Affirmed.

J. D. McKenzie, Alfred Kilne, and James Humphreys, for plaintiff in error. W. F. Way, Sol., for the State.

RUSSELL, J. The plaintiff in error was convicted on the 16th day of May, 1906, upon an accusation filed that day, in which he was charged with the offense of selling intoxicating liquors in Colquitt county on the 29th

day of October, 1907. He waived arraignment, copy of accusation, and list of witnesses, and pleaded not guilty. He did not demur to the accusation. On the trial the evidence showed that he had made a sale of spirituous liquor in Colquitt county on the 29th day of October, 1906. He moved the court to direct a verdict of not guilty, on the ground that the accusation alleged a crime at some subsequent day or impossible date, and that the accusation was not sufficient, on account of this date, to authorize a conviction. The court overruled this motion, and, after argument and the charge of the court, a verdict was rendered finding defendant guilty. On the same day the defendant made a motion in arrest of judgment, upon the following grounds: First, "because the accusation, upon which defendant was tried, alleged and charged that the crime was committed on a day and time subsequent to the day and time of filing the accusation and the trial thereon; the day of filing being May 16, 1906, and the day and time alleged and charged in said accusation being October 29, 1907"; second, "because the verdict and judgment is void and of no effect, based upon an accusation charging a crime subsequent to the date of filing said accusation." The motion in arrest of judgment was overruled. The plaintiff in error excepts to the refusal to direct a verdict of acquittal, and to the judgment in overruling his motion in arrest of judgment.

The only question in the case is whether conviction was warranted on the accusation as written. The insistence of the plaintiff in error, that every indictment or accusation, to support a valid conviction, must charge the crime to have been committed on a definite date previous to the finding of the indictment or filing of the accusation, even though the proof might be any time within the statute of limitations, is not a new one in this state. Counsel for plaintiff in error recognize this fact, and on that account request that we certify this case to the Supreme Court in order that that court may review and reverse the decisions in *McMath v. State*, 55 Ga. 303, *Jones v. State*, 55 Ga. 625, *Williams v. State*, 55 Ga. 391, *Harris v. State*, 58 Ga. 333, *Johnson v. State*, 90 Ga. 444, 16 S. E. 92, *Adkins v. State*, 103 Ga. 5, 29 S. E. 432, *Spencer v. State*, 123 Ga. 133, 51 S. E. 294, and other similar cases. If the decision in *Adkins v. State*, supra, were the last utterance of our Supreme Court upon the point, and if the Supreme Court had not so recently passed upon the question, as in the case of *Spencer v. State*, we would be inclined, simply on account of the intimation in the *Adkins Case*, to certify the case to the Supreme Court as requested. Regardless of the decisions in other states, and as to whether the Supreme Court was wrong in basing the decisions in the cases of *McMath* and *Jones* upon the case of *Conner v. State*, 25

Ga. 515, 71 Am. Dec. 184, we think that the late on which the offense is laid is immaterial, unless the defendant, before pleading to the merits, demurred thereto. The defendant must demur before pleading, or else he will be held to waive his right to have the essential elements of time and place stated with the certainty required by the Code. In *Harris v. State*, 58 Ga. 333, Jackson, J., delivering the opinion, says: "This court has often held that after arraignment and plea the indictment alleging an impossible day or the day after the bill was found true would be held good, but not where it was excepted to in time on special demurrer in writing." In *Bailey v. State*, 85 Ga. 411, the court held that an indictment naming neither a day nor month was defective, and should be quashed on special demurrer before the arraignment; but cited the *Harris Case*, and said that the defendant was entitled, if he demanded in time, to have a perfect indictment in form as to the essential elements of time and place, and when he demurred specially, before arraignment, he ought to have the time stated with reasonable certainty at least. The Penal Code requires that all exceptions that go merely to the form of the indictment shall be made before trial. If they are not made then, they are held in contemplation of law to be waived. *Hill v. State*, 41 Ga. 484, 86 Ga. 427. The case cannot be made stronger when an impossible date is stated than when no date is stated at all; and yet it was held in *Phillips v. State*, 12 S. E. 650, and *Braddy v. State*, 102 Ga. 568, 27 S. E. 670, that a defect in an indictment in not alleging any date or month when the alleged offense was committed must be taken advantage of before arraignment, and that it is too late after conviction to make the point for the first time.

Judgment affirmed.

(2 Ga. App. 298)

#### MILL v. STATE.

STATE v. MILL. (Nos. 552, 629.)

(Court of Appeals of Georgia. July 25, 1907.)

#### 1. CRIMINAL LAW — INSTRUCTIONS — PREPONDERANCE OF EVIDENCE.

The law of the preponderance of evidence is not applicable in criminal cases; and, where in a particular case there is testimony in behalf of the state and the defendant, and the issue to be determined depends upon the weight which the jury may give to the conflicting evidence, it is error to charge said law.

#### 2. SAME — REASONABLE DOUBT.

The only appropriate charge in a criminal case on the subject of the weight of evidence is the fundamental principle that the state is required to prove the guilt of the accused beyond a reasonable doubt.

#### 3. SAME — POSITIVE AND NEGATIVE TESTIMONY.

The law of positive and negative testimony was not applicable to the facts of this case, and a charge thereon was calculated to confuse and mislead the jury, and was especially erroneous

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without an instruction that in weighing the testimony of witnesses the jury should also consider and pass upon their credibility.

#### 4. SAME — NEW TRIAL.

The evidence indicating the guilt of the defendant is weak and not entirely satisfactory; but there is some slight evidence to support the verdict, and we cannot hold that the court erred in the exercise of its discretion in refusing to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

#### 5. SAME — CROSS-BILL BY STATE — COSTS.

There is no law by which the state can maintain a cross-bill of exceptions in a criminal case; and in such a case, there being no provision of law for taxing the cost against the state, the cost will be taxed, under Civ. Code 1895, §§ 5512, 5501, against the solicitor bringing the cross-bill.

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Otto Mill was convicted of maliciously killing a hog, and brings error, and the state assigns cross-error. Reversed.

See 57 S. E. 969.

E. L. Stephens, for plaintiff in error. J. L. Kent, Sol., for the State.

HILL, C. J. Otto Mill was convicted in the city court of Wrightsville on an accusation charging him with the offense of maliciously killing a certain described hog. He filed a motion for a new trial, which was overruled. This is the second time that plaintiff in error has appeared before this court. The verdict of guilty against him was set aside in the first instance because of the failure to prove the venue.

If we had authority to do so, we would be inclined to set aside the verdict and grant a new trial on the ground of the weakness of the evidence for the state; but, if the jury believed the prosecutor, there was some evidence on which a verdict of guilty could have been predicated, and therefore we cannot hold that the trial judge abused his discretion in refusing to grant a new trial. The only evidence against the defendant is that of the prosecutor, who testified that he found his hog dead just outside of the field of the defendant with wounds upon its body, indicating that death had been caused by violence, and the statement by the defendant to him that he had killed the hog and thrown it over the fence. This confession was denied by the defendant, and there was much evidence in his behalf which tended to prove that no hog had been killed by him, several witnesses swearing that they had made diligent search at and near the place where the prosecutor located the body of the dead hog, without finding it, and several other witnesses testified that they had seen the hog described by the prosecutor as having been killed subsequently alive in the prosecutor's lot, and there were no marks upon its body ex-

cept that its tail had been recently bitten off or cut off. The defendant stated, on his trial, that the hog in question had been committing depredations in his cornfield, and that he set his dog on it to run it out, and that the dog had bitten off the hog's tail. The prosecutor testified that this tailless hog was not the one that the defendant had killed, but that this hog had been without a tail since its "plghood." In addition to the weakness of the evidence indicating guilt, there was shown to be a very bad state of feeling between the prosecutor and the defendant. In view of the character of the evidence, we think the court erred:

1. In charging the law of the preponderance of evidence. The entire charge of the court is not given in the record. The excerpt from the charge on the subject of the preponderance of evidence led the jury to believe that they would be authorized to base a conviction on the greater weight of the evidence. We think, under the facts of this case, that this instruction was not only calculated to mislead the jury, but was hurtful to the defendant. This is especially true where there was, as in this case, only one witness for the state and many for the defendant, and the court told the jury that, while they could consider the number of witnesses in deciding upon the weight of the evidence, the preponderance was not necessarily with the greater number. *Williams v. State*, 125 Ga. 302, 54 S. E. 108; *Jackson v. State*, 125 Ga. 101, 53 S. E. 607.

2. The court charged the jury the law of positive and negative testimony as defined in Pen. Code 1895, § 985. This charge was not applicable to the facts of the case, and was calculated to mislead and confuse the jury. Besides, the court, in this connection, failed to instruct the jury that in weighing the testimony of the witnesses they should also consider and pass upon their credibility. This, we think, was error. *Wood v. State*, 1 Ga. App. 684, 58 S. E. 271; *Phillips v. State*, 1 Ga. App. 687, 57 S. E. 1079.

3. Error is also assigned because the court failed to charge the jury the law of confessions; it being insisted that such law was especially applicable in this case, where the only evidence incriminating the defendant was his confession, and this confession was corroborated only by circumstances proving the corpus delicti. While we think that such charge would have been appropriate to the facts of this case, we cannot hold that court committed error in not so charging where there was no request to do so.

For the reasons stated in the second and third paragraphs in the foregoing opinion, the judgment refusing a new trial is reversed.

There is no law in this state authorizing the state to maintain a cross-bill of exceptions in a criminal case.

Judgment reversed.

(2 Ga. App. 428)

CENTRAL OF GEORGIA RY. CO. v. LEWIS. (No. 438.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

1. DISCOVERY—PRODUCTION OF BOOKS AND PAPERS—MATERIALITY—QUESTION FOR COURT.

Summons of garnishment having been served upon a corporation, and it having answered by its agent, denying that it had any money, property, or effects belonging to the defendant, which answer was traversed by the plaintiff, who thereupon served the garnishee with notice to produce certain vouchers and original checks, as well as certain letters described in the notice, which were not produced, it was error for the court to pass an order peremptorily requiring the production of such papers until satisfied by competent evidence that the contents of such papers were in fact necessary and material to the issues involved between the parties. It was therefore error to render judgment against the garnishee in pursuance of such peremptory order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 115.]

2. SAME.

The determination of the materiality of evidence involves the exercise of a judicial function; and the conclusion of a witness that the contents of a paper are material, where there is no proof as to what the paper contains, is no proof that the papers sought to be produced are in fact necessary, and cannot relieve the court from the duty of passing upon the question of materiality.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by W. C. Lewis against the Macon Fair Association. A writ of garnishment was served on the Central of Georgia Railway Company. Judgment for plaintiff on the garnishment, and the railway company brings error. Reversed.

R. D. Feagin and Wimberly & Jordan, for plaintiff in error. Hardeman & Jones, for defendant in error.

RUSSELL, J. The defendant in error brought a suit against the Macon Fair Association, and had summons of garnishment served upon the plaintiff in error, the Central of Georgia Railway Company. The garnishee answered that it was not indebted, and the plaintiff (present defendant in error) traversed that answer. On April 1, 1907, the court entered judgment against the garnishee as in case of default for \$1,301.31, and to this judgment the garnishee excepts.

The action of the court was based upon the failure or refusal of the plaintiff in error (the garnishee in the lower court) to satisfactorily respond to a notice to produce, and upon a refusal thereafter to produce certain vouchers and other papers after being required so to do by order of the court. Error is assigned upon this order of the court rendering judgment by default, and complaint is also made that there was no proper service of the notice to traverse. It ap-



pears from the record that "on Saturday, March 30, 1907, the case was called for trial before the judge without a jury; and counsel for the garnishee asked for further time within which to respond to a notice to produce, filed in said case by the plaintiff and served upon counsel for the garnishee on March 16, 1907, stating that the garnishee had endeavored to get the papers called for, but had been unable to hear from the agents of the garnishee in Savannah, Ga., in whose custody the papers (if in possession of the garnishee) were." The notice filed in the case, and to respond to which counsel for garnishee requested additional time, was as follows: "To the Central of Georgia Railway Company: You are hereby notified to produce upon the trial of the said case in the city court of Macon, to be used as evidence for the plaintiff, the originals of all vouchers issued by the Central of Georgia Railway Company to the Macon Fair Association, or to Eugene Anderson, secretary of said Macon Fair Association, or to Bridges Smith, president of said Macon Fair Association, or to any other officer or agent of said Macon Fair Association, or to any one else for said Macon Fair Association; also the original checks with which said vouchers were paid; also the copies retained by the Central of Georgia Railway Company of all letters transmitting said vouchers, or any of them." This was signed by the plaintiff's attorneys, and an acknowledgment of service thereon, dated March 16, 1907, was signed by Mr. Feagin as attorney for the garnishee. Counsel for garnishee stated in his place that he had delivered the notice to produce (the copy) to Messrs. Wimberly & Jordan, division counsel, at Macon, Ga., on March 20, 1907, his first opportunity to do so after receiving it from plaintiff's counsel, and that the division counsel at once, on March 20, 1907, wrote to the proper authorities at Savannah, requesting that the papers called for by said notice be forwarded to Macon at once, if in the possession of the garnishee, and that no reply had been received as yet to said request. The court then announced that counsel would be given until 9 o'clock Monday morning, April 1, 1907, to respond to said notice and to produce said papers, and, over the objection of counsel for the garnishee, passed the following order and judgment: "The within notice to produce having been duly served on March 16, 1907, and it appearing that the papers required are in existence and are in possession, power, and control of the garnishee, the person notified to produce the same, and that said papers are material to the issue, it is so found, and it is thereupon ordered that the garnishee, the Central of Georgia Railway Company, do have and produce the papers described in the within notice before the court on April 1, 1907, at 9 o'clock

a. m., or, in default, that judgment be entered thereon and thereupon against said garnishee as in case of judgments by default. This March 30, 1907." The plaintiff in error contends that this judgment was error, because there was no evidence before the court upon which to base it. The judge certifies that "counsel for the party giving notice stated in his place that the papers called for were material to the case, and that they were in the custody of the garnishee in the city of Savannah, Ga., and were not in the custody or control or possession of the applicant, and that as a matter of fact the applicant could get along if one little voucher were produced under the notice, and that the same was in garnishee's possession in Savannah, Ga. Counsel for the garnishee then said that he wanted further time to produce this voucher which was in Savannah, and the court then asked would Monday following be sufficient time." On Monday, April 1, 1907, before the case was called by the court for trial, counsel for the garnishee filed the following demand in writing for a jury: "Now comes the Central of Georgia Railway Company, garnishee in the above-stated case, and at the term of court at which said garnishment was answered and before the trial of the issue raised by the traverse to the answer of the garnishees filed in said case, and in terms of the law, demands a trial by jury, on the issue raised by the traverse in said case." Signed by the garnishee's attorney. When the case was called, counsel for the garnishee called the court's attention to this demand and insisted that the same be allowed; but the court refused to consider said demand, holding that the same was not in order, and called upon the garnishee to know if it were ready to respond to the notice to produce.

Two questions are raised as presented by the record, to wit: Should the traverse have been dismissed? Did the court err or abuse its discretion in entering judgment by default, because of the failure of the garnishee to produce the voucher? A notice to produce is a harsh procedure, and the law relative thereto must, for that reason, be strictly construed and followed closely. We think the court erred in granting the peremptory order requiring the garnishee to have the papers in court by 9 o'clock a. m. of April 1, 1907, and also in the judgment rendered in favor of the plaintiff against the garnishee. The learned counsel for defendant in error would be right in his conclusion of law if his premises were correct. The court should have had evidence before it on which to base the proceedings taken, and the party giving them notice (defendant in error) should have made the showing required by Civ. Code 1895, § 5250. Counsel for defendant in error relies upon the recital of the court in the bill of exceptions that

"counsel for the party giving notice stated in his place that the papers called for were material to the case, and that they were in the custody of the garnishee in the city of Savannah, Ga., and were not in the custody or control or possession of the applicant, and that as a matter of fact the applicant could get along if one little voucher were produced under notice, and that the same was in garnishee's possession in Savannah, Ga." This evidence was competent and sufficient in some respects, and yet it was fatally defective in a most important particular. It was shown that the voucher was in Savannah by the admission of the counsel for the garnishee, and he asked for time in which to produce it, and, although it was not necessary, under the ruling in *Morrison v. Hilburn*, 126 Ga. 114, 54 S. E. 938, the judgment was introduced in evidence, but there was no evidence as to the contents of the paper sought to be produced, nor that they were material to the issue, and, for this reason, the court should not have granted the peremptory order in the first place, and rendered a judgment in favor of the plaintiff and against the garnishee thereafter. It is true that, according to the certificate of the presiding judge, counsel stated that the papers called for were material, but this was a mere conclusion of the witness, and not competent evidence, which substituted the judgment of the counsel as to the materiality of the testimony for that of the court, and so far as the trial court knew or could know, and so far as this court can know, there is not a single fact as to the contents of the papers in question from which it can be judicially determined whether the contents of the papers sought to be produced are or are not material to the issue, and as to whether the witness was or was not correct in his conclusion of law. At any rate, in the exercise of harsh remedies, the law should be strictly construed. It would have to be very loosely construed for the statement of a witness, no matter how truthful, that the contents of a certain paper or papers are material to be allowed to oust the judicial function of passing upon the materiality of evidence. Had the trial judge, upon evidence of the contents of the vouchers, properly held them to be material, we might be able to determine, upon review, that such evidence was material, and for that reason, we might be prepared to say that the judgment rendered against the garnishee was correct. In the absence of such evidence, the judge could not say that the evidence was material. Nor can we. It is unnecessary to discuss the remaining assignments of error, for the reason that the error of the judge in passing upon the case without sufficient evidence goes to the root of the whole case and demands a new trial.

Judgment reversed.

(2 Ga. App. 481)

**LEE v. STATE. (No. 556.)**

(Court of Appeals of Georgia. Sept. 19, 1907.)

**HOMICIDE—VOLUNTARY MANSLAUGHTER—EVIDENCE—INSTRUCTIONS.**

The verdict of the jury is sustained by the evidence, the law was correctly presented by the trial judge in his charge, and no reason appears why a new trial should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 86, 430-437.]

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Will Lee was convicted of manslaughter, and brings error. Affirmed.

Watterson & Blalock, Candler, Thomson & Hirsch, and R. L. D. McAllister, for plaintiff in error. W. S. Howard, Sol. Gen., for the State.

**RUSSELL, J.** The plaintiff in error was indicted for murder, and convicted for voluntary manslaughter. He excepts to the overruling of his motion for a new trial, and assigns error as to certain instructions given by the trial judge in his charge to the jury, as well as upon the judge's refusal to charge. He complains of the admission of evidence as to dying declarations and of the failure of the state to introduce the testimony of a certain witness. In view of the fact that the plaintiff in error was only found guilty of voluntary manslaughter, and not of murder, some assignments of error are immaterial in their effect on the defendant; but we will consider each assignment *seriatim*.

The first assignment of error alleges that the charge of the court confused the provisions of sections 71 and 73 of the Penal Code of 1895, and tended to create upon the minds of the jury the impression that the provisions of section 73 qualify and limit the provisions of section 71. It is well settled that section 73 does not qualify or limit the law of justifiable homicide contained in section 71, Pen. Code 1895. Section 73 applies exclusively to cases of self-defense in a mutual combat in which both parties have been at fault. Section 71 refers to cases of apparent danger when the homicide is committed in good faith to prevent the commission of any of the offenses mentioned in section 70, or under the fears of a reasonable man that such an offense will actually be committed unless the person who is actually or apparently about to commit the wrong be killed. Our Supreme Court has held that "Instructions as to these two branches of the law of justifiable homicide should not be so given as to confuse the one with the other." In the cases of *Teasley v. State*, 104 Ga. 738, 30 S. E. 938, and *Ragland v. State*, 111 Ga. 211, 36 S. E. 682, new trials were granted because the practical effect of the charges therein complained of was to deprive the defendant of any right of self-defense unless his life were actually in dan

ger, while as a matter of law the defendant had an equal right to kill in order to prevent a felony upon his person or as to his property.

In this case the trial judge, after charging the jury that "if, at the time of the killing of White by the defendant (if the defendant is shown to have killed White), the circumstances were such as to excite the fears of a reasonable man that a felony was about to be committed on his person, and if, under the influence of such fears, if such existed, Lee shot and killed White, he would not be guilty of any offense, but would be entitled to a verdict of not guilty," and repeating the same principle by instructing the jury, "If you believe from the evidence or from the defendant's statement the deceased was not, at the time he was slain by the accused, attempting to commit a felony on the person of the accused by taking his life or otherwise, yet if the circumstances at the time were such to the defendant as a reasonable man that he believed it was necessary for him to shoot and kill in order to save himself from an assault amounting to a felony upon him, the killing would be justifiable," proceeded to say: "If a person kill another in self-defense, it must appear that the danger was urgent or was apparently so to the defendant at the time of the killing; that in order to save himself from a serious personal injury, or to save his own life, the killing of the other was absolutely necessary. It must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle when the mortal blow was given."

We are of the opinion that, had the court charged section 73 in immediate connection with the instructions first quoted, the exception might have been well taken, because the jury might have been confused; but the judge, after saying that it must appear that the danger was so urgent and pressing, also referred to the other separate defense by adding, "or was apparently so to the defendant," and instead of limiting the jury to a killing done in order to save the defendant's own life he adds as an additional right of the defendant the right to kill "to save himself from a serious personal injury," so that, instead of confusion, the legal right contained in sections 71 and 73 were both clearly presented to the jury. One who slays another can only claim immunity under the doctrine of absolute self-defense when the danger is urgent and pressing, and the danger must at least appear to be equally as urgent and pressing before the doctrine of reasonable fears will apply. "The doctrine of reasonable fear as a defense does not apply in any case of homicide where the danger apprehended is not urgent and pressing, or apparently so at the time of the killing." *Jackson v. State*, 91 Ga. 271, 18 S. E. 298 (1), 44 Am. St. Rep. 22. In the case of *Williams v. State*,

120 Ga. 873, 48 S. E. 368, it was insisted that an instruction similar to the one of which complaint is made in this case was not applicable, and could only be applicable in a case where the evidence disclosed a mutual intent to fight; but the Supreme Court refused to concur in that view.

Plaintiff in error also insists that the law contained in section 71 of the Penal Code of 1895 is confused with that contained in section 73, and that the impression was created upon the minds of the jury that the law contained in section 73 qualified and limited that contained in section 71, by the following charge of the court: "If you have a reasonable doubt, gentlemen, as to whether the defendant acted, when he shot, under circumstances calculated to excite the fears of a reasonable man, or whether he felt at the time he shot, or had reason to feel from the circumstances, that it was necessary to shoot to save his life, limb, or person, he would be justified in so doing. But, gentlemen, I charge you, further, if you believe from the evidence in this case, or from the statement of the defendant, that White, the deceased, made an assault upon the defendant with a dangerous weapon, such as a fire poker, and you find that such a weapon, if it had been used upon the defendant by White, would have been a weapon, thus used, that would likely have produced death, yet if you believe that the deceased desisted, and put down the weapon, and was making no effort with such weapon, or any other weapon, to inflict an injury upon the defendant at the time he was shot by the defendant, and it further appears that the defendant shot him, not in the fear of a reasonable man that he was in any serious personal danger at the time, but that he shot him in a passion aroused as a result of an assault that had ended, and for no other cause, then, gentlemen, the defendant would not be justifiable in thus killing him, but would at least be guilty of the offense of voluntary manslaughter." In our opinion the defendant could not reasonably expect a more favorable charge than the foregoing, and there is no merit in the objection that sections 71 and 73 are confused by the language employed.

The instruction just quoted is also objected to because of the use of the words "at least," and because it is contended that the law relating to homicides growing out of mutual combat was not applicable to the case. We do not agree to the contention that the use of the words "at least" amount to an intimation of opinion on the part of the judge as to the guilt of the accused. It is a deprecatory, rather than an inflammatory, expletive. As a matter of fact, if the defendant shot the deceased after an assault already ended and when he was in no possible danger, the court could have very aptly instructed the jury that the killing might be murder.

As to the remaining objections, it is well

settled that mutual combat can exist where there is mutual intent to fight, though only one of the parties strikes a blow. We have not discussed the two foregoing assignments of error more at length, for the reason that no complaint is made as to the instructions given by the trial judge on the subject of voluntary manslaughter, and the evidence fully authorized the verdict of the jury finding the defendant guilty of that grade of homicide.

Certain evidence was admitted as to statements, alleged to have been made by the deceased, which it is contended were improper and prejudicial to the defendant. Mrs. Tigner testified that the deceased said it was not done in self-defense; that Will Lee did not have to do it; that he regretted very much that it happened; that he wanted to live; that he had lots to live for, but was not afraid to die. "He said that he would like to live for the sake of his old mother, who was blind." Upon defendant's counsel objecting to this evidence, and moving to strike out, the court sustained the objection by merely saying, "yes," and certified that he intended thereby to sustain the objection, and was so understood by counsel. As no further ruling of the court was invoked consensus tollit errorem, the plaintiff in error cannot be heard to complain. *Niagara Ins. Co. v. Williams*, 1 Ga. App. 603, 57 S. E. 1018.

We cannot sustain the objection made to the admission of the evidence relating to dying declarations, upon the ground that the proper foundation had not been laid, inasmuch as it appears to show that there was ample evidence that the deceased was in articulo mortis and conscious of his condition. Certainly the evidence was sufficient to require the court to submit to the jury, under proper instructions, as he did, the question as to whether the statements were really dying declarations. Nor did the court err in refusing to charge the requests of the defendant's counsel upon the subject of dying declarations, because the legal principles contained in the request, so far as pertinent to the case, were fully covered in the charge of the court upon that subject.

Plaintiff in error insists that the court erred in refusing to charge the jury, as requested in writing, that "where a party has evidence in his power and within his reach by which he can establish a fact, if it be true, or a condition, if it exists, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker and inferior nature to prove his claim, a presumption arises that the facts are not as claimed by him, or that the circumstances do not exist." Movant contends that this charge was pertinent and applicable, and should have been

given to the jury, for the following reasons: "It appeared from the evidence of the witness R. O. Settles, as contended, that at the time when movant went into the office of the railroad company, just prior to the shooting, there was present, besides the deceased, White, and the witness Settles, one John Taylor, who heard and saw everything that occurred between the deceased and movant up to the time of the shooting; that both Taylor and Settles left the room prior to the shooting, Taylor leaving before Settles; that at the time the shooting occurred Settles was in such a position that he could not possibly have seen the parties, but that when Settles arrived on the platform outside the office where the difficulty took place, immediately afterwards, he found Taylor standing just outside a window commanding a view of the interior of the office. It thus appeared from the state's own evidence that the only witness to the shooting was Taylor, who was present in the courtroom at the time of the trial, but was never introduced as a witness. No reason was given by the Solicitor General why Taylor was not introduced in evidence. It affirmatively appeared that Settles did not see the shooting, and that there was no eyewitness, unless it was Taylor. Taylor was in no way connected with deceased or movant, and in view of these facts, all of which appeared on the trial of the case, and in view of the argument of counsel for the defendant thereon, movant contends that it was the duty of the court to have submitted to the jury the question whether Taylor did see the shooting, and, if so, to charge the rule of law embodied in the request quoted." There is no merit in this ground of the motion, in view of the fact that the defendant could have introduced the witness as well as the state. There was no evidence showing that the witness Taylor actually saw the combat, or that his testimony would be any more certain or satisfactory than that of the witness Settles; and the state, as any other party, has the right to rely upon the rule that the testimony of a single witness is generally sufficient to establish a fact.

There is no merit in any of the remaining grounds of the motion for new trial, all of which relate to requests to charge which were not given by the court. The principle involved in each of these requests was fully and clearly presented to the jury in the charge as delivered, and no possible ground for complaint appears. The defendant might well have been convicted of the offense of murder. He certainly has no reason to complain of the leniency extended by the jury in basing their verdict upon the theory advanced by his own statement as to the offense, and very fully and fairly presented by the judge in his charge to the jury.

Judgment affirmed.

(2 Ga. App. 463)

**DEAN v. DONALSON. (No. 141.)**

(Court of Appeals of Georgia. Sept. 19, 1907.)

**1. JUSTICES OF THE PEACE—JURISDICTION—DISTRESS WARRANT.**

Any justice of the peace within the county where the debtor may reside or where his property may be found can issue a distress warrant for rent, and unless the amount claimed exceeds \$100 such justice has jurisdiction to try the issue made by a counter affidavit, whether the defendant resides in his district or the property be found in his district or not, provided the county be that of the defendant's residence.

**2. EXECUTORS—ACTIONS BY—DISTRESS.**

An executor, administrator, guardian, or trustee can sue out a distress warrant in his individual capacity, and terms indicating a representative capacity, if used, may be treated and disregarded as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1666.]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; Albert H. Russell, Judge pro hac.

Action by J. R. Donalson, executor of C. U. Curry, against Frank Dean. Judgment for plaintiff, and defendant brings error. Affirmed.

Byron Bower, for plaintiff in error. A. E. Thornton, for defendant in error.

RUSSELL, J. J. R. Donalson, as executor of the will of C. U. Curry, rented certain premises to Frank Dean. The rented premises were part of the estate of the deceased. On the 8th of November, 1905, a distress warrant was issued by W. G. D. Tonge, notary public and ex officio justice of the peace of the 513th district, G. M., of Decatur county, in favor of Donalson, executor, and against Dean, for the sum of \$100. The constable levied on certain personal property of the defendant in the 1,188th district of said county. The defendant filed a counter affidavit and bond, and the papers were returned to the justice of the 513th district, who had issued the warrant. When the case was called in its order the defendant filed a plea to the jurisdiction, showing that he resided in the 1,188th district, G. M., and had never resided in the 513th district. Counsel for Donalson in open court admitted the facts set up on the plea. Thereupon defendant moved to dismiss the levy and quash the warrant, upon the ground that the justice of the 513th district had no jurisdiction of the person or property of the defendant. The magistrate overruled the motions and refused to transfer the case to the court which defendant claims had proper jurisdiction, and over defendant's objection proceeded with the trial. On the trial the plaintiff put in evidence the affidavit and distress warrant, the entry of levy, the will of his testator, showing that he was therein named executor, and testified that as executor he rented the premises to Dean, and that the rent was due and unpaid. On cross-examination he testified that Frank Dean did not owe him anything individually,

that there was no contract between the defendant and himself individually, and that the amount due was due the estate of C. U. Curry, the deceased, of which he was executor. Plaintiff having then closed, the defendant moved that the levy be dismissed and the warrant quashed, and for a judgment in his favor, upon the ground that the evidence showed that whatever debt or contract existed was with the estate of C. U. Curry, and not with Donalson, and that the proceedings were one for James R. Donalson individually; the words "as executor of the estate of C. U. Curry" and the word "executor" being merely descriptive personæ. This motion the court also overruled, and granted a judgment in favor of the plaintiff, as executor of the estate of C. U. Curry, against the defendant (now plaintiff in error) and the securities on his bond. The plaintiff in error insisted that both rulings were erroneous, and carried the case by certiorari to the superior court; but the certiorari was dismissed by his honor, Albert H. Russell, judge pro hac vice.

Three questions are made by the record: (1) Could the justice of the peace issue the distress warrant? (2) Did the justice issuing the warrant have jurisdiction to try the issue raised by the counter affidavit, when it was admitted that the defendant lived in a different district? (3) Was the plaintiff entitled, under the evidence, to a judgment in his favor?

1. As has heretofore been held by this court in Woolsey v. Lawshe, 1 Ga. App. 817, 57 S. E. 1039, any justice of the peace of the county where the debtor resides or has property can issue a distress warrant; for this is the express provision of section 4818, Civ. Code 1895. See, also, Almand v. Scott, 83 Ga. 403, 11 S. E. 653 (2); Jones v. Wiley, 82 Ga. 745, 9 S. E. 614. So that the right of the justice to issue the distress warrant in this case cannot be questioned.

2. The answer to the second question is not so absolutely clear, so far as direct authority is concerned. At least, we have been unable to find any Georgia case where it has been distinctly decided in terms that any justice of the peace of the county can try the issue made by distress warrant and the counter affidavit. But in the case of Jones v. Wiley, while this question was not then before the court, Justice Simmons, in rendering the opinion, draws a distinction between the foreclosure of liens in a justice's court and the issuance of a distress warrant, and the intimation is strong that the justice who issues a distress warrant, if the amount be not greater than \$100, would have jurisdiction to try any issue arising thereon. The motion made in this case was to dismiss the levy, and Chief Justice Bleckley in Almand v. Scott, 83 Ga. 403, 11 S. E. 653, in the latter portion of the third headnote, holds that the fact that a distress warrant is returnable to

another district does not entitle a claimant to have the levy dismissed. No opinion was delivered in the Almand Case, but from the statements of facts in that case it appears that it was tried in the district of the defendant's residence, and from the reading of the whole third headnote it is clear that the learned Chief Justice construed the words "the court having cognizance thereof," in section 4819, Civ. Code 1895, as we do, as meaning the court which issued the warrant; this subject, however, to the exception provided in section 4818, that if the sums claimed to be due exceed \$100 the issue shall be tried either in a county, city or a superior court. We think there is no question that the words "having cognizance thereof," quoted above, give the justice of any district in the county of defendant's residence, who has issued a distress warrant, the right to try any issue which may be raised by a counter affidavit. In ordinary parlance, to have cognizance of means to have knowledge of, and the only court necessarily presumed to have knowledge of the issuance of a summary proceeding, such as a distress warrant, would be the justice who has issued it. But the legal meaning of the word "cognizance" is broader than its ordinary meaning. It not only implies knowledge of the subject-matter, but power to deal with it. "Cognizance" is a word of the greatest import, embracing all power, authority, and jurisdiction." Webster v. Commonwealth, 59 Mass. 386. And the Supreme Court of Pennsylvania, in *Clarion County v. Western Hospital for Insane*, 111 Pa. 339, 3 Atl. 97, held that the word "cognizance," as used in a statute providing that an application may be made "to any judge learned in the law of any court within this commonwealth having immediate cognizance of the crime," is used in the sense of "the right to take notice of and determine a cause."

3. As to the third point, it is sufficient to say that there is no variance between the judgment rendered and the affidavit and warrant, and, treating the words "executor of the estate of C. U. Curry" as being really descriptio personæ, both the proceedings and the judgment may be treated as in favor of Donalson as an individual. And yet, as it is undisputed that the contract of rent was made by the defendant for realty belonging to the estate of the testator and that Donalson is his executor, he could sue and recover, as he has, as an individual. It has frequently been held that a note made payable to an administrator is the property of such individual, and not of the estate of his intestate, and the rule would be the same in regard to any other contract as if it were evidenced by a note. "The legal title to promissory notes and other evidences of debt taken by a guardian, executor, or administrator is in such guardian, administrator, or executor, and he has the right to collect or sell and transfer the same, passing the legal

title thereof to the transferee." *Fountain v. Anderson*, 33 Ga. 379 (6). And the court proceeds to say that, although the purchaser of a note in such a case may know that the note belonged to an estate, the purchaser is not liable to account for the amount of the note so purchased or any loss accruing thereby if the transaction is made in good faith. "Every guardian, administrator, or executor is prima facie liable to his ward or the estate represented for all notes taken by him" (and, we may say, for all debts becoming due to him) "in the discharge of the duties of his office, such as notes taken for property, sold, rented, or hired, etc." See, also, *Zellner, Administrator, v. Cleveland et al.*, 69 Ga. 633; *Saffold v. Banks*, 69 Ga. 289, 293. This ruling is made upon the theory that the descriptio personæ should be rejected as surplusage, and that the entire proceeding can properly be treated as being carried on by Donalson individually. So far as the evidence in this case shows, the defendant in error could have sued out the distress warrant in the first instance in his own name, under the third exception provided in section 3037, Civ. Code 1895. *Morgan v. Morgan*, 65 Ga. 493; *Spence v. Wilson*, 102 Ga. 764, 29 S. E. 713; *Fargason v. Ford*, 119 Ga. 343, 46 S. E. 431, and cases therein cited.

Judgment affirmed.

(2 Ga. App. 487)

#### HARRIS v. STATE. (No. 608.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

#### HOMICIDE—VOLUNTARY MANSLAUGHTER—EVIDENCE—INSTRUCTIONS—VERDICT.

The evidence submitted authorized the charge made by the court upon the subject of voluntary manslaughter, as well as the verdict of the jury finding the defendant guilty of that offense. The case is controlled upon the facts, as to part of the evidence, by the decision in *Gann v. State*, 30 Ga. 67. The verdict was not a compromise; but, the evidence presenting three theories as the truth of the case, the right and duty of selection, being upon the jury, was properly exercised by them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 56, 59, 540.]

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Ben Harris was convicted of voluntary manslaughter, and brings error. Affirmed.

W. A. Post and W. C. Wright, for plaintiff in error. J. R. Terrell, Sol. Gen., and W. L. Stallings, for the State.

RUSSELL, J. The plaintiff in error was indicted for the offense of murder, and found guilty of the offense of voluntary manslaughter. He excepts to the judgment overruling his motion for new trial. Only two questions are made in the record: Did the evidence authorize the verdict? and did the court err in charging the jury upon the subject of voluntary manslaughter?

It is insisted by learned counsel for plain-

tiff in error that a new trial should have been granted on each of the grounds of the original motion, and especially on the ground set forth in the amended motion, which complained that the court erred in charging the jury the law of voluntary manslaughter, for the reason that under the evidence and statement of the defendant this law was wholly inapplicable to the case. The rule may be stated to be that where the evidence, in every view, requires a finding of murder or of not guilty, the law of voluntary manslaughter should not be given in charge, though if the evidence and defendant's statement clearly shows that the defendant should have been found guilty of murder, and he is only convicted of voluntary manslaughter, he will not be heard to complain, although the jury may have been instructed as to the law of voluntary manslaughter when it was not applicable to the case. In the present case the court properly instructed the jury as to the law of voluntary manslaughter.

The charge upon this subject, which is excepted to as inapplicable to the evidence, is as follows: "You will observe, gentlemen, that one of the material facts in the bill of indictment to which I call your attention is that if it be true that Ben Harris did, in the county of Coweta, on or about the time charged in the indictment unlawfully make an assault upon Pete Boozer, as charged in the bill of indictment, with a loaded gun, and if you further believe that the assault was unlawful, yet, gentlemen, if you do not believe that it was made with malice, and if you believe that he shot and killed him, yet, gentlemen, if you do not believe that he killed him with malice why then, as before stated, you could not convict him of the crime of murder; but you could consider, gentlemen, whether or not under the evidence in this case he was guilty of the offense of voluntary manslaughter. Now, manslaughter, the law says, is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever. Murder, you will note, is the unlawful killing with malice. Manslaughter is the unlawful killing without malice. In both cases the killing is unlawful and intentional. The deliberative intent to kill is the distinctive element that differentiates murder from manslaughter. In all cases of voluntary manslaughter the result must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstance to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden, violent impulse of pas-

sion supposed to be irresistible; for if there should have been an interval between the assault or provocation given and the homicide, of which the jury in all cases shall be the judges, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder. You will observe, gentlemen, from the definition I have given you, to reduce a killing that is unlawful from murder to manslaughter, the law says there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice. Now, an assault is defined to be an attempt to commit violent injury upon the person of another. A serious personal injury means an injury greater than a provocation by mere words, and less than a felony. So, gentlemen, you look to the evidence in this case, and determine from the evidence whether or not this man Pete Boozer, the deceased, made an assault upon the person of Ben Harris. If he made an assault, gentlemen, then determine whether it was a felonious assault. If he made an assault, gentlemen, but it was not a felonious assault, why, gentlemen, you could consider whether or not the assault made, if less than felonious, whether or not such an assault would justify the excitement of passion and exclude all idea of deliberation and malice, either express or implied. You can consider, gentlemen, whether or not the deceased, Pete Boozer, made an attempt to commit a serious personal injury upon the defendant, Ben Harris—an injury, gentlemen, that would be less than felony. You can consider whether or not there were other equivalent circumstances; that is, circumstances that would produce the same state of mind that an assault would produce. If you should believe, gentlemen, that this excitement of passion that is supposed to be irresistible was thus engendered by an assault, or by an attempt to commit a serious personal injury by an assault that is less than a felony, on the defendant, or if there were other equivalent circumstances that would justify the excitement of passion and to exclude all idea of malice, either express or implied, and if the defendant acted under such a passion, and not in a spirit of revenge, and shot and killed Pete Boozer, why then, gentlemen, he would not be guilty of murder; but, if not acting under circumstances of justification, he would be guilty of the offense of voluntary manslaughter. But to reduce a crime from murder to voluntary manslaughter the killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should have been an interval of time between the provocation and the homicide sufficient for the voice of

reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge, and shall be punished as murder. So, gentlemen, in applying the law of voluntary manslaughter to this case, if you do apply it, you may look to the evidence, taking into consideration the statement of the defendant, to see what assault less than a felony was made by Pete Boozer upon Ben Harris. If not, see what attempt was made, if any, to commit a serious personal injury upon Ben Harris, if any was made, less than a felony. Take it all into consideration, gentlemen. If such an assault was made, or such an attempt to commit a serious personal injury was made, by the deceased upon the defendant, and it engendered that sudden, violent impulse of passion which is supposed to be irresistible, and the defendant acted under the impulse of passion, if the passion was thus engendered, and he acted under it, and shot and killed Pete Boozer under the influence of this passion, and not in a spirit of revenge, as before stated, he should not be guilty of murder, but would be guilty of voluntary manslaughter, if you find that the killing was not done under circumstances of justification, to which I will presently call your attention. So that, gentlemen, upon this branch of the case, if you find that it is true that Pete Boozer is dead, and that the defendant, Ben Harris, killed him, as charged in the bill of indictment, and you should find that he killed him intentionally, and that the killing was unlawful, and you find that the killing was the result of that sudden, violent impulse of passion supposed to be irresistible, and not under circumstances of justification, and you further believe that the interval between the assault or provocation given, if any was given, and the homicide, was not sufficient for the voice of reason and humanity to be heard, of which time the jury in all cases shall be the judges, then, gentlemen, the defendant, under such circumstances, would be guilty of the offense of voluntary manslaughter."

We have quoted the above portion of the charge to the jury, which is excepted to in its entirety, because we think it especially pertinent to the evidence and clearly expressed to the jury; and in view of the evidence in the case the excerpt from the charge complained of is its own best answer to the complaint. We have very closely scrutinized the evidence and applied it to the above quotation from the charge, with the result that we are satisfied that voluntary manslaughter was involved in the case. The jury were properly instructed upon the subject, and their verdict, finding the defendant guilty of manslaughter, was authorized. The evidence in the case was very voluminous. It could be of no practical benefit to indulge in a long and tedious rehearsal of the facts submitted to the jury, and we have, there-

fore, contented ourselves with simply stating the conclusions deducible from the evidence. According to some of the testimony for the state the deceased was standing still and looking downward when he was shot by the defendant. This evidence would authorize a verdict finding the defendant guilty of murder. Evidence from a number of witnesses, introduced in behalf of the defendant, say that the deceased was attacking the defendant with an extremely dangerous knife, that he was in imminent danger of losing his life, and that the killing was necessary. This evidence, if believed by the jury, would have required a verdict of acquittal, especially in view of the fact that it was supplemented by proof of threats made by the deceased against the defendant and which had been communicated to the defendant. But in addition to all this there was also evidence clearly showing a mutual intent to fight on the part of both the defendant and the deceased; that the parties had a sudden quarrel, and in the heat of blood, without any previous deliberation or malice, and both being armed with and using deadly weapons, the defendant killed the deceased. If this evidence was preferred by the jury, a verdict for voluntary manslaughter is authorized. As the jury had to consider all the evidence, and base their verdict upon such of the testimony as they preferred to believe, the charge of the court was clearly applicable.

Omitting two of the witnesses, whose testimony the jury may not have believed, the case, upon its facts, is controlled by the decisions in *Gann v. State*, 30 Ga. 67, and *Caruthers v. State*, 95 Ga. 343, 22 S. E. 837, which are very similar. It does not appear from any source that there was premeditation, and the current of the evidence leads our minds, as it did that of the lower court and jury, to the conclusion that upon a sudden quarrel the parties fought upon the spot, the combat being with deadly weapons, no undue advantage was taken on either side, and the killing was voluntary manslaughter. As said by Judge Lyon in *Gann v. State*, whenever the killing is the result of irresistible passion, "and not from any mixture of malice or deliberation, then the killing is not murder, but voluntary manslaughter, no matter how that passion may be aroused; for if there is no malice, either expressed or implied, or criminal neglect, there can be no murder. \* \* \* When the provocation given is of such a character that it so excites the slayer with such passion that he cannot resist its influence, and when the killing is caused by such passion, and not solely on account of the provocation given, the defendant is guilty of manslaughter, and not murder." Any other presentation of section 65, Pen. Code 1895, would leave a large number of cases of homicide unprovided for, which are neither murder, involuntary manslaughter, nor justifiable. See 1 Hale, P. C. 453; 1 Hawkins, 31, §§ 22, 29; 4 Black-



Com. 191. If "upon words of reproach or any sudden provocation the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, and death ensues under such circumstances, the offense of the party killing will amount only to manslaughter." 1 Russell on Crimes, 585.

Judgment affirmed.

(2 Ga. App. 486)

HOWARD v. STATE. (No. 597.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

CRIMINAL LAW—WRITTEN INSTRUCTIONS.

In the absence of any written request for more specific instructions, the charge as a whole sufficiently and without material error submitted the issues involved, and the verdict is amply supported by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Will Howard was convicted of crime, and brings error. Affirmed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 396)

BURNAM v. STATE. (No. 539.)

(Court of Appeals of Georgia. July 25, 1907.)

1. ERROR, WRIT OF—CERTIFICATION OF CASE—CONSTITUTIONAL QUESTION.

No question of constitutional construction is involved, such as to require certification of the case to the Supreme Court.

2. SAME.

The court erred in striking the plea in bar on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 408.]

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Le Roy Burnam was indicted for an assault with intent to murder, and, from the judgment for the state striking his plea of former jeopardy and acquittal, he brings error. Reversed.

De Lacy & Bishop and John R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

POWELL, J. The defendant, being arraigned upon an indictment charging him with an assault with intent to murder Mrs. Ray on January 31, 1905, filed a plea of former jeopardy and former acquittal. He alleged that at a preceding term of the court he had been arraigned, tried, and acquitted on an indictment charging him with the murder of M. P. Livingston, "alleged to have been committed at the same time and place as in

the present indictment, and an acquittal on the same evidence was had, and the same issues made as exist and would necessarily be made in this case, and which is the very same offense which he is now charged with, and called upon to be tried in this very court." It was further alleged that the two transactions were identical, and that the former trial was in a court of competent jurisdiction. A copy of the record in the former trial was attached. The Solicitor General filed a demurrer, and the plea was stricken.

1. We fully discussed in the case of *Fews v. State*, 1 Ga. App. 122, 58 S. E. 64, the question as to whether such a plea presents any necessity for constitutional construction. We do not deem it necessary to say more now than is there said.

2. Of course, we do not know what is the real truth as to the allegations of the plea. If the facts of the matter are such as they are stated to be by the Solicitor General in his argument in this court, the acquittal on the first indictment was probably not a bar to the prosecution of the second case. However, by filing demurrers instead of traverse, the Solicitor General gave to the allegations of the plea a constructive verity, which in this court is absolute. That the allegations of the plea are sufficient against demurrer, see *Lock v. State*, 122 Ga. 730, 50 S. E. 932 (2). The same transaction test adopted in this state may make a trial for the murder of one person a bar to a prosecution for assault with intent to murder a different person. For instance, if the defendant shot at A., intending to kill him, and by reason of bad marksmanship struck and killed B., whom he did not intend to kill, the transactions, the assault with intent to murder A., and the actual murder of B., are legally the same. As intimated by this court in the *Fews* case, if by separate shots the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault of these two persons. The intent of the defendant determines the matter. *Crocker v. State*, 47 Ga. 570; *Johnson v. State*, 65 Ga. 94; *Fews v. State*, supra.

Judgment reversed.

(2 Ga. App. 453)

TAYLOR et al. v. FOLDS. (No. 394.)

(Court of Appeals of Georgia. Aug. 15, 1907.)

1. FRAUDULENT CONVEYANCES—SALES—STOCK IN BULK—SALE TO PARTNER.

The act of August 17, 1903 (Acts 1903, p. 92), regulating sales of stocks of goods in bulk, being in derogation of the common law, is to be strictly construed. A sale by one partner of his interests in a mercantile business to his associates is not within the purview of the act.

2. ATTACHMENT—CLAIMS OF THIRD PERSONS.

The evidence demanded the verdict finding the property not subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 1102-1113.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by D. J. Folds against Max Ney. On levy of attachment Charles Taylor and Rosa Moskowitz filed a claim. Judgment for plaintiff, and claimants bring error. Reversed.

Frank M. Hughes and Morris Macka, for plaintiffs in error. W. C. Munday, for defendant in error.

POWELL, J. The defendant in error, Folds, sued out an attachment against Max Ney, setting out that he was doing business under the name of Central Bakery, and obtained judgment thereon. This attachment was levied upon a delivery wagon as the property of defendant. Charles Taylor and Rosa Moskowitz filed a claim to the property. It appeared from the testimony that the debt for which the attachment issued was due Folds for repairs made by him upon the wagon. There was no evidence that Ney had title to or possession of the wagon at the date of the levy or subsequently thereto. Folds did not know at the time he did the work or at the time he sued out the attachment that any one except Ney had any interest in the Central Bakery. The wagon was brought to his shop by a son of Rosa Moskowitz; and this young man told him that Ney would pay for the work. Folds also testified that young Moskowitz afterwards came and got the wagon, and made the statement that his father, A. Moskowitz, had bought out Ney and would pay the bill. To this testimony the claimant objected, but the court overruled the objection. Folds afterwards presented the bill to A. Moskowitz, who declined to pay it. The testimony of the claimant showed that the Central Bakery was a partnership, formerly composed of Ney, Taylor, and Rosa Moskowitz. Prior to the levy Ney had sold to his other partners his interest in the business, and also this wagon. At the time of the levy Taylor and Mrs. Moskowitz owned the wagon, and Ney had no interest in it. No notice of the retirement of Ney from the partnership was given. The property was found subject. The claimants obtained a writ of certiorari; but at the hearing the same was overruled, and the claimants bring error. It is the contention of the defendant in error that the sale from Ney to his other partners was void, because violative of the act of 1903, relating to sales of goods in bulk.

1. While at least one state (See *Block v. Schwartz*, 76 Pac. 22, 27 Utah, 387, 65 L. R. A. 308, 101 Am. St. Rep. 971) has declared that a law similar in terms to our act of August 17, 1903 (Acts 1903, p. 92), regulating sales of goods in bulk, is unconstitutional and beyond the police powers of the state, the better opinion seems to be that such laws are valid. *McDaniels v. Connally Shoe Co.*, 71 Pac. 37, 30 Wash. 549, 60 L. R. A. 947,

94 Am. St. Rep. 889; *Carstarphen Warehouse Co. v. Fried*, 124 Ga. 544, 52 S. E. 598; *Parham v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460; *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 56 S. E. 488. Yet, since this statute is in derogation of the common law and tends to restrain the liberty of contract, it is to be strictly construed. A sale by one partner of his interest in a mercantile business to his other partners is not within the letter of the act; and the courts will not by construction give the act such an extension as to include it.

2. The sale from Ney to his partners not being void by reason of the act of 1903, it follows that the property was not subject. The title to the property was not adjudicated, as against the claimants, by the judgment upon the attachment. *Rogers v. Bates*, 19 Ga. 545. The attachment was not against the Central Bakery as a partnership, but against Ney alone; and therefore the cases of *Gazan v. Royce*, 78 Ga. 512, 3 S. E. 753, and *Deleon v. Heller*, 77 Ga. 740, holding that an attachment against a partnership which does not specify the names of the partners is not void, is not applicable. Folds' lien arose only upon the levy of the attachment. The title of the claimants arose prior to that time, and was therefore superior. It is possible that by a direct action Folds might have sued Taylor and Mrs. Moskowitz and have obtained judgment against them by reason of their connection with the partnership for which he did the work on the wagon; but that issue was not and could not have been on trial in the claim case. The quasi equitable character of a claim case is not so broad as to permit the introduction of a collateral issue of this nature. Especially is this true in the absence of equitable pleadings. *Howard v. Porter*, 99 Ga. 649, 27 S. E. 725. The fact that no notice was given by Ney of his retirement from the partnership may have caused him to remain liable for debts contracted by his partners in the partnership name, but did not have the effect of making the property of his partners subject to attachments and judgment against him individually. The statement of the son of Mrs. Moskowitz made to Folds that his father would pay the debt contracted by Ney was clearly objectionable.

Judgment reversed.

(3 Ga. App. 406)

#### JOHNSON v. STATE. (No. 584.)

(Court of Appeals of Georgia. July 25, 1907.)

##### 1. LARCENY—FROM THE HOUSE—WHAT CONSTITUTES.

To steal articles of value from the porch of a building used as a restaurant, it being shown by the evidence that said porch was also used as a part of the restaurant, is larceny from the house, and it is not error to instruct the jury that if they "find from the evidence that the basket containing these articles was taken from an ice box which was jammed up between the front steps and the front part of the restaurant, and if you further find that the ice box was

part of the appurtenances belonging to that restaurant, and that, besides this, the offense is proven to you beyond a reasonable doubt, it would be larceny from the house."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 47.]

**2. CRIMINAL LAW—INSTRUCTIONS—INVASION OF PROVINCE OF JURY—INTIMATION OF OPINION.**

To charge the jury that "the state contends before you, gentlemen, that this defendant was seen by a certain witness to take and start away and carry away this basket containing the articles testified to you about, that it was afterwards found in a wagon he was in charge of and driving, and that this is the only way possible to account for the theft," so particularizes and argumentatively enforces upon the jury the inference of guilt as to amount to an intimation of opinion, within the terms of section 4334 of the Civil Code of 1895, and is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1731, 1732, 1764.]

**3. SAME—PROOF OF GOOD CHARACTER OF DEFENDANT—MATTER NOT SUPPORTED BY EVIDENCE.**

To charge the jury that "good character proven by a reliable witness goes to the credit of a witness, but I charge you, further, to take all the surrounding circumstances of this case together, and see if you can learn the facts and arrive at a truthful verdict" is not a correct charge where the defendant has put his character in issue. It does not give the jury the proper rule applicable to proof of good character of the defendant. It was unauthorized by the evidence in the case, for the reason that no evidence was adduced as to the good character of any of the witnesses; and, in the absence of instructions as to the effect of evidence of good character, the latter portion of the charge was calculated to diminish the force of the evidence for good character in behalf of the defendant, if it did not, indeed, entirely withdraw it from the consideration of the jury.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Frank Johnson was convicted of larceny from the house and he brings error. Reversed.

J. J. Forehand and T. R. Perry, for plaintiff in error. J. H. Tipton, Sol., for the State.

**RUSSELL, J.** Judgment reversed.

(2 Ga. App. 397)

**BUTLER v. STATE (No. 550.)**

(Court of Appeals of Georgia. July 25, 1907.)

**1. CRIMINAL LAW—INSTRUCTIONS.**

This case is controlled by the decision in the case of Rouse v. State (Ga. App.) 58 S. E. 416.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1732.]

**2. SAME—ARGUMENTATIVE INSTRUCTIONS.**

To charge the jury as follows: "See in this case what, if anything, the evidence shows with reference to this defendant's connection with the keeping or maintaining of this establishment. You have heard the testimony. Did he furnish keys to persons, enabling them thereby to gain access to this establishment? If so, for what purpose did he furnish them? Why did he furnish them? What was his object in furnishing them? Did he cash checks for those who won money at games played there? If he did, what was his reason for doing so? Did he have an altercation with witness Graham with reference

to the destruction of cards in the establishment? If so, what concern was it of his? Look to the evidence, and see what those things indicate. See what conclusion the evidence leads your minds to. Of course, those things may happen without showing any proprietorship. That is true with reference to the last transaction. A man who would resent the destruction of cards in an establishment and get into an altercation with another on that account would not necessarily be concerned in the proprietorship of the establishment. All those things are matters that the jury should consider in connection with all the facts and circumstances. See what those things indicate"—is so prejudicially argumentative, and so strongly intimates to the jury that certain facts and circumstances have been proved, as to render the grant of a new trial obligatory upon this court. Civ. Code 1895, § 4334; Baldwin v. State, 47 S. E. 558, 120 Ga. 188.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Frank Butler was convicted of crime, and brings error. Reversed.

O'Connor, O'Byrne & Hartridge and Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

**RUSSELL, J.** Judgment reversed.

(3 Ga. App. 397)

**FULTON v. STATE (No. 549.)**

(Court of Appeals of Georgia. July 25, 1907.)

**CRIMINAL LAW—INSTRUCTIONS.**

This case is controlled by the decision this day rendered in the case of Butler v. State, 2 Ga. App. —, supra, ante. The charge of the court plainly violated the provisions of Civ. Code 1895, § 4334.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

F. E. Fulton was convicted of crime, and brings error. Reversed.

Twiggs & Oliver, O'Connor, and O'Byrne & Hartridge, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

**RUSSELL, J.** Judgment reversed.

(3 Ga. App. 398)

**HARPER v. STATE (No. 551.)**

(Court of Appeals of Georgia. July 25, 1907.)

**CRIMINAL LAW—APPEAL—REVIEW—FINDINGS OF FACT.**

As to the exception as to the sufficiency of the evidence, the case is controlled by Plummer v. State, 57 S. E. 969, 1 Ga. App. 507, and as to the exception to the charge of the court it is controlled by the long line of decisions cited in Michie's Digest, 1390.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Jim Harper was convicted of crime, and brings error. Affirmed.

Gleaton & Gleaton, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

**POWELL, J.** Judgment affirmed.

(2 Ga. App. 412)

**WHITE v. STATE. (No. 595.)**

(Court of Appeals of Georgia. July 25, 1907.)

**HOMICIDE—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER—JUSTIFIABLE HOMICIDE.**

The charge of the presiding judge was not, for any reason, erroneous. It is a clear, impartial, and comprehensive presentation of the law applicable to the evidence adduced in the case.

(a) Evidence for the state showing that the killing occurred shortly after the deceased's attempt to kill the defendant, but after the deceased had been disarmed, and while the deceased was making an assault upon the defendant, fully authorized the charge of the court upon the subject of voluntary manslaughter. If the jury believed this testimony, the killing could be attributed either to the sudden irresistible impulse of passion, aroused by the attempts of the deceased to slay the defendant before being disarmed, or to the fact that the defendant, no longer being in danger of losing his life or having a felony committed upon his person, killed the deceased merely to prevent an assault or an assault and battery. If this testimony was believed by the jury, the killing, in either event, would be voluntary manslaughter.

(b) There was no error in not charging the jury the principle of law contained in Pen. Code 1895, § 72. This section refers only to homicides having their origin in a forcible attack and invasion of the property or habitation of another; and, as there was no evidence tending to show that any attack or invasion of the habitation of the defendant was intended by the deceased, but that on the contrary he was a guest or visitor at defendant's residence before the beginning of the difficulty, a charge upon section 72 would have been unauthorized and erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 653.]

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Will White was convicted of a crime, and he brings error. Affirmed.

A. H. Freeman, for plaintiff in error. J. R. Terrell, Sol. Gen., and W. L. Stallings, for the State.

**RUSSELL, J.** Judgment affirmed.

(2 Ga. App. 442)

**LIGHTSY v. STATE. (No. 607.)**

(Court of Appeals of Georgia. Aug. 8, 1907.)

**1. HOMICIDE — INSTRUCTIONS — JUSTIFIABLE HOMICIDE.**

This case is controlled by repeated rulings, of the Supreme Court that the law embraced in Pen. Code 1895, § 73, does not qualify or limit the law of justifiable homicide as contained in sections 70 and 71, and that instructions as to these two separate branches of the law of justifiable homicide should not be so given as to confuse the one with the other, to tend to perplex the jury in making appropriate application of the law to the facts.

**2. CRIMINAL LAW—INSTRUCTIONS—ON MATTER NOT SUPPORTED BY EVIDENCE.**

In no view of the evidence or the statement of the accused was the law of justifiable homicide as laid down in Pen. Code 1895, § 73, applicable to this case, and the court erred in giving in charge that section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 622.]

**3. SAME.**

In a homicide case, where the evidence and the statement of the accused present only the conflicting theories of murder or justifiable homicide, it is error for the court to give in charge the law of voluntary manslaughter, and a verdict against the accused for that offense should be set aside.

**4. ERROR, WRIT OF—REVIEW.**

The other assignments of error are without merit.

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; A. W. Fite, Judge.

Bob Lightsey was convicted of voluntary manslaughter, and he brings error. Reversed.

J. M. Bellah, F. W. Copeland, and W. M. Henry, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

**HILL, C. J.** Bob Lightsey was tried for murder, and convicted of voluntary manslaughter, in the superior court of Chattooga county. He made a motion for a new trial, which was overruled. We find three of the grounds meritorious.

1. Under the evidence and the defendant's statement, the court erred in giving in charge section 73 of the Penal Code of 1895. The Supreme Court has repeatedly ruled that this section should never be given in charge, unless there is some evidence tending to show that there was a mutual combat between the accused and the deceased, or an agreement between the parties indicating a mutual intent to fight. Among the many cases expressly so ruling, we cite *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277, where Mr. Justice Little elaborately treats the subject of justifiable homicide under Pen. Code 1895, §§ 70, 71, 73, pointing out clearly when either or all of these sections would be applicable and when not. See, also, *Stubbs v. State*, 110 Ga. 916, 36 S. E. 200; *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126; *Freeman v. State*, 112 Ga. 48, 37 S. E. 172; *Heard v. State*, 114 Ga. 90, 39 S. E. 909; *Jordan v. State*, 117 Ga. 405, 43 S. E. 747. In this case there was no witness to the act of killing. The accused, by his statement, put his defense squarely on Pen. Code 1895, §§ 70, 71. The evidence in behalf of the accused strengthened the position of self-defense made by the statement, and neither by the evidence nor the statement was there any fact or circumstance tending to show any mutual combat or any agreement evidencing a mutual intention to fight. The theory of the state was that the accused, after the quarrel with the deceased, threatened to kill him, armed himself, sought and found him, and without any real or apparent danger shot him as soon as he saw him. It is not necessary to give in detail the evidence of the state and the accused, or to attempt to evolve the truth from these conflicting theories. That is a problem for the jury. It is sufficient to state generally that under neither theory was the law of

mutual combat as defined by Pen. Code 1895, § 73, in any respect applicable. The evidence both for the state and the accused, including the defendant's statement, made a case of murder or justifiable homicide under Pen. Code 1895, §§ 70, 71. Nevertheless, the court, after giving to the jury a charge covering the code definitions of murder and voluntary manslaughter, further instructed them as follows on the subject of justifiable homicide: "Justifiable homicide is the killing of a human being in self-defense, or in defense of his person, as applicable to this case. A bare fear of any of these offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of these fears, and not in a spirit of revenge." Again: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary; and it must also appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given, or that the deceased was manifestly intending or endeavoring, by violence or surprise, to commit a felony upon him." Now, this charge qualified the right of self-defense as laid down in Pen. Code 1895, §§ 70, 71, by the more exacting limitations of justifiable homicide under section 73. This charge was calculated to impress the jury with the fact that the law of justifiable homicide would not give the right in self-defense to slay one who was manifestly intending and endeavoring by violence or surprise to commit a felony on his person, unless it also appeared that the deceased was the assailant, that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given, and that at the time of the killing the danger was so urgent and pressing that, in order to save his own life, the killing was absolutely necessary. This is not the law, and imposes upon one who is entirely faultless, and who exercises his right of self-defense under sections 70 and 71, the greater burden imposed upon one who is not without fault, but who voluntarily enters into a deadly mutual combat, and who therefore must show, in order to justify the killing of his adversary, an absolute necessity to do so to save his own life. It is true that the judge further on, in applying the law to the contentions of the parties, restricted his charge to the law of justifiable homicide as laid down in Pen. Code 1895, §§ 70, 71. But we do not think this corrected the erroneous intermingling of the Code sections, but rather tended to add to the confusion of the jury on the subject.

2. It is also insisted that the court erred in the manner in which he charged the three Code sections under consideration. They were all charged together and in immediate connection with each other, and without drawing any distinctions between the sections as constituting different kinds of justifiable homicide. We think this exception is well taken. There may be cases of homicide when it would be entirely proper to charge all three of these sections to meet different theories presented by the evidence; but, whenever it is proper to do so, the court should by specific instructions make clear to the jury the application of each section to the different theories arising from the facts and circumstances of the particular case.

3. In our opinion there was no evidence in this case that required the court to give in charge the law of voluntary manslaughter. If the evidence relied on by the state for a conviction was the truth of the case, the accused was guilty of murder. If the statement of the accused and the evidence in his behalf was the truth of the case, he was not guilty of any offense, but his defense of justifiable homicide was fully sustained. There is no fact or circumstance in the record upon which a verdict for voluntary manslaughter can be legally predicated, and such verdict should be set aside as contrary to law, *McBeth v. State*, 122 Ga. 737, 60 S. E. 931; *Berry v. State*, 122 Ga. 429, 50 S. E. 345; *Tolbirt v. State*, 119 Ga. 970, 47 S. E. 544.

Judgment reversed.

(2 Ga. App. 435.)

DAVIDSON & GRINSTEAD v. WAXELBAUM & BRO. (No. 446.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

1. PARTNERSHIP—EVIDENCE—DECLARATIONS.

While the testimony of an alleged partner is competent to prove the fact of partnership, his mere declaration, written or spoken, is not admissible for that purpose. *Abel v. Jarratt*, 28 S. E. 453, 100 Ga. 732.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partnership, § 70.]

2. SAME.

Where there is independent prima facie proof of a partnership, the declarations of either one of the alleged partners, written or spoken, are admissible in corroboration. *Ham v. Brown*, 58 S. E. 316; *Jones v. Harrell*, 35 S. E. 690, 110 Ga. 380.

3. ERROR, WRIT OF—INSTRUCTIONS—EXCEPTIONS.

A general exception to the charge as not being "full enough to clearly explain to the jury the law as to the distinction between a corporation and a partnership, and did not fully set forth the contention of the defendant," is not sufficiently specific, and presents no question for the determination of this court. *Austell v. James*, 22 S. E. 953, 97 Ga. 334; *Chambers v. Walker*, 6 S. E. 165, 80 Ga. 642; *Footte v. Kelley*, 55 S. E. 1045, 126 Ga. 799.

4. TRIAL—INSTRUCTIONS.

The written request to charge, in so far as it is sound, is covered by the general charge in much clearer and more pertinent language.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 651-659.]

**5. SAME.**

The entire charge in this case is a full and fair presentation of the issues involved, and the law applicable thereto. The assignments of error are wholly without merit, and the verdict is amply supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action between Davidson & Grinstead and Wixelbaum & Bro. From the judgment, Davidson & Grinstead bring error. Affirmed.

S. W. Sturgis and Jas. A. Thomas, for plaintiff in error. Hardeman & Jones, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 432)

**DAVIDSON & GRINSTEAD v. WAXELBAUM CO.** (No. 447.)

(Court of Appeals of Georgia. Aug. 8, 1907.)  
**PARTNERSHIP—EVIDENCE.**

This case is controlled by the decision this day rendered in No. 448 between Davidson v. Wixelbaum, 58 S. E. 687.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action between Davidson & Grinstead and the Wixelbaum Company. From the judgment, Davidson & Grinstead bring error. Affirmed.

S. W. Sturgis and Jas. A. Thomas, for plaintiff in error. Hardeman & Jones, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 470)

**GOODWYN v. CENTRAL OF GEORGIA RY. CO.** (No. 336.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

**1. EVIDENCE—HEARSAY—DECLARATIONS AS TO PAIN.**

The declaration of the plaintiff, made to a physician, that he felt no sensation of pain resulting from sticking a needle into his finger, does not fall within any of the exceptions to the rule as to hearsay, and was properly excluded. *Atlanta Street Railroad Company v. Walker*, 93 Ga. 463, 21 S. E. 48; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *Atlanta, K. & N. Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818. Especially was there no error in excluding the declarations of the plaintiff as to his physical symptoms and suffering, which were no part of the res geste of the injury, when the plaintiff himself as a witness fully described the character and extent of his injuries. "The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaint relates." *Atlanta Street R. R. Co. v. Walker*, supra.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1061, 1062, 2323; vol. 3, Appeal and Error, § 2915; vol. 37, Negligence, § 6.]

**2. ERROR, WRIT OF—EXCLUSION OF EVIDENCE.**

An objection that the court erred in refusing to allow a witness to answer a question asked on the direct examination will not be considered, where the expected answer is not set out, so that the court can determine whether the evidence would have been admissible. *Hagerstown Steam Engine Co. v. Grizzard*, 86 Ga. 574, 12 S. E. 939.

**3. EVIDENCE—EXPERTS—OPINIONS.**

The testimony of the engineer of the backing train that at the time he struck the car in which plaintiff was at work he was moving back at the usual speed necessary for switching and making couplings of that character was properly admitted. Civ. Code 1895, § 5287.

**4. NEGLIGENCE—ORDINARY CARE—REASONABLE DILIGENCE.**

The court instructed the jury that the law required the defendant railroad company to show that at the time of the injury its agents and servants were in the exercise of "ordinary care," instead of charging the rule of diligence in the language of section 2321, Civ. Code 1895, to wit, "all ordinary and reasonable care and diligence." The words "ordinary care" embody the same degree of diligence as the words "ordinary and reasonable care and diligence," and have substantially the same significance. The words "ordinary" and "reasonable," descriptive of diligence, are synonymous, and are used interchangeably in statutes and by the courts. Especially is this true when the court defined correctly the meaning of "ordinary care" in a proximate portion of the charge.

**5. SAME.**

The court charged the jury that "ordinary care" is "that care that a prudent man would exercise under like or similar circumstances." The use of the word "a," instead of the word "every," made no material change in the definition, and could not have misled the jury.

**6. DAMAGES—MEASURE OF DAMAGES—INSTRUCTIONS.**

The court instructed the jury as follows: "The plaintiff alleges, and asks for damages for, pain and suffering. In determining the question as to whether you will allow damages for pain and suffering, the court can give you no rule. There is no rule, except the enlightened conscience of intelligent, honest jurors." Considered alone, this instruction would be error; but, in connection with the entire charge, it is clear that the court in this excerpt was referring to the measure of damages for pain and suffering, and not to plaintiff's right to recover damages for pain and suffering.

**7. ERROR, WRIT OF—REVIEW.**

The other assignments of error are wholly without merit, and the verdict, approved by the trial court, is fully warranted by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by R. B. Goodwyn against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Lambdin, R. P. Searson, Jr., and Jno. W. Bennett, for plaintiff in error. Hall & Cleveland, and J. F. Redding, for defendant in error.

HILL, C. J. Judgment affirmed.

POWELL, J., disqualified.

(2 Ga. App. 473)

**LINDER v. HUTTON & GIBBS.** (No. 387.)  
(Court of Appeals of Georgia. Sept. 19, 1907.)**ERROR, WRIT OF—REVIEW**

No material error appears, and the undisputed evidence fully supports the finding of the court.

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Action between J. E. Linder and Hutton & Gibbs. From the judgment, Linder brings error. Affirmed.

E. L. Stephens, for plaintiff in error. J. L. Kent, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 479)

**CAUDELL v. SOUTHERN RY. CO.** (No. 414.)(Court of Appeals of Georgia. Sept. 19, 1907.)  
**TRIAL—NONSUIT.**

The plaintiff having failed to prove his case as laid, the court should have awarded a nonsuit. The defendant having introduced no testimony, the direction of a verdict in its favor was erroneous. *Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co.*, 57 S. E. 879.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 383.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by Ella Caudeil against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, and judgment of nonsuit ordered.

J. C. Edwards and J. L. Perkins, for plaintiff in error. McMillan & Erwin, for defendant in error.

**HILL, C. J.** The judgment is reversed, with direction that in the trial court a judgment of nonsuit be substituted for the judgment rendered.

(2 Ga. App. 492)

**RAGLAND v. STATE.** (No. 621.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

**ARSON—EVIDENCE—BURDEN OF PROOF.**

In cases of alleged arson, where nothing appears but the burning, the law presumes that the fire was the result of accident or some providential cause, and the burden is on the prosecution to overcome this legal presumption and prove beyond a reasonable doubt the existence of a criminal design. In the opinion of a majority of this court, the facts and circumstances in the record do not even tend to show that the fire was a felonious one, and the verdict is without legal support, and must be set aside and a new trial ordered.

(Syllabus by the Court.)

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Scott Ragland was convicted of arson, and brings error. Reversed.

58 S.E.—44

J. H. Longino, for plaintiff in error. Wm. Schley Howard, Sol. Gen., for the State.

**HILL, C. J.** Judgment reversed.

**POWELL, J.** (specially concurring). I think that the circumstances introduced by the state, tending to show that the burning was not accidental, but was felonious, were sufficient to give "scope for legitimate reasoning by the jury," and therefore sufficient to support the verdict as to that point; but I concur with the majority of the court in holding that the circumstances by which the state claims to have connected the defendant with the crime are too wholly inconclusive to justify a verdict of guilty.

(3 Ga. App. 492)

**LUNSFORD et al. v. STATE.** (No. 610.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

**1. CRIMINAL LAW—EVIDENCE—REVIEW.**

The verdict against W. B. Lunsford is wholly without any evidence to support it and is therefore contrary to law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3075.]

**2. SAME—EXAMINATION OF WITNESSES.**

The examination of two of the witnesses was conducted by the trial judge in such manner as to violate the spirit of section 4334 of the Civil Code of 1895, as construed by this court in *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929, and a new trial is ordered for both defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 1525.]

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

W. B. Lunsford and others were convicted of crime, and bring error. Reversed.

Payton & Hay, for plaintiffs in error. W. E. Wooten, Sol. Gen. for the State.

**HILL, C. J.** Judgment reversed.

(3 Ga. App. 472)

**SIMONS & CO. v. BURT.** (No. 383.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

**1. JUSTICES OF THE PEACE—CERTIORARI—JUDGMENT.**

The judge of the superior court is without jurisdiction to render a final judgment on a certiorari, where there is no question of law which must finally govern the case, but only issues of fact are involved.

**2. SAME.**

Where the judge of the superior court is of the opinion that the verdict against plaintiff in certiorari is without evidence to support it, the proper judgment is to sustain the certiorari and remand the case for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; S. B. Hatcher, Judge pro hac.

Attachment by Simons & Co. against one McGhee. B. I. Burt interposed a claim to the fund garnished. Verdict finding the fund

subject and claimant brought certiorari. Final judgment for claimant, and plaintiffs bring error. Reversed.

J. E. Chapman and A. W. Cozart, for plaintiffs in error. T. T. Miller and Ed. Wohlwender, for defendant in error.

HILL, C. J. Simons & Co., plaintiffs in error, instituted suit by attachment against McGhee, which was levied by serving summons of garnishment on Pou & Co. The answer of the garnishees admitted an indebtedness of \$127.70. Burt dissolved said garnishment, claimed the fund, and traversed the answer of the garnishees; and issue was joined thereon by plaintiffs in attachment. On the trial of the claim case in the justice court to which the attachment was made returnable, a verdict was rendered finding the fund subject to the attachment. The claimant carried the case to the superior court by certiorari. On the hearing, the certiorari was sustained by the judge pro hac vice, and a final judgment entered in behalf of the claimant. Exceptions were taken to this judgment, because contrary to law and without evidence to support it, and for the reason that such final judgment depended upon an issue of fact, there being no question of law which must finally govern the case, and the court erred in rendering it.

The claimant by his evidence showed that, before the attachment was levied by service of the summons of garnishment, he had bought from the defendant in attachment 110 cords of wood, which had been shipped by his (claimant's) directions to the garnishees, to whom claimant had sold said wood. It was contended by plaintiffs in attachment that the sale of said wood was not complete; that there had been no separation and delivery of the 110 cords of wood by the defendant in attachment to the claimant, but that said 110 cords was a part of 175 or 200 cords which were shipped by defendant in attachment to the garnishees. There was much conflict in the evidence as to whether the sale of the 110 cords was a completed sale, or only an executory contract. There was also conflict in the evidence as to the amount of wood shipped to the garnishees. If the judge of the superior court was of the opinion that the evidence preponderated in favor of the claimant, or plaintiff in certiorari, he had the right, in the exercise of his discretion, to sustain the certiorari and remand the case for another trial; but he erred in rendering a final judgment. This would be so, even where there was no conflict in the evidence, if there was no controlling question of law, "because it could not be known with certainty that the evidence on another trial would be the same." *Williams v. Bradfield*, 116 Ga. 705, 43 S. E. 57; *Bass Dry Goods Co. v. Electric Storage Battery*, 123 Ga. 640, 51 S. E. 579.

We think, therefore, that the court erred in

rendering a final judgment for the claimant, and we reverse this judgment, and direct that the case be remanded to the justice court for a new trial.

Judgment reversed.

(2 Ga. App. 420)

### VANCE v. STATE. (No. 242.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

#### CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

This court having duly certified to the Supreme Court the constitutional questions made in the bill of exceptions, and that court having decided that the act of 1903 (Acts 1903, pp. 90, 91), under which plaintiff in error was convicted, was not contrary to the provisions of the Constitution on any of the grounds stated, and there being no other assignment of error, the judgment of the trial court is affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 711.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Governor Vance was convicted of fraudulently procuring money under contract of employment, and brings error. Case certified to Supreme Court, and answers certified. 57 S. E. 889. Judgment affirmed.

Williams & Harper, for plaintiff in error. Zach Childers, Sol., and F. A. Hooper, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 421)

### McLENDON BROS. v. FINCH. (No. 380.)

(Court of Appeals of Georgia. Aug. 8, 1907.)

#### 1. COVENANTS—IMPLIED COVENANTS—SALE OF STANDING TIMBER.

A conveyance of standing timber for saw-mill purposes being a sale of real estate, and not a lease, the provisions of Civ. Code 1895, § 3613, that "in a sale of land there is no implied warranty of title," are applicable thereto. Where the vendor has given such a conveyance containing no covenant of warranty, and has taken purchase-money notes from the vendee, the latter cannot defend against a suit upon the notes by any plea predicated upon the theory of a breach of an implied covenant of quiet enjoyment under such instrument.

#### 2. EVIDENCE—PAROL EVIDENCE AFFECTING DEED.

While a vendee may recover from his vendor, who includes in a subsequent conveyance to a third person the land already sold (upon the theory of money had and received), such portion of the consideration of the second conveyance as is represented by the land so improperly included (*Niles v. Groover*, 78 Ga. 461, 3 S. E. 899), it is competent for the vendor to show that the land contained in the first conveyance was inserted in the second conveyance by mutual mistake, and that no part of the consideration of the second conveyance was given therefor.

(a) If a vendor fraudulently makes a second deed of conveyance to the same land, a cause of action *ex delicto* will arise in favor of the first vendee, if he suffers damage thereby, although his conveyance may have contained no covenant of warranty.

(b) Such a cause of action, being *ex delicto*,



cannot be set off against a suit upon promissory notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1912; vol. 43, Set-Off and Counterclaim, § 32.]

### 3. ELECTION OF REMEDIES—RIGHT OF ELECTION.

A person who has suffered an actionable wrong may pursue any number of consistent concurrent remedies against different persons until he obtains satisfaction from some of them. He is not permitted to pursue inconsistent remedies.

(a) No matter what right the party wronged may have of electing between remedies or of pursuing different defendants for the same cause of action, when he once obtains full satisfaction from one source, his cause of action ends, and he can assert it no further.

(b) If the plaintiff in a suit brought upon a given cause of action accepts a sum of money in full settlement thereof, he cannot thereafter set up the same cause of action against another whom he had the election of suing in the first instance.

(c) A settlement of a cause of action by a partnership stops the individual partners, at least those who participated or acquiesced therein, from afterwards asserting the same cause of action as their own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, § 1.]

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Action by J. T. Finch against McLendon Bros. on promissory notes. Judgment for plaintiff, and defendants bring error. Affirmed.

R. E. L. Whitworth and J. J. Northcutt, for plaintiffs in error. A. J. Camp and W. E. Spinks, for defendant in error.

POWELL, J. In March, 1902, Finch, for the consideration of \$1,000, sold to Smith & Tomlin all of the timber on certain lots of land, together with sawmill privileges, including right of ingress and egress, but limited the time within which the timber was to be cut and the privileges exercised to two years from date. The instrument of conveyance contained no clause of warranty. As a part of the transaction Smith & Tomlin gave promissory notes for the purchase money of the timber. In September, 1902, Smith & Tomlin transferred their conveyance to McLendon Bros., and Finch took the notes of the latter partnership in lieu of the notes of the former. Afterwards the partnership of McLendon Bros. & Smith, composed of the same persons as the partnership of McLendon Bros. with the addition of Smith, acquired the conveyance; but the record is silent as to just how this was done. In May, 1903, the East & West Railroad Company sought to condemn a right of way through the lands on which the timber stood; and, to avoid the statutory proceedings, Finch, in consideration of \$800, executed and delivered to the railroad company a warranty deed to the strip of land sought as a right of way, and made no exception as to the timber. At the time this conveyance

was executed McLendon Bros. & Smith were in possession of the timber and were actually engaged in cutting it. The railroad company proceeded to open and grade its right of way, and, in addition to cutting down a considerable quantity of the timber, also impeded the ingress and egress to and from the mill and timber of McLendon Bros. & Smith; and this partnership brought suit against the railroad company for these damages. In settlement of this suit the railroad company paid to McLendon Bros. & Smith \$425, and took from them a receipt in full for all damages done by the cutting of the right of way. Subsequently to this transaction Finch sued McLendon Bros. upon the notes which they had given for the timber. In defense to this action several pleas were filed, all of them based upon the fact that Finch had executed the deed to the railroad company without excepting the timber and milling rights previously conveyed. They first set up the transaction as a plea of failure of consideration, asserting that the second conveyance was a violation of the former contract, and that through the violation of this contract the defendants had been damaged in a sum far in excess of the amount due on the notes, by reason of the fact that the railroad company had destroyed their timber and mill rights, and that the consideration of the notes had therefore failed. They also set up the same transaction in the form of a plea of recoupment, and prayed judgment for the excess of the damages above the amount of the notes. They further set up that, in conveying the land to the railroad company, Finch had also conveyed the timber; that the timber conveyed was of the value of \$500; that, this amount of money having been received by Finch for timber belonging to defendants, he should in equity and good conscience account to them for it; and they therefore prayed a set-off of this amount. It appeared from the testimony that the railroad company had notice of the timber conveyance at the date on which they bought the right of way, and that no part of the \$800 consideration was paid on account of the timber. The defendants objected to this testimony, so far as it went to show that Finch had received no consideration for the timber, on the ground that it contradicted the recitals of the deed from Finch to the railroad company, which asserted that in consideration of \$800 Finch conveyed the land and did not except the timber. The court directed a verdict for the plaintiff, and the defendants bring error.

1. The relation between the parties to a conveyance whereby the one sells to the other the timber on land is that of vendor and vendee, and not that of landlord and tenant; and the conveyance is a deed, and not a lease, although the time within which the timber is to be cut and removed is limited to less than five years. *Baxter v. Mattox*,

106 Ga. 344, 32 S. E. 94; *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S. E. 218. In cases of landlord and tenant, no estate passes out of the landlord further than a mere usufruct, which is not assignable without the landlord's consent. Civ. Code 1895, § 3115. The conveyance of timber, on the other hand, authorizes the grantee, not merely to use it and return it, but to take it away, sell it, and otherwise possess it. The time limit within which the timber must be removed is not a limitation directly upon the estate owned in the timber, but upon the concurrent license of ingress and egress necessary to the use of the timber. These conveyances are further distinguishable from leases, by reason of the fact that they are assignable without the consent of the grantor. *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Baxter v. Mattox*, 106 Ga. 355, 32 S. E. 94. The conveyance from Finch to Smith & Tomlin, being a deed and not a lease, is within the purview of Civ. Code 1895, § 3613, that "in a sale of land there is no implied warranty of title." It is to be treated as a quitclaim deed. *McDonald v. Beall*, 55 Ga. 289 (9, 10); *Wright v. Shorter*, 56 Ga. 72 (4, 5); *McDonough v. Martin*, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343; *Nathans v. Arkwright*, 66 Ga. 186. Whether it is such a deed as falls within the purview of Civ. Code 1895, § 3609, which provides that a title after acquired by the vendor inures to the benefit of the vendee, is not in point in this case and is not decided. See *Morrison v. Whiteside*, 116 Ga. 459, 42 S. E. 729; and *Taylor v. Wainman*, 116 Ga. 795, 42 S. E. 58. But it has no express contract of warranty, and none will be implied. This conveyance being a deed, and not a lease, this case is distinguishable from *Perry v. Wall*, 68 Ga. 70, and *Williams v. George*, 104 Ga. 599, 30 S. E. 751; for statutes declaring "that no covenants shall be implied in a conveyance of real estate have been considered as not applying to leases, because they are not conveyances of real estate within the meaning of the statute." *Brewster on Conveyancing*, § 211. The case is likewise distinguishable from *Sanderlin v. Willis*, 94 Ga. 171, 21 S. E. 291, and *Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 905; for in those cases there was involved the breach of the express covenant of a bond for title.

We have thus defined the character of the timber conveyance executed by Finch to McLendon Bros., as prefatory to the statement that, since it contained no covenant of warranty and since none will be implied, Finch committed no contractual breach by his subsequent deed to the railway company. Finch having committed no contractual breach in executing the second conveyance, it follows that the court did not err in disregarding such of the defendant's pleas as were neces-

sarily founded upon this theory. This is especially applicable to the plea of recoupment. Further, as to the plea of failure of consideration, let us inquire as to what was the consideration of the notes. It was the execution of the timber conveyance by Finch and the passage of the title to the timber from him to his grantees. Has this consideration failed in any respect? It is not insisted that the conveyance was not executed, or that the title did not pass. The title did pass, and it is not shown to have failed in the slightest degree; for, when it came into conflict with the railroad company's subsequent deed, it prevailed and damages were recovered for an invasion of it. There was, therefore, no failure of consideration.

2. As to the plea in which the defendants sought to set off a portion of the money received by Finch from the railway company on the theory of money had and received by him for their benefit, we will proceed to discuss this point for the moment, without reference to the fact that the defendants, instead of ratifying the deed Finch made to the railroad company, repudiated it and asserted their superior title, and took payment from the company in settlement for the value of the timber taken. In *Niles v. Groover*, 78 Ga. 461, 3 S. E. 899, the Supreme Court held: "Where an owner of land sold a portion thereof and subsequently sold a right of way to a railroad company passing through both his own land and that which he had previously sold, in an action for money had and received, brought by a person holding by conveyances under the original vendee against such vendor, she would be entitled to recover, not merely the value of the land so illegally sold by the vendor as a right of way, but the amount received by him for that portion of the land belonging to her which he thus sold; and if, in the sale to the railroad company, all parts of the land conveyed by him were treated as equally valuable, and the purchase money was paid as a gross sum, then the plaintiff would be entitled to recover a proportion of the purchase money corresponding to the proportion in which she held the land sold as to quantity." In that case the deed from Niles under which Mrs. Groover claimed was not recorded, and the subsequent deed made to the railway company was superior to hers, so that no redress was left to her other than to demand that Niles pay her the money which he had received from the sale of her land. We think, as to the case at bar, that if Finch had received from the railway company any money on account of a sale of the timber belonging to the defendants, they might have ratified the sale and have held him responsible for so much money as he received on that account. But under the testimony no sum was received by Finch on account of the timber; and this testimony was competent, for it did not contradict the deed, but merely explained the recital as to the

consideration. See Civ. Code 1895, § 3599. And compare *Delvin on Deeds* (2d Ed.) § 896. Since the plaintiff received no money from the sale of property belonging to the defendant, the plea of set-off on this ground necessarily fell.

We do not mean to say that a vendor may not become responsible to his vendee by the execution of a second deed covering the same property, even though the first conveyance be by quitclaim only. One "who fraudulently makes a second deed of conveyance to any land or real estate" is not only guilty of a crime (Pen. Code 1895, § 669), but commits an actionable wrong against the person injured. In this case, if Finch, having conveyed the timber to the defendants, although by only a quitclaim deed, had deeded the land, not omitting the timber, to the railroad company, and it had taken as a purchaser without notice, the defendants would have had a cause of action against him; but it would have sounded in tort, and not *ex contractu*. The plaintiff's action upon the notes being purely *ex contractu*, the defendants could not set off against it a cause of action arising in their favor from the plaintiff's having made, even though fraudulently and tortiously and to their damage, a second deed; for a cause of action arising *ex delicto* cannot be set off against an action *ex contractu*. Civ. Code 1895, § 4944; *McKleroy v. Sewell*, 73 Ga. 659.

3. So far we have discussed the questions as if the defendants in the court below had never received satisfaction for these very damages by which they sought to defeat or diminish the plaintiff's cause of action. However, it appears from the record that McLendon Bros. & Smith, a firm composed of the defendants and another, had sued the railroad company for a recovery of these very damages, and had accepted a sum of money in full settlement of the cause of action. That there can be but one satisfaction for the same cause of action is elementary, and the justness of the rule must appeal to every one not possessed of "an unnatural insensibility to the essential fitness of things." No matter what right of election the plaintiff may have as to choice of remedies, or as to whom he shall sue or join as parties defendant or as to waiving tort and suing on contract; still, when once he has received satisfaction for the cause of action, his right to further sue in any form forever ends. "A plaintiff may pursue any number of consistent concurrent remedies against different persons until he obtains satisfaction from some of them." Civ. Code 1895, § 4945. He is not permitted to pursue inconsistent remedies. *Equitable Life Assurance Society v. May*, 82 Ga. 646, 9 S. E. 597. A careful reading of the opinion by Chief Justice Bleckley in the case just cited, and an application of the principles there outlined, will make it plain that it is utterly inconsistent that McLendon Bros. should sue and recover from the rail-

road company on the theory that the conveyance which they held to the timber was perfect as title and superior to the deed of the railroad company, and then afterwards seek to recoup or set off against Finch, on the theory that the second conveyance impaired or invalidated the first conveyance; and likewise it is inconsistent that they should sue and recover from the railroad company on the theory that its payment to Finch for the timber afforded no protection against their prior title, and afterwards seek to appropriate to their benefit, as money had and received to their use any portion of the sum so paid to Finch by the company. Nor is it any reply to an application of this principle that in the settlement with the railroad company McLendon Bros. and their partner accepted less than the amount sued for and less than the actual damage done them. There is no intimation that the settlement was unfair or fraudulent. They voluntarily accepted the sum in full satisfaction. They pursued their action until the defendant therein tendered in settlement a sum which their judgment dictated they should accept. Such a settlement is as complete an estoppel against another suit upon the same cause of action as a judgment recovered and paid off would have been. *Atlanta Elevator Company v. Fulton Mills* 106 Ga. 431, 32 S. E. 541.

Nor is application of this doctrine to be withheld because the suit and satisfaction against the railroad company was in favor of McLendon Bros. & Smith, while McLendon Bros. alone are involved in the present transaction. It appears from the record that McLendon Bros., as well as their partner, Smith, participated in the settlement made with the railroad company and shared in the proceeds. This estops them. Compare *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513.

The verdict directed by the court was the only legal result of the case.

Judgment affirmed.

(2 Ga. App. 466)

SIMS v. SCHEUSSLER. (No. 329.)

(Court of Appeals of Georgia. Sept. 19, 1907.)

# 1. EVIDENCE—DOCUMENTARY—COPY.

A copy of an instrument required by law to be recorded, taken from the proper registry and duly certified, is presumptive evidence of the existence of an original.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1318.]

# 2. SAME—SECONDARY EVIDENCE.

The proper custodian of a canceled mortgage is the mortgagor, and of an outstanding uncanceled mortgage is the mortgagee. Where it appears that due notice has been served on the mortgagee to produce the original mortgage, and that the mortgagor resides beyond the jurisdiction of the court, a sufficient foundation was laid to admit as secondary evidence a properly certified copy of the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 638-641.]

### 3. BILLS AND NOTES—EVIDENCE—INSTRUCTIONS.

The issues in the case and the law applicable thereto were fully, fairly, and correctly submitted, and no material error appears, except in the exclusion of certain testimony set out in the opinion.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by G. W. Sims against Christine R. Scheussler. Judgment for defendant, and plaintiff brings error. Judgment refusing new trial reversed.

Denny & Harris, for plaintiff in error. C. N. Featherston and Dean & Dean, for defendant in error.

HILL, C. J. Sims brought suit against Mrs. Scheussler on a note made by her and indorsed by her husband. In her plea she admitted the execution of the note and that the plaintiff was the holder thereof. She defended on the ground that the note was without legal consideration, and was made by her in assumption of the debt of her husband to the plaintiff, or as security for such debt, and was therefore void and could not be enforced as to her. The jury found in favor of the defendant, and plaintiff's motion for a new trial was overruled.

The evidence in the record shows that Sims and defendant's husband were partners, engaged in the hardware business, and that prior to the execution of the note sued on Sims sold his interest in the business to Scheussler for the balance of the purchase price amounting to \$2,460.96. These notes were not paid at maturity, and the note for \$1,200 sued on was the outcome of efforts made by Sims to collect them. To this point the evidence presents no conflict. The plaintiff contended that, soon after the sale of his interest in the hardware business to Scheussler, the latter gave his wife a mortgage for \$6,000 on the whole stock of hardware goods; that, when he made an effort to collect his purchase-money notes, he was met by this claim of the wife; that he thereupon employed an attorney and threatened to attack the validity of this mortgage as against his notes; that in the negotiations which followed the wife finally gave him the note sued on for the notes held by him, made by her husband for the purchase of the goods covered by the mortgage, in full settlement of his claim of priority of payment out of said stock of goods; that these purchase-money notes were thereupon transferred and delivered to the defendant, and the mortgage canceled by a transfer to the mortgagee of the stock of goods, and that the consideration of the note sued on was the notes made by Scheussler in payment of the hardware stock, and the settlement of any claim, legal or equitable, based upon said notes; that therefore the note sued on and made by the wife was for her own benefit, and to protect her interest in the prop-

erty covered by her mortgage. If this was the truth of the transaction, the note made by the wife was a valid contract, and enforceable against her under the law of this state. A wife can buy the notes of her husband, or she can make a valid obligation in settlement of such notes, if they apparently constitute a prior claim against property derived from her husband and to which she has title or interest. *Daniel v. Royce*, 96 Ga. 566, 23 S. E. 493; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Atlanta, etc., Land Co. v. Austin*, 122 Ga. 374, 50 S. E. 124.

The defendant denied the foregoing contention of the plaintiff. She denied that she held any mortgage on the hardware stock, or had any interest in said stock, or any claim against her husband in connection with said stock of goods. She contended that the note sued on was made by her solely for the purpose of paying or assuming the debt of her husband to the plaintiff, as represented by the notes held by him against her husband, and that her said note was given by her as security for the payment of said notes by her husband. If this contention was the truth of the transaction, the note was invalid and void as against the defendant. *Civ. Code 1895, § 2488*. Any contract of the wife to which a creditor of the husband is a party, the purpose of which is to make the wife the husband's surety, or by which she assumes the payment of her husband's debt, is invalid, and cannot be enforced against her. *Berry v. Goodger*, 80 Ga. 620, 6 S. E. 19; *Nelms v. Keller*, 103 Ga. 746, 30 S. E. 572; *Carlton v. Bank*, 96 Ga. 470, 23 S. E. 388; *Johnson v. Leffler Co.*, 122 Ga. 670, 50 S. E. 488; *White v. Stocker*, 85 Ga. 200, 11 S. E. 604; *Bank of Cartersville v. Bayless*, 96 Ga. 684, 23 S. E. 851; *Chastain v. Peak*, 111 Ga. 889, 36 S. E. 967.

The evidence in the case was close and directly conflicting as to the material facts, and it was doubtful what was the real transaction between the parties. Every fact and circumstance was, therefore, valuable and weighty which tended to support the contention of either side. The learned trial judge in his charge submitted the issues and the law fairly, fully, and correctly. In our opinion, however, he erred in excluding certain testimony offered by the plaintiff. A copy of a mortgage for \$6,000, dated December 29, 1886, in favor of Mrs. Christine R. Scheussler, covering a stock of hardware, as security for a note of even date with the mortgage and payable to Mrs. Scheussler January 10, 1887, recorded in the clerk's office of the superior court of Fulton county January 24, 1887, and duly certified by the clerk of said court, was offered in evidence by the plaintiff. This certified copy also showed a cancellation of said mortgage signed by Mrs. C. R. Scheussler on April 30, 1888, in consideration of the transfer by the mortgagor to the mortgagee of a stock of hardware described in the mortgage. This satisfaction,

the certified copy stated, was entered of record December 17, 1886. Of course, this last date was a palpable clerical error. Before the certified copy of the mortgage and note was offered in evidence, proof was made that the defendant had been duly served with notice to produce the original, and that she had responded that she was unable to comply, and denied the existence of the original, or that it had ever been in her possession or control. The court excluded this testimony on the ground that there was no proof of the existence of the original. We think this was error. Clearly the ground upon which the ruling was based was erroneous. If the testimony was for any reason inadmissible, the reason for its exclusion would be immaterial. In our opinion, under the facts before the trial court, this testimony was competent. If the mortgage in question had been paid off and canceled, the proper custodian was the mortgagor. The defendant denied the existence of the original, but insisted that, if a genuine original had ever existed, the entry from the record showed that it had been paid before the giving of the note sued on, and the testimony was, therefore, not relevant and material. If the mortgage had been paid off, its proper custodian was the mortgagor, and the evidence showed that he had died out of the State, beyond the jurisdiction of the court, seven years before the suit was brought. If the mortgage had not been paid off, its proper custodian was the mortgagee, the defendant, who had been duly served with notice to produce. These facts show proper diligence as foundation for the introduction of the certified copy. The existence, genuineness, and contents of a deed showed to be lost or destroyed, or beyond the jurisdiction of the court, may be proved by a certified copy of it, if it has been properly and legally probated for record. *Bady v. Shivey*, 40 Ga. 684; *Hayden v. Mitchell*, 103 Ga. 435, 30 S. E. 287; *Brown v. Oattis*, 55 Ga. 416; *Lunday v. Thomas*, 28 Ga. 537; Civ. Code 1895, § 5172. The proper registration of the mortgage was presumptive evidence of the existence of an original, and the evidence that all the search for the original had been made which the law required entitled the plaintiff to the benefit of this secondary evidence. The testimony was relevant and material. It tended to strengthen the contention of the plaintiff that the defendant had an interest in the stock of hardware sold by him to her husband in which he also claimed an interest, and that her note was made for her benefit to protect that interest.

We think the court also erred in ruling out the statement of J. H. Lumpkin, a witness for the plaintiff, that "Mrs. Scheussler had some kind of a claim on the property," referring to the stock of hardware. This witness had testified that he was present with the plaintiff, Mr. Scheussler, Mrs. Scheussler, and Mr. Burton Smith, attorney for

plaintiff, when the note sued on was signed by Mrs. Scheussler. He was representing Mr. and Mrs. Scheussler as attorney in the negotiations leading up to the execution of the note, and gave testimony as to what took place at the negotiations, stating that "Mrs. Scheussler had some kind of a claim on the property. Whether this was called a mortgage, or bill of sale, or transfer, in the negotiations with Silms and his attorney which resulted in the giving of the note by Mrs. Scheussler, I am not quite positive." Objection was made to the statement that "Mrs. Scheussler had some kind of a claim on the property," and the court excluded it. This was not an effort to prove the contents of a written instrument, but was the statement of a substantive fact. Especially was this testimony admissible in view of the evidence of Mrs. Scheussler that she had no claim of any sort on the stock of hardware, or against her husband. That she had some kind of claim on the property at the time she executed the note sued on was material, as tending to show a valid consideration for the note.

The other assignments of error are without substantial merit; but we think the plaintiff, in view of the great conflict in the evidence, was entitled to every fact and circumstance relevant to the issue of the validity of the note sued on and tending to establish the truth of his contention.

The judgment refusing a new trial is reversed.

(3 Ga. App. 479)

#### KELLAM v. STATE. (No. 540.)

(Court of Appeals of Georgia. Sept. 19, 1907.)  
LANDLORD AND TENANT—SALE OF CROPS—  
CRIMINAL LIABILITY.

The facts in this case do not show a violation of section 672 of the Penal Code of 1895, and the verdict is set aside and a new trial ordered.

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Tilman Kellam was convicted of a violation of Pen. Code 1895, § 672, and brings error. Reversed.

E. L. Stephens, for plaintiff in error. J. L. Kent, Sol., for the State.

HILL, C. J. Plaintiff in error was a tenant, and was convicted of a violation of section 672 of the Penal Code of 1895. The evidence showed that the tenant delivered to the landlord two bales of cotton, which paid his rent, being all the cotton made by him during the year; that he also owed the landlord \$59 for three tons of guano, advanced to him during the year in which the crop was made to aid in making it. The tenant was also indebted to the landlord \$114 paid for him by the landlord before he moved to his place. The tenant, in addition to the two bales of cotton delivered in payment of rent, tendered

to the landlord all the "stuff" that he had made during the year on the place, and the landlord refused to accept it, because "it was nothing but a little trash of corn and fodder, and was worthless." The tenant also turned over to the landlord his mule, buggy, and harness, and the landlord allowed him \$110 for the property on what he owed him. The tenant sold the seed out of one of the bales of cotton for \$5.16. He stated that he was compelled to do this to get something to eat, as the landlord did not furnish him any rations. For the sale of these seed, and using the money therefrom, the landlord prosecuted the tenant for a violation of section 672, Pen. Code 1895.

We think the facts in this case do not show that essential element of this offense, a fraudulent intent. The tenant seems to have acted in the utmost good faith. He paid his rent in full, and offered to turn over to the landlord his entire crop, which was refused, and did turn over to the landlord his mule, buggy, and harness. The tenant owed \$59 for advances made to make the crop. His mule, buggy, and harness, according to the landlord, was worth \$110. This was more than sufficient to pay the advances, and we think should have been first applied in payment of the debt for the advances. But it does not appear that the value of the property delivered to the landlord by the tenant and the value of the crop which he tendered to the landlord would not have been sufficient to have fully paid the debt due for advances and the old debt contracted before the relation of landlord and tenant existed. The facts in this case show that the tenant was acting honestly, and had done everything possible to pay his landlord, and had in fact paid him in full for all advances made to aid in making the crop. It would be unjust to let this verdict stand, and the judgment refusing a new trial is reversed.

Judgment reversed.

(2 Ga. App. 473)

**A. G. RHODES & SON FURNITURE CO.  
v. FREEMAN. (No. 411.)**

(Court of Appeals of Georgia. Sept. 19, 1907.)

**1. ACTION—WAIVER OF TORT—SUIT ON CONTRACT.**

Where personal property of A. is delivered into the possession of B. under a promise to be returned on a certain named contingency, and B. refused to return the property to A. on the happening of said contingency, A. has an election of remedies. He can sue in trover, or he can waive the tort and bring an action ex contractu on account for the value of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 198, 199.]

**2. SALE—RESCISSION—RECOVERY OF PRICE PAID.**

There was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Diana Freeman against the A. G. Rhodes & Son Furniture Company. Judgment for plaintiff was affirmed on certiorari, and defendant brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, C. A. Picquet, and Walter Pearce, for plaintiff in error. Austin Branch, for defendant in error.

HILL, C. J. Defendant in error brought suit in a justice court against plaintiff in error on open account for the sum of \$35 and obtained a judgment. On certiorari this judgment was affirmed. The uncontroverted facts make the following case: The Rhodes & Son Furniture Company sold to Diana Freeman a set of furniture for \$165. As part of the purchase price she was to be allowed \$35 for an old set of furniture which she delivered to the vendor. The purchase was made by Diana Freeman on condition that it should be approved by her husband. He did not approve, and Diana demanded the return of her old furniture by the Rhodes Company according to the understanding; but the company refused to return it, and subsequently sued out an attachment for the \$130, balance of the purchase money of the new furniture, and seized the same, and Diana Freeman brought suit on account for her old set of furniture. It is contended by plaintiff in error that the judgment overruling the certiorari was error for two reasons: (1) Because the evidence established a conversion of the furniture by the Rhodes Company, and the remedy was either in trover for the conversion, or for damages on account of the breach of duty by the company in failing to comply with its agreement, and that, such suits sounding in tort, the justice court was without jurisdiction. (2) Because the plaintiff in error, as defendant in the justice court, pleaded that in the particular matter out of which the claim of \$35 arose it had sworn out a purchase-money attachment, and that said cause was still pending, the evidence supported this plea, and that, pending the controversy in the attachment case, plaintiff could not maintain her suit for the old set of furniture; it being a part of the purchase money.

1. The rule is well settled that the plaintiff may waive the tort and sue for money had and received to his use, where the property has been turned into money. James v. Smith & Bros., 62 Ga. 347; Buchanan v. McClain, 110 Ga. 480, 35 S. E. 665; Clark on Contracts, p. 776. It is only where personal property has been wrongfully taken and converted in some other manner than by a sale, and where no money has been received for it, that the remedy against the wrongdoer is restricted to an action ex delicto. But where personal property has been delivered to one under a contract, express or implied, to be returned on certain conditions, and such personal property is not returned as agreed, suit can be brought either in tort, or the tort can

be waived and suit brought in assumpsit for the value of the property. *Spencer v. Hewett*, 20 Ga. 426; *Buchanan v. McClain*, supra; *Pomeroy*, Code Remedies, § 569. The undisputed evidence in this case is that the contract of purchase was to be rescinded, and the old set of furniture returned to the defendant in error, if the trade was not approved by her husband, and that the value of the said old set of furniture was \$35. The contingency which was to prevent a complete consummation of the sale did happen, but the furniture company refused to rescind, and kept the old furniture, and sued for the purchase price of the new. It seems clear that the plaintiff in the court below had a selection of remedies—suit in trover, or in assumpsit for the value of the property.

2. The pendency of the attachment suit for the purchase money presented no legal reason why the plaintiff could not sue for the value of the furniture. The evidence does not show that she was making any resistance to the attachment suit. On the contrary, it seems that she treated the contract of sale as rescinded, and, failing to get her property returned to her, was suing for its agreed value. Under the facts, and without reference to any mere technical question of procedure, we think the justice of the case is with the defendant in error. The furniture company has retaken its property, and should either return or be made to pay for that of the defendant in error.

Judgment affirmed.

(129 Ga. 268)

### CURRY v. CURRY.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### ERROR, WRIT OF—DISMISSAL.

It appearing from the official entry made upon the bill of exceptions in this case that it was not filed in the office of the clerk of the trial court within fifteen days from the date of the judge's certificate, the writ of error must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2320.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action between C. W. Curry and Jennie Curry, administratrix. From the judgment, C. W. Curry brings error. Dismissed.

J. W. Quincey, S. C. Townsend and W. T. Dickerson, for plaintiff in error. R. G. Dickerson and L. A. Wilson, for defendant in error.

COBB, P. J. The bill of exceptions was certified by the judge on December 3, 1906. Service was acknowledged by counsel on December 26, 1906. It appears from the official entry of the clerk of the trial court that the bill of exceptions was filed in his office on December 26, 1906. A motion is made to dismiss the writ of error upon the ground that it was not filed in the office of the clerk of the

trial court within 15 days from the date of the judge's certificate. This motion must be sustained. *Swafford v. Swafford*, 125 Ga. 386, 53 S. E. 959, and cases cited.

Writ of error dismissed. All the Justices concur.

(129 Ga. 35)

### NELSON et al. v. SPENCE et al.

(Supreme Court of Georgia. Aug. 10, 1907.)

#### 1. BANKRUPTCY—EFFECT ON FORECLOSURE.

Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder, as to the property included in the mortgage, will not be affected by a subsequent adjudication in bankruptcy. *Merry v. Jones*, 119 Ga. 643, 46 S. E. 861.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 7-9.]

#### 2. REFORMATION OF INSTRUMENTS—OMISSION BY MISTAKE.

Even if the instrument sought to be foreclosed in equity is, on its face, not a mortgage, but a bill of sale to secure a debt, it is within the power of a court of equity, upon proper allegations of omission from the instrument, made through the mutual mistake of both parties thereto, and upon sufficient evidence submitted on the trial to sustain the allegations of such an omission through mutual mistake, to reform the instrument so as to make the omitted stipulation a part of the instrument in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 74.]

#### 3. SAME.

The amendment offered by the defendant in error to his original petition for the foreclosure of the alleged mortgage, while inartificial in form and somewhat indefinite in its allegations, and upon this ground subject to special demurrer, was, in the absence of such demurrer, sufficient to authorize the admission of evidence tending to show that both parties to the instrument intended that it should contain words making it a mortgage covering the stock of goods as "a stock in bulk changing in specifics, and including the soda-fountain in the store."

(a) The instrument reformed takes effect from the time when it was originally executed, except as to bona fide purchasers without notice and those standing in like relations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 112.]

#### 4. SAME.

After the amendment seeking to have the instrument reformed, it was competent to show by parol evidence what the intention of the parties thereto was, as upon the ascertainment of their mutual intention depends the determination of the rights of the plaintiff in the equitable petition to the reformation of the paper as prayed. Such parol testimony was not admissible to vary or explain the terms of the instrument as it was originally executed, but was admissible for the consideration of the jury in passing upon the question as to whether certain other terms should be added to it, because they were originally intended as a part of the paper, but had been omitted from it by mutual mistake of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 156.]

#### 5. CORPORATIONS—MORTGAGE—PRESUMPTIONS.

Where the name of a corporation as mortgagor, together with its common seal, is affixed to a mortgage by one signing his name as treasurer of such corporation, the presumption is that such officer had authority to execute the

instrument in behalf of the corporation. Carr v. Georgia Loan & Trust Co., 108 Ga. 757, 33 S. E. 190.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1723.]

#### 6. APPEAL—HARMLESS ERROR.

The presumption in favor of the authority of the officers executing the paper referred to was rebuttable; but, there being no evidence impeaching the presumptive authority in this case, the admission of the other evidence tending to establish the authority, if error, was harmless.

#### 7. CONTRACTS—QUESTION FOR JURY.

It was error for the court to submit to the jury the decision of the question "as to whether this instrument sued on is a deed or bill of sale, or whether or not it is a mortgage." The construction of the paper, inasmuch as it was unambiguous, was a question for the court. Besides, while the paper itself is free from ambiguity, this part of the charge is not, as it might be understood by the jury as referring to the paper as it stood before or after being reformed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 167.]

#### 8. TRIAL—INSTRUCTIONS.

The court having properly instructed the jury that the power of a court of equity to grant relief in cases of the kind under consideration is exercised with caution, and that to justify its exercise the evidence must be clear, unequivocal, and decisive as to the mistake, the fact that the court in a subsequent part of the charge instructed the jury that it was incumbent on the plaintiff to prove by a preponderance of evidence that such a mistake had been made before the jury would be authorized to overcome the prima facie presumption which arises upon this instrument upon the face of it was not error requiring the grant of a new trial.

#### 9. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.

The court charged the jury as follows: "I charge that even if the intent to delay and defraud creditors existed on the part of the corporation, Perry's Pharmacy, but that at the time J. M. Spence was not aware, didn't know, of that intent, and that the circumstances were not such as to put a reasonable man upon notice that it was time for him to investigate that it was a suspicious transaction, then I charge you on that issue you should find in favor of the plaintiff, J. M. Spence." The plaintiff in the foreclosure proceedings having been shown to be president of the corporation, a part of whose duties it was to familiarize himself with the books and accounts of the corporation, as to transactions between the corporation and such officer, whatever intent to delay or to defraud creditors might have existed on the part of the corporation would be presumed in law to be known by the president thereof, and the ruling requiring "circumstances sufficient to put a reasonable man on notice," especially as the jury were not cautioned to take into consideration the superior opportunities of an officer for obtaining information as to the intent with which the act or deed was done, was harmful error.

#### 10. TRIAL—INSTRUCTIONS.

It appearing that the plaintiff in the foreclosure proceedings was president of the corporation, and there being no controversy under the pleadings and evidence as to this fact, the court should not have so charged the jury as to leave upon their minds the impression that it was an open question for their decision whether or not he was actually an officer of the corporation.

#### 11. FRAUDULENT CONVEYANCES—INTENT OF PARTIES—INSTRUCTION.

The intention and purpose of the parties to the instrument under consideration in the making of the same being a material question for

determination, it was error for the court to refuse an appropriate request to charge embracing the following: "You may take into consideration the kinship, friendship, or intimacy of the parties concerned, see what their interests were. You may look to the whole dealings with the corporate affairs of Perry's Pharmacy, and from all the circumstances that have been brought out in evidence you are to judge of this question."

#### 12. APPEAL—REVIEW.

Other questions made in the record are not dealt with, as it is not probable that they will arise on the next trial.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; I. J. Hofmayer, Judge pro hac.

Action by J. M. Spence against Perry's Pharmacy. R. B. Middleton, receiver, filed an intervention. L. W. Nelson, trustee in bankruptcy, and the pharmacy, joined in the intervention. Verdict for plaintiff, and, from an order denying a new trial, the interveners bring error. Reversed.

J. M. Spence filed an equitable petition against Perry's Pharmacy, alleging that he is the holder of a mortgage on the entire stock of merchandise carried by said defendant; that said mortgage, for the sum of \$4,200 principal, is due and unpaid; that said stock is not of sufficient value to cover the amount of the mortgage, and that it could be sold for a larger sum at private sale than at public sale. Wherefore he prayed that the mortgage be foreclosed, and that "a receiver be appointed to take charge of all of the assets of said defendant, including all of the property described in said mortgage, all notes and accounts, choses in action, \* \* \* and that the same be sold to satisfy said mortgage." A copy of the instrument sued on is attached to the petition, the material portions of which are as follows: "Six months after date we promise to pay to the order of J. M. Spence \$4,200, for value received." It further provides for interest from maturity at the rate of 8 per cent., and 10 per cent. attorney's fees, and contains a waiver of "all homestead and exemption rights which I or my family may be entitled to under the constitution or laws, state or federal. \* \* \* And, in order to secure the payment of the said indebtedness, we hereby bargain, sell and convey to the payees of this note, their heirs and assigns, the following property: \* \* \* All of the stock of merchandise carried by Perry's Pharmacy in their store at Camilla, Ga., consisting of [itemizing said stock], and all other articles carried in their stock not herein mentioned." And, in case said debt was not paid at maturity, the payee was authorized to seize and take possession of said property and sell the same, after advertising the sale for 10 days, at public outcry in front of the courthouse door, and apply the proceeds to the payment of said indebtedness. The instrument was signed as follows: "Perry's Pharmacy [L. S.] T. B. Perry, Sec. & Treas. [L. S.] T. B. Twitty, V. Pres. [L. S.]" After



considering the petition, the judge at chambers passed an order appointing T. B. Perry permanent receiver, "to take charge of all the mortgaged property described in said petition, and to take charge of the store of defendant, and to carry on the business of the same in the ordinary way, keeping a full account of his doings until further order of the court." At the following term R. B. Middleton, receiver of the Rodrigues Cigar Company, a creditor of Perry's Pharmacy, filed an intervention, attacking for fraud a certain sale of goods by Perry's Pharmacy to the Robbins-Thompson Drug Company, and alleging that the instrument in favor of J. M. Spence was made for the purpose of delaying, hindering, and defrauding the other creditors of said defendant, "that said so-called mortgage is void and fraudulent, for the reason that it was made to prefer an officer of said corporation after said corporation was insolvent," and that said instrument was a violation of the provisions of the act of the General Assembly relating to the sale of goods in bulk. Acts 1903, p. 92. The intervenor prayed that the mortgage in favor of J. M. Spence be declared to be null and void, and that this intervenor's claim, and all other just claims of such creditors as may hereafter intervene, be proved and allowed against the assets of Perry's Pharmacy, and that T. B. Perry be removed as receiver. Subsequently other creditors intervened, alleging the insolvency of Perry's Pharmacy, and praying that a receiver be appointed under the provisions of the insolvent trader's act. At the hearing the motion to remove T. B. Perry from his position as receiver was denied, and he was ordered to take charge of that part of the goods of the Robbins-Thompson Drug Company which had been purchased from Perry's Pharmacy. After the filing of the original petition by J. M. Spence, Perry's Pharmacy was adjudicated a bankrupt in the District Court of the United States, and L. W. Nelson was appointed and qualified as trustee in bankruptcy. He joined in the intervention of Middleton et al., and prayed that T. B. Perry, receiver, be directed to turn over to him, the trustee in bankruptcy, all the assets of the Perry's Pharmacy. The interveners also filed a demurrer to the foreclosure proceeding instituted by Spence, on the ground that "said alleged mortgage [in favor of Spence] is no mortgage, but shows upon its face that it is a deed to secure a debt," and because it conveys title only to those goods in the stock of Perry's Pharmacy at the time of the execution of the instrument, and does not operate upon after-acquired goods. Nelson, trustee, filed a plea in abatement to the original foreclosure proceeding, based on the latter ground of the demurrer. The intervention was amended by alleging, in substance, that the instrument sought to be foreclosed by Spence was void, because not properly executed by Perry's Pharmacy, that said instrument was

tainted with usury, and that Perry's Pharmacy is not indebted to Spence in the sum named in the said instrument. Spence amended his petition by alleging that "it was the intention of the parties to said mortgage from Perry's Pharmacy to J. M. Spence that it should cover the stock of goods in said mortgage described, including the soda fount, as a stock of goods in bulk changing in specifics, and by mutual mistake these words were omitted from the instrument," and prayed that the mortgage be so reformed as to conform to the intention of the parties. The interveners objected to the allowance of this amendment, on the ground that it set up a new cause of action, and because it sought to vary the terms of an unambiguous written instrument. The objection was overruled, and they excepted *pendente lite*. At the hearing of the application of Nelson, trustee, the court passed an order directing "that the notes, accounts, choses in action, books and papers of the Perry's Pharmacy, also the property received by the receiver from the Robbins-Thompson Drug Company, be delivered by T. B. Perry, receiver, to L. W. Nelson, trustee in bankruptcy, and that the application of the trustee in bankruptcy to have the assets and money taken possession of or arising under the original mortgage foreclosure in favor of J. M. Spence be refused." The interveners excepted *pendente lite* to this order. Upon the trial the jury returned a verdict finding that "the paper sued on by the plaintiff [Spence] was intended by parties thereto as a mortgage," and that "it was the intention of the parties to include the soda fount," and also in favor of the plaintiff upon the mortgage. The interveners made a motion for new trial, which was overruled, and they excepted, assigning error upon this judgment and upon their exceptions *pendente lite*.

D. F. Crosland, R. J. Bacon, Jr., and B. B. Lane, for plaintiff in error. E. E. Cox, A. G. Powell, M. E. O'Neal, S. A. Roddiberry, and Theo. Titus, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(129 Ga. 181)

#### SEIFERT v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. Aug. 4, 1907.)

#### TELEGRAPHS—DELAY IN DELIVERY—PETITION.

A petition in a suit against a telegraph company alleged that a telegram to a physician had been delivered to the defendant for transmission, which showed upon its face that he was called for the purpose of relieving the plaintiff from suffering that she was then enduring; that the telegraph company negligently failed to transmit and deliver the telegram within a reasonable time; that on account of such failure the suffering of plaintiff continued for many hours, which could and would have been relieved if the telegram had been promptly delivered

and the physician had responded thereto, which, it is alleged, he would have done; and that after the lapse of many hours the physician came and promptly relieved the suffering of the plaintiff. The only damages alleged were the mental and physical suffering which the plaintiff endured during the time that the physician would have come, if the telegram had been promptly delivered, and the time that he actually arrived. *Held*, that the petition set forth no cause of action for the damages alleged, and was properly dismissed on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 68.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Mrs. E. C. Seifert against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Seifert sued the telegraph company, alleging: That her husband delivered to the defendant a message in the following words: "To Dr. R. C. Mosely, Bolingbroke, Ga.: Come at once. Mrs. Seifert worse. E. C. Seifert." The defendant received the message and undertook to transmit it with reasonable dispatch. The charges demanded were paid. The message was delivered to the defendant at 12:50 p. m. on July 18th, and was not delivered to the addressee until 8:35 a. m. on the 19th. The delay was due to the gross negligence of the defendant. The message could have been transmitted in 15 minutes, and delivered in 5 minutes after its arrival. The office of the addressee was within 50 yards of the office of the defendant in the village of Bolingbroke, and his residence was also in that village. When the message was delivered to the telegraph company, the agent was informed that the plaintiff was ill and suffering intensely, and that the message was to her physician, and that it was of the utmost importance that it should be transmitted without delay; and the agent agreed to do so. On July 18th the plaintiff became suddenly worse, and began to suffer the most intense pain from an illness which had begun on July 5th. Dr. Mosely was her attending physician. Those with her were unable to offer the slightest relief. The physician would have come at once, had he received the telegram. The home of the plaintiff was only five miles from Bolingbroke, and Dr. Mosely could have reached her in 30 minutes after he received the message, and he could have relieved her within 10 minutes after his arrival, and when he did arrive, on the 19th, he immediately relieved her of her most acute suffering. No other physician was accessible. The husband of the plaintiff was compelled to hire a buggy and drive through the country to Bolingbroke and secure the physician. The failure of the defendant to promptly transmit the telegram caused the plaintiff 19 hours of the most intense suffering, which affected her general health, retarded her

recovery, and caused her to fall into an illness from which she suffered and still suffers. The defendant was informed of her suffering, and of its character, and of the necessity for relief, and the importance of prompt transmission and delivery of the telegram; and the telegram was sent by her husband for her and in her behalf, for the reason that she was unable to attend to the matter. The defendant filed demurrers, both general and special, which were sustained, and the plaintiff excepted.

N. E. & W. A. Harris, for plaintiff in error. Jos. H. Hall and Warren Roberts, for defendant in error.

COBB, P. J. (after stating the facts as above). Where an agent sends a telegram for an undisclosed principal, the principal may bring an action in his own name for damages resulting from error in transmission which brought about a delay in delivering the telegram. *Propeller Towboat Co. v. Western Union Tel. Co.*, 124 Ga. 478, 52 S. E. 766; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672. An undisclosed principal may bring a suit in his own name for the breach of the contract made by his agent with a telegraph company, in which it agreed to transmit and deliver a telegram with reasonable dispatch, or for a breach of any duty arising out of the contract, and recover such damages as are appropriate to the form of action in which the suit is brought. It is said that the suit by the plaintiff in this case is well brought, for the reason that her husband merely acted as her agent in sending the telegram; that she was the undisclosed principal in the contract made between him and the telegraph company, and therefore any right of action which arose out of the breach of the contract, whether it sounded in contract or in tort, could be asserted by her in her name. The averments of the petition are possibly sufficient, as against a general demurrer, to show that there was an agency, and that the transaction did not arise merely from the fact that the relation of husband and wife existed between the parties. For the purposes of the present case we will treat the action as well brought in the name of the plaintiff.

The purpose of the pleader was evidently to bring an action sounding in tort, and the petition will be so construed. The only damages alleged are those resulting from the physical and mental suffering endured by the plaintiff during the hours that elapsed between the time that the doctor would have arrived if the telegram had been promptly delivered and the time at which he did arrive, being about 19 hours. The averments of the petition made a clear case of gross negligence against the defendant. According to the averments there was absolutely no reason why there should have been such

an unreasonable delay in transmitting and delivering the telegram. In an action sounding in tort, before there can be a recovery for any damages, it must appear from the allegations that there has been a breach of some duty which the telegraph company owed to the plaintiff, and that the damages claimed were the natural and legitimate consequences of such breach of duty. The company owed a duty to the plaintiff to transmit and deliver the telegram within a reasonable time. There was undoubtedly a breach of this duty. Was the damage sustained by the plaintiff the natural and legitimate consequences of this breach of duty? Whether there can be a recovery of damages resulting from mental anguish and pain, when there has been no physical tort committed, is a matter about which the courts of this country are not in accord. In *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 133, it was held that the addressee of a telegram was not entitled to recover of the telegraph company damages on account of the mental pain and suffering alleged to have resulted from the failure of the company to deliver a message in due time. In the opinion Mr. Justice Lumpkin says: "The law protects the person and purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."

There were other courts which took a contrary view of this question at the time that the *Chapman Case* was decided, and since that decision rulings have been made in other jurisdictions which are in conflict with the rule as adopted by this court. On account of these rulings, and statutes passed in the different states, it may be safely asserted that in more than a majority of the

states where the question has been dealt with, either by the courts or by the legislatures, provision has been made for the recovery of damages for mental pain and suffering in a number of cases where the transaction does not involve a physical tort. See, in this connection, *Western Union Tel. Co. v. Motley*, 87 Tex. 38, 27 S. W. 52; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Bonner v. Western Union Tel. Co.*, 71 S. C. 308, 51 S. E. 117; *Watson's Pers. Inj.* § 393 et seq., 462. It will be seen that even in those states where recovery is allowed for mental anguish, independently of any contemporaneous physical injury, the damages recoverable must be the natural and proximate result of the breach of duty out of which it is claimed they arose. Without reference to what may be the rule elsewhere as to the recovery of damages merely for mental anguish, independently of a physical tort, this court is committed, under the *Chapman Case*, to the proposition that there can be, in this state, no recovery of damages in such a case. The plaintiff, therefore, cannot maintain her suit so far as it attempts to recover damages for mental pain and suffering.

But the petition also alleged that the suffering endured by her was physical, and that this could have been relieved if the telegram had been transmitted and delivered within a reasonable time. The case resolves itself, therefore, into the question as to whether the telegraph company is liable for the damages resulting to the plaintiff from physical suffering which she was enduring at the time that the telegram was delivered to the company for transmission, and which she continued to endure up to the time that the physician arrived. Can it be said that her suffering was the natural and proximate result of the failure of the telegraph company to transmit and deliver the message within due time? If so, the plaintiff is entitled to recover. If not, no recovery can be had. Civ. Code 1895, § 3912, declares that "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." The suffering which the plaintiff was enduring at the time that the telegram was delivered for transmission was, of course, neither the natural nor proximate result of any act of the defendant. The suffering which was endured during the 19 hours that elapsed after the physician should have arrived and before he did arrive was not caused by any act of the defendant. The suffering was not the result of any breach of duty, either of omis-

sion, or of commission, of the defendant. This suffering would have been brought about if there had been no telegraph company and no message. But it is said that relief would have come if the telegram had been delivered within a reasonable time, and that there would have been a cessation of the suffering, and the wrongful act of the defendant was in so conducting its business as that the plaintiff was not relieved from the physical suffering which she was enduring. The mental suffering which the plaintiff endured could not be the subject of recovery, under the ruling in the Chapman Case. The physical suffering stands upon no different footing. There may possibly be cases where there is mental suffering and no physical suffering, though all pain necessarily involves consciousness and mental perception. There cannot be a case where there is physical suffering without more or less mental suffering. *Atlanta & West Point Railroad Co. v. Potts*, 128 Ga. 397, 57 S. E. 686. The mental suffering of the plaintiff is not recoverable, for the simple reason that it is not the natural and proximate result of the negligence of the defendant. Neither was the physical suffering the natural and proximate result of the defendant's negligence. It had its origin and continuance, not in the defendant's conduct, but in the malady with which she was afflicted. In the origin and continuance of it the defendant's conduct was not in any sense the preponderating cause. We are aware of the fact that there is a case in which the right to recover upon facts very similar, in fact almost identical with the present case, has been sustained. *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274. But it is to be noted that this case arose in a state where a recovery for mental pain and suffering, independent of any physical tort, was allowable. There was no error in sustaining the demurrer.

Judgment affirmed. All the Justices concur.

(129 Ga. 32)

#### BROWN v McBRIDE et al.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. WILLS — EXECUTION — EVIDENCE — SIGNATURE OF WITNESS.

When it is sought to prove a will in solemn form, where one of the subscribing witnesses is absent, it is competent to prove the signature of such witness, after proving that the witness is inaccessible. Such proof for the purpose mentioned is equivalent to proof that the witness is dead or beyond the jurisdiction of the court.

1 (a). In such a case a witness is competent to testify as to his belief who will swear that he knows or would recognize the handwriting of the subscribing witness. The source of his own knowledge is a question for investigation, and goes entirely to the credit and weight of the evidence. The testimony objected to, fairly interpreted, should be construed as meaning that the witness knew the signature of the subscribing witness to the will, and would recognize it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 687; vol. 20, Evidence, § 2247.]

#### 2. SAME—SANITY OF TESTATOR—EVIDENCE.

In an application to probate a will in solemn form, where the sanity of the testator is the question at issue, it is not erroneous to allow nonexpert witnesses to testify as to their opinion of the condition of the testator's mind, after stating the facts upon which they based their opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 116, 118.]

#### 3. WITNESSES—IMPEACHMENT.

Where a witness upon his direct examination testified that the testator was of sound mind, and, for the purpose of impeachment, a written contract was introduced, which had been executed by the witness, wherein it was recited that the testator was non compos mentis, it was competent, after the introduction of such contract, for the witness, in explanation, to testify that he did not know the meaning of the terms "non compos mentis" as used in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1261.]

#### 4. WILLS—EXECUTION—EVIDENCE.

The excerpts from the charges of the court complained of stated correct principles of law, and were applicable to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 651.]

#### 5. SAME—PROOF IN SOLEMN FORM—EVIDENCE.

Upon an application to prove a will in solemn form, it is not erroneous to exclude from evidence, upon the ground of irrelevancy, letters of administration and the bond of the administrator from the court of ordinary, originating in a proceeding for administration upon the estate of the deceased before the will was offered for probate in solemn form. Nor was it erroneous to exclude from evidence, upon the ground of irrelevancy, a written order signed by the attorneys of one other than the propounder of the will, addressed to the caveator, requesting him to pay certain amounts of money to certain creditors of the estate of the deceased.

#### 6. SAME—EXECUTION.

A will is properly executed if signed by the testator, and, after signing it, he acknowledges to three subscribing witnesses that he signed it, and thereupon the three witnesses, in the presence of the testator and in the presence of each other, sign the will as witnesses thereto. It is not erroneous, therefore, upon an application to prove the will in solemn form, to refuse a request to give to the jury a charge which contains the following: "If it appears from the evidence in the case that Clegg signed the will in the presence of the attesting witnesses, or of one of the attesting witnesses, then it would not have been executed according to law, and could not be probated in solemn form, but your verdict would be against the will."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 249.]

#### 7. TRIAL—INSTRUCTIONS.

In the absence of a timely written request, it is not erroneous for the court to omit to charge the law upon the subject of impeachment of witnesses. *Boynton v. State*, 115 Ga. 587 (3), 41 S. E. 995, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 643.]

#### 8. APPEAL—REVIEW.

Upon the trial certain rulings were made to which exceptions pendente lite were allowed, and upon which error is assigned in the bill of exceptions. These questions were sufficiently dealt with when the case was before this court on a former occasion (*Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583), and it is not now necessary to deal with them.

#### 9. CONTINUANCE.

Upon the motion to continue, the evidence was of such character as to show no abuse of discretion in ordering the trial to proceed.

## 10. WILLS—PROBATE.

Upon a careful examination, the evidence appears to be of such character as to support the verdict finding in favor of the validity of the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 700-710.]

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Proceedings by J. M. McBride for the probate of the will of one Clegg. S. B. Brown filed a caveat. From a judgment probating the will, he brings error. Affirmed.

Allen Fort & Sons and E. A. Hawkins, for plaintiff in error. Ware G. Martin, Jas. Taylor, and Shipp & Sheppard, for defendant in error.

ATKINSON, J. 1. The issue arose out of an application to probate a will in solemn form. Clegg was the testator. G. A. McDonald, J. M. Rhodes, and A. A. Kerney were the subscribing witnesses. There was no testimony by any witness that the testator actually signed the will in the presence of any of the witnesses, but there was testimony to the effect that all three of the witnesses signed the will in the presence of the testator, and in the presence of each other. Upon this point, Kerney testified by interrogatories: "I was a witness to the will; signed the original will as a witness at the request of Judge D. H. Pope. George McDonald and John Rhodes were the other witnesses. I do not know whether the other two witnesses were present when Clegg signed the will, but my best judgment and recollection is that I was not present when Clegg signed the will. I and the other two witnesses signed the will in the presence of the testator, as witnesses, and in the presence of each other." Neither McDonald nor Rhodes testified. It was proved on the trial that McDonald was dead. It was shown that the signature to the will was the genuine signature of the testator. There was also evidence to the effect that some 15 years before the trial Rhodes had left the country, and had not been heard of since. Frequent inquiries had been made to ascertain his whereabouts, and all efforts to locate him had proved unavailing. He had killed a man before leaving. A witness who saw him at the time he was leaving testified: "Rhodes told me on the train that he had had some trouble, and had to leave. He told me he was going 'up the country,' was what he said. He did not say how far, and I haven't either met or seen him since or heard from him." There was other testimony tending to show an inability to discover Rhodes' whereabouts. It was not affirmatively shown that he was either dead or beyond the limits of the state. Having in this manner shown the absence of the two witnesses, the propounder of the will then offered evidence for the purpose of proving the signatures of such absent witnesses en-

tered upon the original will. For this purpose, several witnesses were permitted to testify, in substance: "I would say to the best of my knowledge that the signature of J. M. Rhodes to the paper presented to me is the signature of J. M. Rhodes. I have seen it a good many times. I have had a good many deals with him." The testimony was admitted over the objections (a) that the evidence was illegal and insufficient to prove the signature of J. M. Rhodes; (b) that there was no proof that Rhodes was dead or beyond the jurisdiction of the court. For the same purpose, another witness testified: "That is Mr. McDonald's and that is Mr. Virgil A. Clegg's signature. That is the signature of McDonald." This evidence was objected to upon the ground that it was illegal and insufficient to prove the signature of McDonald; the witness not having testified to ever having seen him write or that he knew his signature or his handwriting. Under the provisions of Civ. Code 1895, § 3282, a will is proved in solemn form when "the will is proven by all the witnesses in existence and within the jurisdiction of the court, or by proof of their signatures and that of the testator, the witnesses being dead, and ordered to record." There was proof in this case that the witness McDonald was dead, and sufficient proof accounting for the absence of the witness Rhodes to show that he was inaccessible, and that his testimony could not be had. Under these conditions, we think a sufficient showing was made to justify the court in hearing evidence upon the handwriting of both witnesses. The reason is equally as cogent for proving the will by proof of handwriting of the subscribing witness when the witness is inaccessible to the court and cannot be found, in order that his testimony may be procured, although he may at the time be found within the jurisdiction of the court, as if he were dead, or, if living, as if he were living without the jurisdiction of the court. See, in this connection, *Robinson v. State*, 128 Ga. 254, 57 S. E. 315. The court was authorized to hear evidence for the purpose of determining whether the witness had been shown to be accessible or not. Evidence was submitted upon that proposition, which was of such character as fully sustained the conclusion of the court that the witness was inaccessible. The witness being inaccessible, it was the duty of the court to meet the necessity which arose on account of the absence of the witness by admitting testimony in proof of the signature of the witness to the will. When it is attempted to prove the will by proof of the signature of the subscribing witness, any witness is competent to testify as to his belief who will swear that he knows or would recognize the handwriting; the source of his own knowledge being a question for investigation and going entirely to the credit and weight to be given his evidence. Civ. Code 1895, § 5246. While the

testimony which was admitted did not in so many words say that the witness "knows or would recognize the handwriting," yet a reasonable interpretation of the testimony will admit of no other construction than that the witness meant that he knew or would recognize the handwriting. If it had been desired to press him further upon the extent or source of his information, it would have been competent upon cross-examination to do so; but, in the absence of anything further, we think the testimony shows upon its face that it was admissible in evidence for the purpose offered, and, after admission, its credit was for the jury.

2. Ann Willis, a nonexpert witness, testified, with respect to the sanity of the testator: "I judged his mind was good." This testimony was objected to upon the ground that it was an expression of opinion of a nonexpert witness, without stating the facts upon which the opinion was based. It appears from the testimony of the witness that she resided on the testator's place and was acquainted with him. She further testified, in substance, as follows: "All his business he pretty much looked after himself. He gave directions. He had a business transaction the day before he died concerning a barrel of whisky. He appeared all right. He closed the transaction by writing a paper and giving it to the gentleman with whom he had the conversation, and told him to carry it to somebody in Leesburg. Mr. Clegg wrote the paper himself, and died the next day." J. A. McDonald, another nonexpert witness, testified: "I talked with him. He was all right." This evidence was objected to upon the ground that it was an expression of opinion relating to the mental condition of the testator, without stating the facts upon which the opinion was based. An examination of McDonald's testimony shows that he was a neighbor of testator, lived about a mile from him, that he had seen him just a few days before his death, and had had a conversation with him about his farm. The testator told the witness that he was going to town, and afterwards he saw him on his way to town two or three times. He afterwards left home and went to Albany, remained a few days under treatment, and came back home. Witness was working for the testator at the time, and saw him frequently. He says the testator attended to his business himself and gave directions himself; that there was no difference between the general way of transacting business then and prior to that time. The reason for the objection urged against the admissibility of the evidence is not supported by the recitals of the record. Both witnesses testified to such an acquaintance with the testator and to his demeanor in the transaction of business in the conduct of his farm as to authorize an expression of their opinions before the jury as to his mental condition. The opinions, of course, were to be taken in the

light of the facts upon which they were based; and, in view of the testimony of the witnesses as a whole, we can see no error in the admission of the testimony in evidence over the objection urged thereto. See, in this connection, *Proctor v. Pointer*, 127 Ga. 134, 56 S. E. 111; *Slaughter v. Heath*, 127 Ga. 748 (6), 57 S. E. 69.

3. McBride was called by the propounder of the will to show that the testator was sane and mentally competent to execute a will. The caveators introduced, for the purpose of impeachment, a certain written contract signed by McBride, in which it was declared that the testator was non compos mentis. It was competent by way of explanation for the witness, on redirect examination, to testify that he did not know the meaning of the term "non compos mentis" as used in the paper which he signed. The question here is one of impeachment, and not whether a party is bound by the recitals of the contract which he signed.

4. One of the grounds of the motion for new trial is as follows: "Because the court erred in giving in charge to the jury the following charge, to wit: 'And it is also required, under the law, that the propounders shall produce all the witnesses to that will for the purpose of showing by them the proper execution of that will, unless those witnesses are dead, or out of the jurisdiction of the court, if they cannot show them to be dead, or without the jurisdiction of the court, or beyond the limits of the state. If they fail to show that the witnesses are dead, or cannot show that they are absolutely beyond the limits of the state or boundaries of the State, yet if they show an effort and an endeavor by diligence, a diligent effort to locate a witness, and that they cannot locate the witness, that they have been diligent in trying to ascertain the whereabouts of the witness, if it is shown that the witness is gone, and that they have been diligent in ascertaining the residence of said witness, if they failed to do so after making such diligent search, that would be sufficient accounting for the absence of such witness under the law.'" For the reasons indicated in the first division of this opinion, the foregoing is a correct proposition of law, and it appears to be applicable to the facts as indicated by the record.

Another ground of the motion for new trial is as follows: "Because the court, after giving in charge the following, to wit: 'In the propounding of a will, the burden of the proof is upon the propounder (that is, in this case, upon those who are setting it up, the execution, those affirming it to be the will of V. A. Clegg), to show all the facts necessary to make a good will, and this includes not only the fact of execution, but that the will is the free act of a man competent under the law to make a will. Those are necessary, gentlemen, in setting up and propounding a will in common form'—erred in qualifying

the same, under the contention of caveator that greater proof of the knowledge of the contents by the testator was necessary in this case, the capacity of the testator being involved as follows: 'While that is true, if it is shown by satisfactory proof, the execution of the will by the testator, the signing of it, and that the testator could read and write and knew the contents of the will, so far as knowing the contents of the will on the part of the testator, that would be sufficient to carry the burden in that respect; if they can show the execution, that it is the signature of the testator, and that the testator was present, who was competent to read and write, nothing else appearing, that would be sufficient to carry the burden, so far as knowing the contents of the will is concerned.' This ruling is also correct. See, in this connection, *Slaughter v. Heath*, 127 Ga. 748 (9), 57 S. E. 69.

5. The eighteenth ground of the motion for new trial complains that the court erred in excluding upon the ground of irrelevancy, upon objection being urged, certain letters of administration granted upon the estate of the testator to his daughter, together with the petition for administration, signed by the attorneys of the applicant, and also the administrator's bond filed by the administrator. It was urged that the evidence was material as a circumstance tending to show that the court of ordinary had denied the probate of the will of V. A. Clegg by granting letters of administration; that it was the judgment of a court having jurisdiction of the subject-matter, and was notice to the world that said Clegg died intestate. The nineteenth ground of the motion for new trial complained of a like ruling of the court in excluding from evidence a certain paper which was signed by the attorney of the daughter of the testator, addressed to S. B. Brown, the caveator, requesting Brown to pay certain amounts of money to certain parties designated as creditors of the estate of V. A. Clegg, the testator. There was no error in excluding either of these papers from evidence. Neither was in the slightest degree material upon any question raised upon the application to prove the will in solemn form.

6. The court refused, upon application of the caveator, to charge the following written request: "The law requires that the testator must sign the will in the presence of the attesting witnesses, or the testator must acknowledge the signing of the will in the presence of the subscribing witnesses. If it appears from the evidence in the case that Clegg signed the will not in the presence of the attesting witnesses, or one of the attesting witnesses, then it would not have been executed according to law, and could not be probated in solemn form, but your finding should be against the will. The law requires that there should be three attesting witnesses, and that the testator should have

signed in their presence. In investigation of the question of whether or not a testator is of sound mind, if it should appear that at any particular time the insanity of the testator has been shown, then the presumption of law is that this condition of insanity continues until this presumption is rebutted by satisfactory proof." This request contains at least one inaccurate expression which justified the court in refusing to give it in charge. The court was requested to charge: "If it appears from the evidence in the case that Clegg signed the will not in the presence of the attesting witnesses, or of one of the attesting witnesses, then it would not have been executed according to law, and could not be probated in solemn form, but your finding should be against the will." This is not a correct statement of the law. The witnesses need not have seen the testator sign the will. It would have been sufficient if all of the witnesses in the presence of each other, and in the presence of the testator, signed the will, after he had signed it, upon his acknowledgment of having signed it, although they did not see him affix his signature. Such an execution would have complied with the terms of the statute. Civ. Code 1895, § 3272. See, in this connection, *Beall v. Mann*, 5 Ga. 456-459. The request was not so qualified as would have authorized its submission to the jury.

Judgment affirmed. All the Justices concur.

(129 Ga. 174)

# BRUNSWICK & B. R. CO. v. HOODENPYLE.

(Supreme Court of Georgia. Aug. 8, 1907.)

## 1. RAILROADS — FRIGHTENING HORSES — UNUSUAL NOISES.

A railway company is not legally responsible for producing noises which are unusual, or greater than is customary in the running of its locomotive and cars, unless such noises are unnecessary. *Morgan v. Central Railroad*, 77 Ga. 788; *Georgia Railway & Electric Co. v. Joiner*, 120 Ga. 905, 48 S. E. 336, and citations.

Where, however, a petition alleged, in substance, that those in charge of a locomotive being operated on the road of the defendant company caused great and unusual volumes of steam to be suddenly emitted from the locomotive, which made a loud and unusual noise, and enveloped plaintiff's horse, being driven near by on a public street of a city, thereby greatly frightening the animal; that by reason of the attempt of the horse in its fright to run away, and the endeavor of plaintiff's driver to prevent it, a portion of the wagon was backed upon defendant's track; that, notwithstanding those in charge of the locomotive saw the wagon on the track, the frightened condition of the horse, the inability of the driver to control the animal, and the great peril of plaintiff, who, on account of a sudden jerk of the wagon by the horse in its fright, had fallen down in the wagon and was unable to extricate himself from the contents of the vehicle and alight therefrom, and though the locomotive was being run so slowly that it could easily have been stopped before reaching the wagon, such employees made no effort to stop the locomotive, but ran the same against plaintiff's wagon before the horse

could be made to pull it from the track, thereby violently throwing plaintiff to the ground and greatly injuring him in the particulars described; and that the defendant company was not only negligent because of the emitting of the steam in the manner and under the circumstances set forth, but was also negligent because of the failure to stop the locomotive before it struck the wagon—held, that the petition was not open to general demurrer on the ground that it did not allege that the noise made by the escaping steam was unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1110.]

## 2. ERROR, WRIT OF—RECORD—REVIEW—RULINGS ON EVIDENCE.

Even if in any event the asking of leading questions and the admission of the answers thereto is cause for a new trial, the mere propounding of such questions is not, when it does not appear what, if any, were the answers thereto. *City of Rome v. Stewart*, 116 Ga. 738, 42 S. E. 1011, and citations. See, also, *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2899.]

## 3. EVIDENCE—HEARSAY.

When the plaintiff, upon being asked why he left a place where he was being treated by specialists, answered, "Because they could do nothing for me," the answer was not objectionable as being hearsay.

## 4. WRIT OF ERROR—ASSIGNMENTS OF ERROR—OBJECTIONS TO EVIDENCE.

An assignment of error upon the admission of specified evidence as a whole was not well taken when some of such evidence was admissible. *Collins Park R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975 (3).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3033.]

## 5. EVIDENCE—OPINION EVIDENCE.

"The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form correct conclusions therefrom." *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239; *O'Neill Mfg. Co. v. Harris*, 127 Ga. 640, 56 S. E. 739, and cases cited.

## 6. ERROR, WRIT OF—REVIEW.

Where the opinion of a witness, under the rule just stated, was inadmissible, the ruling of the court in rejecting it will be sustained, though based on another and insufficient, or even wrong, reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3413.]

## 7. APPEAL—REVIEW.

It was not cause for a new trial that the court declined to permit the defendant's counsel, on cross-examination of the plaintiff, to propound to him the following question: "Did you not notice this locomotive pop off down there half an hour before that?" Even if the question had been allowed and had been answered in the affirmative, the answer would not have shown that the locomotive was then emitting steam in the same manner and in such volumes as it was when plaintiff's horse was frightened.

## 8. TRIAL—REMARKS OF COURT.

The court did not err in stating the contentions of the plaintiff. This is especially clear in view of the amendment to the petition, the effect of which was to make it allege that the defendant company owned, and, at the time of the occurrence complained of, was operating on its track, the engine and car which struck the plaintiff.

## 9. SAME—INSTRUCTIONS.

The instructions of the court to the jury as to the contentions of the defendant were not such as to lead "the jury to infer that defendant admitted causing the accident and the conse-

quent injury to plaintiff." Nor were these instructions such as to place "upon defendant a burden not imposed by the declaration nor the law"; that is, of showing that the noise made by the escaping steam was necessary.

## 10. RAILROADS—INJURIES AT CROSSING—INSTRUCTIONS.

The court charged: "So that when an injury is shown to have been sustained by a person by the running of the cars or the locomotives of a railroad company, the presumption of law is that they were negligent, and that presumption remains until the railroad company introduces evidence and shows, or shows by evidence introduced, that it was not negligent." This charge was not fairly subject to the exception that it "probably led the jury to believe that it was necessary to rebut this presumption by the evidence introduced by the defendant, and that they were not allowed to consider evidence introduced by plaintiff to determine whether this presumption had been overcome." The words "or shows by evidence introduced," used by the court, clearly indicated that the evidence introduced by plaintiff should be considered by the jury on the point in question.

## 11. DAMAGES—AMOUNT.

In view of the evidence for the plaintiff as to the extent of his injuries and the pain suffered by him in consequence thereof, this court cannot say that the verdict was so excessive as to require a new trial.

## 12. RAILROADS—INJURY AT CROSSING.

The verdict was not without evidence to support it, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by J. N. Hoodenpyle against the Brunswick & Birmingham Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. A. Wimblish, Twitty & Reese, and J. D. Sparks, for plaintiff in error. F. H. Harris, Ernest Dart, and Courtland Symmes, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(129 Ga. 234)

LOUISVILLE & N. R. CO. et al. v. HURT.

(Supreme Court of Georgia. Aug. 10, 1907.)

## ACTIONS—MISJOINDER OF CAUSES—PETITION.

The petition, when properly construed, set forth two separate and distinct causes of action, one of them arising ex contractu and the other ex delicto, and was subject to demurrer on the ground that there was a misjoinder of causes of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 469-489.]

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by J. F. Hurt against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Julian F. Hurt sued the Louisville & Nashville Railroad Company and the Atlanta, Knoxville & Northern Railway Company, alleging that the former company, desiring to



complete its line of railroad through the county of Gordon, and acting under the charter of the latter company, and with its knowledge, permission, and consent, sent out agents for the purpose of procuring rights of way; that said agents approached the plaintiff, who represented himself and his sister, Mrs. Newman, and proposed, if plaintiff and his sister would give the company a right of way through their lands in the county named, that, in return for such concession, the company would locate one of its depots and stations on said land, and a town would grow up around it, and, in this way, the value of the land of plaintiff would be greatly enhanced; that believing such an arrangement would be of advantage, and not knowing just where the line of road would run, the plaintiff and his sister executed and delivered deeds conveying rights of way to the Louisville Property Company, a subsidiary corporation of the first-named defendant for the purpose of acquiring and holding real estate that it might need in the construction of its railroad. While petitioner does charge that the agents of the defendant intentionally misled him, it is charged that he believed the statements and acted upon them, and would never have made the deed but for such statements, and that to repudiate the statements would amount to a fraud. The petition charges that the agent of the defendant located the line of road partly on the lands of the plaintiff and partly on the lands of his sister, and have graded and constructed the same ready for the laying of the track, and absolutely refuse to locate a station or depot either on the land of himself or of his sister. The land taken by the railroad amounts to two acres, and is worth at least \$100 per acre. In grading the line, the plaintiff was further damaged \$500 by the diversion of the waters of a creek and by the manner in which the culverts were constructed. To this petition each of the defendants filed separate demurrers, both general and special. In each of the demurrers the point is made that there is a misjoinder of causes of actions; there being two causes of action alleged, one arising out of contract and the other out of tort. The demurrers were overruled, and the defendants excepted. The trial resulted in a verdict in favor of the plaintiff, and the defendants excepted also to a judgment overruling a motion for a new trial.

D. W. Blair, F. A. Cantrell, and F. C. Tate, for plaintiffs in error. T. W. Skelley and R. J. & J. McCamy, for defendant in error.

COBB, P. J. (after stating the facts as above). It is conceded by counsel that, under the ruling in *Atlanta, Knoxville & Northern Railway Co. v. Newman*, 128 Ga. 281, 57 S. E. 514, the petition set forth no cause of action against the *Atlanta, Knoxville & Northern Railway Company*. The judgment, there-

fore, will be reversed in any event so far as that company is concerned. Treating the petition as one in which suit against the *Louisville & Nashville Railway Company* alone is brought, is it subject to the objection that it sets forth two causes of action, one *ex contractu* and the other *delicto*, and is therefore subject to demurrer upon the ground that there is a misjoinder of causes of action? The concluding paragraphs of the petition unquestionably set forth a cause of action *ex delicto*. This is conceded. The question is: What is the character of the cause of action set forth in the first part of the petition, which relates to the agreement to build a depot and establish a station on the land of the plaintiff? The definite allegation of the petition is that the defendant, through its authorized agents, agreed to do this. If they did, the undertaking amounted to a contract between the parties. They have refused to do it, and hence there has been a breach of the contract, and damages are claimed for this wrong. Unquestionably, if the agreement between the railroad company and the plaintiff was an enforceable contract, the plaintiff, in an action *ex contractu*, could recover damages for its breach. But counsel say that their petition, properly construed, is not brought for a breach of the contract. Their contention is that the defendant obtained the plaintiff's land by fraudulent misrepresentations, and that they have a right to bring an action for damages and make it pay for the land taken. Counsel do not characterize the form of action which they claim the petition sets forth; but in the way in which it is described by them it must be considered in the nature of an action 'for deceit—a cause of action made up out of the two elements of fraud and injury. The basis of the cause of action, whatever it may be, is the contract. The right of action of the plaintiff must therefore be one that can be enforced either in an action *ex contractu* for a breach of the contract, or in an action for a tort arising out of a breach of some duty which the contract imposes. As was said by presiding Justice Lumpkin, in *Louisville & Nashville Railroad Co. v. Spinks*, 104 Ga. 695, 30 S. E. 968: "Every person who makes a contract of any kind is, of course, under a duty of performing it; but it would never do to hold that every breach of a civil contract, though necessarily in a sense involving a breach of the duty thereby imposed, would give rise to an action *ex delicto*." In order to sustain that part of the petition which relates to the agreement to locate a station, it will be necessary to construe the suit as a cause of action for deceit, or in the nature thereof. Before this can be done it must appear that there was actual fraud in the statements relied on. The petition expressly negatives intentional fraud. We do not think that the petition can be properly construed as setting forth a cause of action as for a deceit. It is an action for the damages result-

ing from a failure to comply with the contract. There is no duty alleged growing out of the contract, except merely the duty of performance in manner and form as the contract provides for. If an action of tort would lie in this case, then an action of tort would lie in any case where the vendee of the land refuses to pay the purchase money. Properly construed, the petition sets forth two causes of action, one *ex contractu* and the other *ex delicto*, and was subject to the demurrers urged against it.

Judgment reversed. All the Justices concur.

(129 Ga. 246)

**GIDDENS et al. v. GIDDENS.**

(Supreme Court of Georgia. Aug. 12, 1907.)

**NEW TRIAL—GROUNDS.**

No complaint being made that any error of law was committed upon the trial, the only grounds of a motion for a new trial being that the verdict was contrary to law and to the evidence, and without evidence to support it, and the evidence, though conflicting, being amply sufficient to authorize the verdict, there was no abuse of discretion in refusing a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 144.]

(Syllabus by the Court.)

Error from Superior Court, Talbot County; W. A. Little, Judge.

Action between Orrie Giddens and others and Belle Giddens. From the judgment, Orrie Giddens and others bring error. Affirmed.

J. J. Bull, for plaintiffs in error. Persons & McGehee, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(129 Ga. 271)

**MARTIN v. HUNTER.**

(Supreme Court of Georgia. Aug. 14, 1907.)

**INJUNCTION.**

There was no abuse of discretion in granting an injunction in this case.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by W. A. Martin against J. L. Hunter. From a judgment, Martin brings error. Affirmed.

W. T. Dickerson and Wilson, Bennett & Lambdin, for plaintiff in error. S. C. Townsend, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(129 Ga. 232)

**HINTON v. BREWER.**

(Supreme Court of Georgia. Aug. 10, 1907.)

**INSANE PERSONS—INQUISITION—COSTS.**

One who, after suing out a commission of lunacy, voluntarily dismisses the proceeding, is

not compelled to pay the costs which have accrued therein as a condition precedent to instituting a second proceeding of the same character relative to the same person and involving the same questions which were presented by the first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 39.]

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action between E. E. Hinton and S. S. Brewer. From the judgment, Hinton brings error. Affirmed.

See 57 S. E. 748.

Z. B. Rogers and P. P. Proffitt, for plaintiff in error. C. P. Harris, for defendant in error.

FISH, C. J. The sole question presented by the record in this case is whether the costs of a former proceeding to obtain an adjudication that a person is of unsound mind, and the appointment of a guardian for such person, must be paid by the petitioner in such proceeding as a condition precedent to his instituting a second proceeding for the same purposes. Under the provisions of Civ. Code 1895, § 5043, a plaintiff cannot recommence his suit where it has been nonsuited, dismissed or discontinued, without the prepayment of the costs already incurred. Is a proceeding for a commission of lunacy a suit within the meaning of the provisions of that section? In our opinion it is not. A proceeding for a commission of lunacy is begun in the interest of the public and the person alleged to be of unsound mind; and, if voluntarily discontinued, costs should not be imposed upon the petitioner, if the proceeding was instituted in good faith. We quote from 22 Cyc. 1137: "In the absence of statutory regulation, the matter of the allowance of costs in original lunacy proceedings rests in the equitable discretion of the court having jurisdiction, and the same rule obtains in respect of costs upon a traverse or supersedeas of the inquisition. Where there is a finding of insanity, the costs of the inquiry are ordinarily to be paid by the insane person or his estate; it being considered that these are in the nature of necessary expenses incurred for the benefit of the party and for which he or his estate is impliedly bound. Where the proceedings result in a finding of sanity, costs will not be allowed as of course against the prosecutor, if the proceedings were commenced in good faith and for the supposed benefit of the alleged lunatic; but where proceedings are promoted without probable cause or maliciously, the prosecutor will be held liable for the costs." Civ. Code 1895, § 2583, provides: "It shall be the duty of each ordinary of this state to draw his warrant upon the treasurer of his county for such sum or sums as shall be actually necessary or requisite to defray the expenses of trying every commission of lunacy, and of carrying or conveying an insane person from

such county to the State Lunatic Asylum, when such insane person shall be lawfully committed to such asylum: provided, that no money shall be drawn from the county treasury for the purposes herein set forth, where the estate of such insane person is sufficient to defray such expenses." It would seem from the language of this section that the costs of trying commissions of lunacy should be paid out of the treasury of the county, except where the person as to whom such proceeding is had is found to be insane and his estate is sufficient to defray such expenses. But whether or not this be a proper construction of this section, or whether the petitioner for a commission of lunacy is, under given circumstances, liable for the costs of the proceeding, we hold that he is not bound to pay the costs of such a proceeding, voluntarily dismissed by him, as a condition precedent to the institution of a second proceeding of like character against the same person whose mental condition was the subject for inquiry in the first.

Judgment affirmed. All the Justices concur.

(129 Ga. 227)

**WHEELER v. FIDELITY & CASUALTY CO. OF NEW YORK.**

(Supreme Court of Georgia. Aug. 12, 1907.)

**INSURANCE—ACCIDENT POLICY—ACTION—PETITION.**

The petition sets forth no cause of action, and was properly dismissed on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1164.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by F. F. Wheeler against the Fidelity & Casualty Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

Wheeler sued the Fidelity & Casualty Company, alleging, that the defendant was indebted to him in a stated sum on a policy of accident insurance. The policy insured the plaintiff against "disability or death resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means (suicide, sane or insane, not included)." The policy, in different clauses, made stipulations in reference to the terms upon which the insured would or would not be entitled to indemnity; such clauses containing such expressions as: "If said injuries shall," etc. The policy also contained the following clause: "In case a person other than the insured or his legal representatives is specifically named as beneficiary, then, and not otherwise, this policy shall also, in consideration of the premium, insure the person so named as beneficiary against disability or death, resulting directly, and independently of all other causes, from bodily injuries sus-

tained through external, violent, and accidental means (suicide, sane or insane, not included), and received by said person while riding as a passenger in or on a public conveyance propelled by steam, electricity, compressed air or cable, and provided for passenger service, including a passenger elevator." It was alleged that Lela Wheeler, wife of the plaintiff, was specifically named as the beneficiary in the policy, and that she died as the result of a gunshot wound accidentally inflicted. The shot that killed her was fired from a passing street passenger car, propelled by electricity. The conductor of the car got into an altercation with a passenger, and shot at the passenger in the car, and the bullet struck the plaintiff's wife while she was going up the front steps of her home on the street along which the car was passing. It was alleged that the soliciting agent of the defendant, at the time the policy was sold, represented that the plaintiff would be indemnified in the sum named in the policy in the event that his wife should die as the result of an external, violent, or accidental means, whether received on a car or otherwise; that the agent stated that it was a new form of insurance which furnished greater protection than any policy that had ever been issued; that this was an inducement held out to the plaintiff to take the policy. By amendment it was alleged that at the time the plaintiff paid the renewal premium the defendant was issuing two forms of policies for the same premium, in one of which the liability was not confined and limited, and in the other of which it was confined and limited by express words; and that the plaintiff paid the renewal premium upon the faith of the representation made to him that the policy covered all of the injuries of the nature and character of those which resulted in the death of his wife. The defendants filed a general demurrer; and also a special demurrer to that portion of the petition relating to the representations of the soliciting agent, upon the ground that whatever representations might have been made were merged into the written contract, and the terms of the writing could not be varied by parol testimony.

R. R. Richards, for plaintiff in error. Garrard & Meldrim, for defendant in error.

COBB, P. J. (after stating the facts as above). If the stipulation in the policy providing for indemnity to the insured for loss resulting from the death or disability of his wife is interpreted as it stands alone, there can be but little question that under the terms of the stipulation there was to be no liability upon the company unless the death or disability resulted from an injury to the wife while she was a passenger upon a car or an elevator. The words are clear and unequivocal. This clause in the policy is entirely free from ambiguity. But it is said this clause should be interpreted in the light

of the entire contract, and this is the correct rule. And if there is any other clause or stipulation in the policy which would enlarge the liability of the company to the plaintiff growing out of accidents to the wife, then the company would be liable to the extent to which the terms of the policy enlarged the liability, but no further. The insured is indemnified against disability and death resulting from bodily injury sustained through external, violent, or accidental means, except in those cases where the disability or death may result from causes made the subject of express exceptions in the policy. The policy then asserts that "if said injuries" shall disable the insured, etc., the company will pay a certain amount per week, "if said bodily injuries" are received by the insured while riding as a passenger in a public conveyance, etc., the amount paid to be stated amounts, etc.; and again, "if said injuries" shall not wholly disable the insured, the indemnity shall be paid in a prescribed manner. And in other clauses there are different stipulations in reference to the indemnity, preceded by the words, "if said injuries." The clause containing the stipulation upon which the present suit is based follows all of these clauses. It is argued, because there is in that clause the expression, "This policy shall also, in consideration of the premiums, insure the person so named as beneficiary against disability and death," etc., that all stipulations preceding this clause are carried into it, and authorize a claim of indemnity in the event of the death or disability of the beneficiary under the same conditions where such claim could be made by the insured himself; that the subject-matter of the policy is indemnity against death or disability by accidental means of every character, except those expressly excepted, of both the insured and the beneficiary; and that, when the policy is construed as a whole, the insured is indemnified against the death or disability of himself, and also against the death or disability of the beneficiary. We cannot agree to this view. While we recognize the rule that a policy of insurance must be construed most strongly against the insurer, still the words of the policy must be given the meaning which they ordinarily bear; and where it is manifest that it was the intention of the insurer that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. We do not think there is any ambiguity whatever in the clause of the policy providing for indemnity resulting from death or disability of the beneficiary. Nor do we think there is any stipulation in the policy which can be properly held to vary or alter the plain and evident meaning of the terms in this clause. The writing being unambiguous, parol evidence as to what was said by the parties at the time it was executed will not be admitted to vary or alter the terms of the writing. The petition set forth no cause of

action, and was properly dismissed on demurrer.

Judgment affirmed. All the Justices concur.

(129 Ga. 326)

### HOLTZENDORFF v. DE RENNE

(Supreme Court of Georgia. Aug. 10, 1907.)

#### NEW TRIAL — INSTRUCTIONS — EXPRESSION OF OPINION.

Where the court, in its charge to the jury, expresses an opinion upon a material question of fact as to which the evidence is conflicting, it is cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 57-61.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

W. J. De Renne filed a distress warrant on the property of Nannie L. Young. S. T. Holtzendorff interposed a claim. Judgment finding the property subject, and claimant brings error. Reversed.

Shelby Myrick, for plaintiff in error. W. G. Charlton and Geo. W. Owens, for defendant in error.

FISH, C. J. A distress warrant in favor of W. J. De Renne against Nannie L. Young was levied on certain furniture and household goods, which were claimed by S. T. Holtzendorff. Upon the trial of the issue as to whether or not the property was subject to the distress warrant, the evidence submitted in behalf of the claimant tended to show that, 24 days prior to the levy, the claimant purchased the property levied upon from the defendant, Mrs. Young, and received from her a bill of sale to the same, and very soon afterwards moved it from the house where it then was to another house, where he rented it to Mrs. Young's mother, who was in possession of it at the time of the levy. The evidence in behalf of the plaintiff tended to show that Mrs. Young was in possession of the property for some time prior to the alleged sale, subsequently thereto, and at the time of the levy. So there was, therefore, a sharp conflict in the evidence as to whether or not Mrs. Young retained possession of the property after the alleged sale by her to the claimant. The court instructed the jury as follows: "Whether the retention of possession by the vendor in this case, Mrs. Young, of the property, has been sufficiently explained to remove the presumption of fraud, is a question for the jury to determine. \* \* \* The possession of Mrs. Young of a whole or part of the property sold by her to Holtzendorff after judgment against her and at the time of the levy is presumptively a possession as owner." The jury returned a verdict, finding the property subject and a stated amount of damages against the claimant for filing the claim for delay only. The claimant made

a motion for a new trial, which was overruled, and he excepted.

Error was assigned in the motion upon the above-quoted instructions of the court, on the ground that the court therein assumed that the question of possession in the defendant, Mrs. Young, was not a disputed fact, and that the language used by the court amounted to an expression of opinion that possession of the property in question by Mrs. Young had been actually shown after the time claimant contended that he had purchased it from her. We think the assignment of error was well taken. Instructing the jury that it was for them to determine "whether the retention of possession" of the property by Mrs. Young, after the alleged sale of the same by her to the claimant, had been sufficiently explained to remove the presumption of fraud, was equivalent to an expression of opinion by the court that Mrs. Young had retained possession after the alleged sale. The same is true of the instruction that: "The possession of Mrs. Young of a whole or part of the property sold by her to Holtzendorff after judgment against her, and at the time of the levy, is presumptively a possession by the owner." The court therefore should have granted a new trial. While other questions are made in the record, under the view that we have taken of the case, it is unnecessary to deal with them.

Judgment reversed. All the Justices concur.

(129 Ga. 214)

### HARLEY v. RIVERSIDE MILLS.

(Supreme Court of Georgia. Aug. 9, 1907.)

#### RELEASE—CANCELLATION—RETURN OF BENEFITS.

One who, for valuable considerations, including the payment to him of a given sum of money, has released another from all further liability for personal injuries sustained by the releasor, cannot, even upon legal grounds, obtain a rescission of such contract of release, and recover upon the original cause of action, without first restoring or offering to restore, to the releasee what he paid for such release.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 45.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Harry H. Harley against the Riverside Mills. Judgment for defendant, and plaintiff brings error. Affirmed.

B. B. McCowen, for plaintiff in error. C. Henry and R. S. Cohen, for defendant in error.

FISH, C. J. Harry H. Harley brought an action against the Riverside Mills for damages from personal injuries alleged to have been sustained by him on February 8, 1902, by reason of the negligence of the defendant in furnishing to the plaintiff, its employé, a

machine with which to perform the work assigned to him which was defective and not suited to the purpose for which it was used. The petition was dismissed on demurrer, and the plaintiff excepted. In sustaining the demurrer the court passed the following order: "It appearing that petitioner had received a certain sum from defendant's company in payment of the damages received, and had brought suit against said defendant company after having signed a release without restoring to said company the amount received in settlement, it is ordered that the demurrer filed in said case be sustained." So much of the petition as bears on the question presented was as follows: "That defendant corporation recognized its obligation to petitioner, and through its superintendent, James H. Vivian, obtained a release for said liability from petitioner on or about the 18th of February, 1902, under promise to take petitioner back in their employment as soon as he was able to knock about at his half regular salary of \$1.40 per day until well, and then to give petitioner employment at \$1.40 per day as long as he should live." In connection with this allegation, there was attached, as an exhibit to the petition, a copy of the release contract, executed by plaintiff on February 18, 1902, in the presence of two witnesses, one of them a notary public. This contract, after reciting that the plaintiff on February 8, 1902, had the misfortune to lose a portion of his left hand on a planer in the defendant's shop, contained the following language: "Whereas the Riverside Mills have agreed to pay all doctors' bills in connection with said accident and also pay me half time, namely seventy cents per day, until I am discharged by their physician, now, therefore, this indenture witnesseth that in consideration of the payment of all doctors' bills in connection with said accident, and the further payment of half time to me by the Riverside Mills, until I am discharged by their physician, the receipt of first payment of which half time is hereby acknowledged, namely \$4.20 for six days' lost time week ending February 15, 1902, I have remised, released, and forever discharged, and by these presents do \* \* \* remise, release, and forever discharge the Riverside Mills \* \* \* of and from all \* \* \* cause and causes of action, suits, debts, \* \* \* damages, \* \* \* claims and demands whatsoever in law and equity, which against the said Riverside Mills, I ever had, now have, or which I \* \* \* may have, \* \* \* by reason of the accident which happened to me on or about February 8, 1902, as aforesaid." The petition further alleged: "That in recognition of said agreement [the alleged agreement made with plaintiff by defendant's superintendent], petitioner was permitted to return to work, and received his half pay, until about well, when petitioner, without reason-

able cause or fault on his part, was discharged, in violation of said agreement, thereby rendering the release signed by petitioner null and void." There was a prayer that the release be declared of no effect, and that plaintiff recover a stated amount of damages on account of his injuries.

Counsel for plaintiff in error contends, in his brief, that the acknowledgment of "having received \$4.20 for six days' lost time," contained in the contract of release, "should [not] be construed into an acknowledgment that he had not earned it, when it entered into the general average of his pay while convalescent. The release does not say for lost time to date, but only for time lost to the 15th, when the contract was entered into on the 18th, and after he had according to the petition taken up his light duties at the mill. The idea was to average his pay while disabled at 70 cents per day, including the time lost when he earned nothing, to the time when well and earning almost full pay; the \$4.20 received being for salary, and not in settlement of his claim for damages." The essential weakness of this contention consists in the fact that counsel seek to construe the release contract in connection with allegations as to a promise made by defendant's superintendent, on or about the time that this contract was signed, which promise does not appear in the written instrument. It is, perhaps, not material; but we may say, in passing, that the statement that the contract was entered into after the plaintiff, "according to the petition, had taken up his light duties at the mill," is not supported by the petition, as it fails to state when the plaintiff "was permitted to return to work, and received his half pay." This contention of counsel as to the construction to be placed upon the contract of release is not supported by the language of that contract, which states that the \$4.20 received by the plaintiff was for six days' lost time during the week ending February 15, 1902, and in consideration of the payment of this sum of money, and the assumption of the other specific obligations by the defendant, the plaintiff executed the release. Nor does it appear from the contract of release that it was obtained by defendant under its promise to take plaintiff back into its employment, as soon as he was able to "knock about," at half his regular wages, until well, and then to give him employment for the balance of his life at \$1.40 per day. And, of course, such parol promise or agreement, even if made contemporaneously with the execution of the written contract, by defendant's superintendent, or any one else representing it, could not be added to the written contract of release. The petition, taken in connection with the release contract, which is made a part thereof, when properly construed, is an effort to rescind such contract, for no legal reason, and without restoring, or offering to

restore, to defendant, the other party to the contract, the money plaintiff had received by virtue of the same; and then, with this contract out of the way, to recover damages for the injuries sustained by plaintiff. Even if the plaintiff had, by the allegations of his petition, shown a legal reason for a rescission of the contract, such as fraud in its procurement, he could not have obtained a rescission, without refunding, or offering to refund, the money which he had received thereunder. *East Tenn. Va. & Ga. Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Id.*, 89 Ga. 264, 15 S. E. 861; *Western & Atlantic R. Co. v. Burke*, 97 Ga. 560, 25 S. E. 498; *Strodder v. Souther Granite Co.*, 94 Ga. 628, 19 S. E. 1022; *Id.*, 99 Ga. 596, 27 S. E. 174; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254. It follows that there was no error in sustaining the demurrer to the petition.

Judgment affirmed. All the Justices concur.

(129 Ga. 257)

#### STOCKING v. MOURY.

(Supreme Court of Georgia. Aug. 13, 1907.)

VENDOR AND PURCHASER — PURCHASE-MONEY NOTE—ACTION—EXECUTION—AFFIDAVIT OF ILLEGALITY.

Where land was sold, a promissory note given for the purchase money by the vendee, bond for title executed by the vendor, the note subsequently indorsed by the payee and transferred to a third party, who, upon the maturity of the same, brought suit thereon and recovered a general judgment against the maker and indorser, with a special lien on the land, and the execution issued upon such judgment was levied upon the land, it was not a good ground of illegality to such execution that, after the rendition of the judgment, the land had been conveyed by the payee of the note, who then held the legal title thereto, to the other defendant, the maker of the note, in order that the execution might be levied thereon as the latter's property, in accordance with the provisions of Civ. Code 1895, § 5432.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

On levy of execution by David Moury, A. N. Stocking filed affidavit of illegality. Judgment for plaintiff in execution, and claimant brings error. Affirmed.

See 57 S. E. 704.

D. K. Johnston, for plaintiff in error. H. W. Dent and J. A. Perry, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(129 Ga. 255)

#### SISTRUNK et al. v. PENDLETON, Judge.

(Supreme Court of Georgia. Aug. 13, 1907.)

1. EXCEPTIONS, BILL OF — MANDAMUS — REFUSAL TO SIGN BILL OF EXCEPTIONS.

In passing upon an application for mandamus to compel a judge to certify a bill of exceptions which is presented in proper form, this court will not look into the merits of any assignment of error therein made; but mandamus

will not lie to compel the trial judge to sign and certify a bill which is so defective in form as to necessitate a dismissal of the writ of error in case it should be certified and brought to this court.

## 2. SAME—SUFFICIENCY.

It appearing that persons who are essential parties to a bill of exceptions sued out in this case are neither named nor designated as such in the bill presented, and that the only attempt to do so is by using with reference to them the words "et al." and "tenants," following the name of one who is a proper defendant in error, such bill of exceptions is fatally defective for want of necessary parties. *Farr v. Farr*, 113 Ga. 577, 38 S. E. 962; *Orr v. Webb*, 112 Ga. 806, 38 S. E. 98.

(Syllabus by the Court.)

Application by J. E. Slstrunk and others for writ of mandamus against J. I. Pendleton, Judge. Writ denied.

BECK, J. Mandamus nisi denied. All the Justices concur.

(129 Ga. 287)

## SMITH et al. v. MAYOR AND COUNCIL OF MACON.

(Supreme Court of Georgia. Aug. 10, 1907.)

### 1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The decision in the case of *Toney v. Macon*, 119 Ga. 83, 46 S. E. 80, upon review, is adhered to and approved.

### 2. SAME—EQUAL PROTECTION OF THE LAWS.

That provision of the act of 1903 (Acts 1903, p. 579), amending the charter of the city of Macon, which authorizes the city authorities to determine which of the existing roads and alleys in the territory annexed to the city by the act shall be declared to be public streets of the city, does not abridge the privileges and immunities of the citizens of the annexed territory, nor deprive them of property without due process of law, nor deny to them the equal protection of the law, within the meaning of the fourteenth amendment to the Constitution of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Constitutional Law, §§ 807, 633.]

### 3. STATUTES—TITLE OF ACT.

The act of 1903 (Acts 1903, p. 579), amending the charter of the city of Macon, is not, for the reasons urged in the present case, subject to the objection that it contains in the body of the same, matter variant from the title thereof.

### 4. CONSTITUTIONAL LAW—EXTENSION OF CITY LIMITS.

The act above referred to is not unconstitutional for any reason urged against it in the present case.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by William Smith and others against the mayor and council of the city of Macon. Judgment for defendants, and plaintiffs bring error. Affirmed.

Smith, and more than 50 others, in behalf of themselves and others in a similar situation that might thereafter unite with them, brought an equitable petition against the mayor and council of the city of Macon, alleging: That they are residents and owners of real estate in the territory described in

the act approved August 12, 1903 (Acts 1903, p. 579), purporting to extend the limits of the city of Macon. The city authorities of Macon have issued tax executions against plaintiffs, and are proceeding to enforce the same by levy and sale, claiming the act under the authority of the act above referred to. The act of 1903 is violative of that provision in the Constitution of this state which declares: "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times amenable to them." Civ. Code, 1895, § 5698. The act is also violative of that provision in the fourteenth amendment to the Constitution of the United States, which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Civ. Code 1895, § 6030. The act conflicts with this provision, for the following reasons: (a) It places upon the annexed territory their proportionate part of the existing debt of the city of Macon, amounting to \$900,000, when the residents thereof had no voice in the creation of the debt. (b) It imposes upon residents of the annexed territory penalties for failure to make sewer connections not imposed upon the other residents of the city. (c) It discriminates against the residents of the new territory by annexing without a vote, as was allowed under the act of 1900 (Acts 1900, p. 336), when other territory was annexed. (d) It discriminates against the residents of the annexed territory in the matter of the sale of liquor. (e) It permits the city authorities to determine which of the existing streets and alleys shall be adopted and maintained as such, thus vesting the authorities of the city with the arbitrary power to refuse to maintain any street in the annexed territory. The act also violates the Constitution of this state, for the following reasons: (a) It contains matter in the body not referred to in the title; such matter being the authority to issue bonds to the constitutional limit without a vote. The title purports to amend the charter of the city, and the body does not refer to the charter, and does not purport to amend the same. The title purports to provide for the amendment or repeal of all existing laws for extension of the corporate limits, and there is in the body no repeal of any existing law on the subject. (b) The provision of the act in reference to the sale of liquor constitutes a surrender of the police power, and is also a special law, and there is an existing general law on the subject. (c) The act authorizes the city authorities to work the county chain gang on the streets of the annexed ter-

ritory, in violation of the act of November 27, 1901. Acts 1901, p. 221. (d) The act does not allow a vote by the residents of the territory to be annexed, on the question of annexation, notwithstanding a provision to that effect in the act of 1900. Acts 1900, p. 336. (e) The act provides penalties against residents of the annexed territory, not imposed on other residents of the city. The prayer was for an injunction to restrain the sale of the property of the plaintiffs under the tax executions, for general relief, and process. In an amendment allowed on November 30, 1906, it is alleged that only one street in the annexed territory has been worked, graded, or improved since the act of 1903 was passed. This street is the main thoroughfare of the territory, upon which the residents are exclusively white persons. The plaintiffs are all negroes, and the streets upon which they reside have received no attention whatever. Since the petition was filed, the property of plaintiffs has all been sold at the tax sales and bought in by the city. The prayer of the amendment is that the tax sales be set aside and the deeds thereunder canceled. There was also an amendment striking 15 of the plaintiffs. The defendants filed a motion, in the nature of a general demurrer, to dismiss the petition, because it set forth no cause of action, and there was nothing therein alleged which entitled the plaintiffs to the relief prayed. The court sustained this motion, and the plaintiffs excepted.

W. D. McNeill and J. E. Hall, for plaintiffs in error. Minter Wimberly and Jesse Harris, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. Many of the questions involved in the present case were decided in the case of *Toney v. Macon*, 119 Ga. 83, 46 S. E. 80. We have been asked to overrule that decision, but must decline to do so. Nothing has been suggested which arouses any misgivings as to the soundness of the rulings therein made, and the decision is therefore adhered to and reaffirmed.

2. We will now deal with such questions in the present case as are not controlled by the rulings in the case above referred to. The second section of the act in question is as follows: "The mayor and council of the city of Macon shall have full power and authority, and are hereby vested with power and authority, to select, lay out, and name such of the roads and alleys in the territory hereinbefore set forth, to be adopted and known as streets and public alleys of the city of Macon. The mayor and council of the city of Macon shall not be liable in any amount for any failure to keep in repair any of the roads or alleys in said territory, unless the same shall have been first selected, named, and laid out as streets or alleys." Acts 1903, p. 581. This section simply confers upon the municipality the power, usual-

ly given to all municipalities, to determine what shall be its highways and thoroughfares. The General Assembly has the authority to establish and abolish highways, and it may delegate this authority to municipalities. *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312. This is all that has been attempted in the act now in question. When the city authorities select an existing road or alley in the annexed territory as a street of the city, it becomes thereby an established street of the city, and cannot be thereafter vacated except in the manner prescribed by law. The effect of the act is really to authorize the city authorities to vacate such of the roads and alleys in the annexed territory as, in their discretion, they shall see proper not to select, lay out, and name as streets of the city. There can be no question as to the authority of the General Assembly to thus deal with its highways. If, however, any of the roads or alleys were established public highways at the date of the passage of the act, and the city authorities fail or refuse to select them as streets of the city, thus carrying into effect the power to vacate delegated to them, those whose property may be damaged by this act of the municipality may not be without a remedy. See, in this connection, *Marietta Chair Co. v. Henderson*, 121 Ga. 399-404, 49 S. E. 312. There is nothing in the act in question, in reference to the power given to the city authorities over the roads and alleys of the annexed territory, which violates the provisions of the fourteenth amendment to the Constitution of the United States.

3. The title to the act of 1903 is in the following words: "An act to amend the charter of the city of Macon, providing for the extension of the corporate limits of said city, and also providing for amendment or repeal of all existing laws relating to the extension of the corporate limits of the city of Macon, and for other purposes." Acts 1903, p. 579. The body of the act does not, in terms, declare that it is an amendment to the charter, but the subject-matter is such that there can be no doubt that such was the legislative purpose. It deals with matter appropriate only to an amendment to the charter. It is, in substance, an amendment to the charter, and it is entirely immaterial that it is not so declared in terms. The act authorizes the city authorities to issue bonds for the purpose of establishing a system of sewers. There is nothing in the act to indicate that these bonds were to be issued in any other manner than that prescribed by the Constitution and general laws of the state on the subject. If there is any ambiguity in the act on this subject, the doubt will be resolved by according to the General Assembly the intention to follow the Constitution. If the language, properly construed, shows a contrary intention, so much of the act as is subject to this criticism can be disregarded, and the remaining portions of the act will be upheld.



The title is broad enough to embrace the provisions in reference to the issue of bonds. It contains the words "and for other purposes," and these words authorize any legislation germane to the general purpose of the act, which was to amend the charter of the city. *Mayor of Macon v. Hughes*, 110 Ga. 796, 38 S. E. 247. The act of 1900 (Acts 1900, p. 336), amending the charter, was not a general law within the meaning of the Constitution which would inhibit the General Assembly from thereafter enacting another amendment to the charter providing for the annexation of described territory, and, at the same time, keep in force the act of 1900 as authority for future annexation in the manner therein prescribed. The act of 1903 provided it should not have the effect to repeal the act of 1900, except as to the territory embraced in the act of 1903. This was permissible legislation, and the title of the act was broad enough to cover it. The act distinctly stated that it was an act providing for the amendment or repeal of existing laws relating to the extension of the corporate limits. These words would authorize the legislation in section 5 (page 582) of the act, even if the words "and for other purposes" did not appear in the title. The act of 1900 is amended by the act of 1903, and also partially repealed. A partial repeal of an act in a subsequent act is an amendment of the act therein dealt with.

4. It is contended that the act of 1903 is invalid, for the reason that it authorizes the working of the county chain gang on the roads in the annexed territory, in violation of the act of 1901 (Acts 1901, p. 221). In what respect it violates the act of 1901 is not pointed out, and we are at a loss to ascertain the point intended to be raised. This general attack raises no question for decision, and, in addition to this, nothing is said in the brief of counsel on the subject. Even if the pleadings had raised any question for decision, we would treat it as abandoned. The act of 1903 is not unconstitutional for any reason urged against it in the present case.

Judgment affirmed. All the Justices concur.

(129 Ga. 287)

WALKER v. HILLYER.

(Supreme Court of Georgia. Aug. 10, 1907.)

#### JUDGMENT—PARTIES.

In a proceeding to foreclose a mortgage on realty, signed by two persons, where a plea in bar filed by one of them is admitted to be good, and the only evidence submitted is the note and mortgage, which contains a written assignment to the plaintiff, it is not error for the court to direct a verdict sustaining the plea of the defendant, which is admitted to be good, and in favor of the plaintiff for the amount due on the note and mortgage against the other defendant, and against the land embraced in the mortgage.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *Moses Wright, Judge.*

Action by J. F. Hillyer against Caleb Walker. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry Walker, for plaintiff in error. W. M. Henry, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(62 W. Va. 313)

#### STATE v. HARDEN.

(Supreme Court of Appeals of West Virginia. Sept. 5, 1907.)

#### 1. INTOXICATING LIQUORS—LICENSE—POWER OF MUNICIPAL AUTHORITIES.

The power reserved to the Legislature by section 46 of article 6 of the Constitution of this state [Code 1906, p. lxiii], to regulate or prohibit the sale of intoxicating liquors, sustains legislation, vesting in the councils of cities and towns sole power to grant or refuse state licenses for such sales within the corporate limits thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 7.]

#### 2. SAME.

So much of section 24 of article 8 of the Constitution [Code 1906, p. lxxiv] as commits to county courts the superintendence and administration of the internal police and fiscal affairs of their counties, under such regulations as may be prescribed by law, and provides that no license for sales of intoxicating liquors in any municipal corporation shall be granted without the consent of the municipal authorities, is operative, as to the jurisdiction to grant or refuse licenses for such sales, only so long and to such extent as the Legislature, by committing to county courts such jurisdiction, makes the function a part of the police affairs of the counties.

#### 3. STATUTES—CONSTRUCTION.

In ascertaining the intention of the people in adopting a Constitution, all parts of the Constitution must be considered, every article, section, clause, phrase, and word allowed some effect, and all parts, clauses, phrases, and words harmonized, if possible. No part or word in it can be ignored, discarded, treated as meaningless, or denied purpose and effect, unless there be irreconcilable contradiction and repugnancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 9.]

#### 4. INTOXICATING LIQUORS—REGULATION.

As section 24 of article 8 [Code 1906, p. lxxiv] gives jurisdiction to county courts, under such regulations as may be prescribed by law, a construction, denying power in the Legislature to withhold, or take, from them the power to grant or refuse licenses for the sale of intoxicating liquors, would render the word "regulating," in section 46 of article 6 [Code 1906, p. lxiii], useless and ineffective of any purpose, contrary to a rule of interpretation, universally observed by courts.

#### 5. CONSTITUTIONAL LAW—CONSTRUCTION BY LEGISLATURE.

A contemporaneous construction or interpretation, given to a Constitution by the Legislature, and acquiesced in by the people and the courts for a long period of time, will not be disturbed or overthrown, unless it be plainly wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Laws, §§ 14, 15.]

**6. SAME—INTERPRETATION OF FRAMERS.**

In determining the meaning of a constitutional provision, the interpretation put upon it by its framers in drafting it, and the people in putting it into operation, as shown by existing conditions and laws, left undisturbed and expressly recognized and continued, ought to have great weight.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 13.]

**7. STATUTES—CONSTRUCTION—REPEAL.**

A statute revising the whole subject-matter of a former one, or a former series of statutes, becomes, by reason of its scope and purpose, to the full extent of the terms used and necessarily implied, the exclusive rule and law, governing the subject, and is therefore a substitute for the former statute or statutes, repealing such parts thereof as are inconsistent with the new act, and not a mere amendatory act, adding to or detracting from the former law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 242.]

**8. SAME.**

The purpose of such a statute is the provision of a new, complete, and comprehensive system of law for the government of its subject-matter, and the method of drafting and passing it is not the erection, upon former laws as a substructure, of a mere superstructure, but the laying of new foundations and the erection of a new and complete structure, using only such of the old materials as are deemed suitable, so that the work consists, not of mere alteration and remodeling, nor of exclusion, nor of the double process of exclusion and inclusion, but of inclusion only, by means of express and implied enactments and re-enactments and express and implied adoptions of existing laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 242.]

**9. SAME.**

The language of such a statute, relating to a given subject within the scope and purpose of the act, is presumed to be the full and complete expression of the legislative will and intention respecting that matter; and for the law on that subject resort cannot be had to other statutes, unless the language used is incapable of conveying any meaning or has expressly or impliedly adopted them. Statutes formerly in effect relating to the same matter are not considered as laws in pari materia.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 242.]

**10. SAME—INTENT OF LEGISLATURE.**

However awkward, informal, and unusual the language of a statute may be, the legislative will and intention manifested by it must be ascertained by the court and enforced as the law. The intention expressed is paramount to form and must have the force of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 261.]

**11. SAME.**

Awkwardness, informality, and terseness of expression in a statute cannot be imputed to incompetency or lack of wisdom on the part of the Legislature, nor to the perpetration of fraud and trickery upon it.

**12. SAME—PRESUMPTIONS.**

An interpretation of a statute or clause thereof which gives it no function to perform, and makes it a mere repetition of another clause, must be rejected as unsound, for it is presumed that the Legislature had a purpose in using every word and clause found in a statute, and intended the terms used to be effective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 283.]

**13. SAME—AMBIGUITY.**

Ambiguity in a statute or other instrument consists of susceptibility of two or more mean-

ings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.

**14. SAME—IMPLICATIONS.**

That which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms.

**15. INTOXICATING LIQUORS—LICENSES—POWERS OF TOWN.**

Tested by these well-settled rules of interpretation and construction, section 35, c. 40, p. 88, of the Acts of 1891, the declared and manifest object of which was the provision of a complete system of law for the government of the town of Point Pleasant, as shown by its title and enactments, reading as follows, "The council shall prescribe, by ordinance, the manner in which licenses of all kinds shall be applied for and granted, and it shall require the payment of the taxes thereon before delivery to the person applying therefor," vests in the council of said town sole power to grant or refuse state as well as municipal licenses for the sale of intoxicating liquors.

**16. SAME.**

The language of said section is not ambiguous, but, if it were, it could mean nothing else, when read in the light of section 40, p. 90, of the same act, showing knowledge on the part of the Legislature of an alleged previous amendment made to the charter of said town purporting to confer such authority upon the council in express term.

**17. STATUTES—CONSTRUCTION.**

In seeking the meaning and intent of a statute, regard must be had to its subject-matter and all the surrounding circumstances known to the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 291.]

**18. SAME—PRESUMPTIONS.**

The Legislature is presumed to have had full knowledge of the subject-matter of statutes passed by it.

**19. CONSTITUTIONAL LAW—LEGISLATIVE POWERS.**

The province of the Legislature is to make and repeal laws, not to determine what is, or has been, the law, for that is judicial action within the exclusive province of the courts.

**20. STATUTES — CONSTRUCTION — PRESUMPTIONS.**

Courts will not presume that the Legislature, in referring to all the amendments made to the charter of a town, did not take notice of one of them, because, since the passage of the act, making such reference, its validity has been denied, for it was not within the domain of legislative action and power to pass upon the question of its validity.

McWhorter and Miller, JJ., dissenting.  
(Syllabus by the Court.)

Error to Circuit Court, Mason County.

John Harden was convicted of an illegal sale of liquors, and brings error. Reversed.

L. O. Somerville, W. R. Gunn, John L. Whitten, Henry M. Russell, J. S. Spencer, and McHohan, McClintic & Mathews, for plaintiff in error. The Attorney General, L. S. Echols, Lace Marcum, and Rankin Wiley, for the State.

POFFENBARGER, J. Whether the defendant, John Harden, had a valid license

to sell, at retail, spirituous liquors, wine, porter, ale, beer and drinks of a like nature, at the time he made the sale of liquor charged in the indictment against him as having been unlawfully made, is the sole question presented by this record. That he made a sale of liquor in the town of Point Pleasant, Mason county, W. Va., within one year next preceding the finding of the indictment, is fully proven and not contested. Whether his license was valid or not must be determined by the application, to the provisions of the charter of the town of Point Pleasant, which the defendant insists conferred upon the council of said town sole authority and power to grant such licenses for such sales within the corporate limits of said town, of principles of law and settled rules of interpretation. The question is purely a legal one. It is in no sense a moral question or a question of public policy. It is to be determined solely by legal tests, and not by the personal views, opinions, or preferences of anybody assuming to speak for the general public. It is a question of what the Legislature had the power to say and what it did say, as determined by rules of law. In construing statutes, courts have nothing to do with, and cannot consider, matters of public policy, moral justice, or expediency, except in so far as the Legislature, by some language used in the statute, has evinced an intention to pursue or advance some particular policy. "Statutes cannot be declared invalid on the ground that they are unwise, or unjust, or unreasonable or immoral, or because opposed to public policy, or the spirit of the Constitution. Unless a statute violates some express provision of the Constitution, it must be held to be valid. These principles are supported by numerous authorities, some of which are referred to in the margin." Lewis' *Suth. Stat. Const.* § 85, referring to probably 75 or 100 decisions, including *Dewey v. United States*, 178 U. S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170, in which Mr. Justice Harlan said, in reference to the duty of the court: "Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such." And further: "Of course, our duty is to give effect to the will of Congress touching this matter; but we must ascertain that will from the words Congress has chosen to employ, interpreting such words according to their ordinary meaning, as well as in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the government at the time it acted on the subject." In *Brewer v. Blougher*, 14 Pet. (U. S.) 178, 10 L. Ed. 408, Chief Justice Taney said: "The expediency

and moral tendency of this new law of inheritance is a question for the Legislature of Maryland, and not for this court." Nor is the court at liberty to inquire into the motives of the legislators in voting for a law or to impeach the law on the ground of fraud or corruption, either at the suit of a private person or the state. Lewis' *Suth. Stat. Const.* § 496; *Slack v. Jacob*, 8 W. Va. 612. It is conclusively presumed that the Legislature has acted from pure motives and had wisdom enough to preclude their having been imposed upon or deluded into unwise legislation. From these rules and principles no court can depart without violation of law, in deference to public clamor or for any other purpose. Though every man in the state should demand of the court that it annul a law or refuse to sustain it, because, in the estimation of the public, it is an unwise law, or an immoral law, the court could not comply with the demand. Their application must be made to the Legislature, the only tribunal having power to grant such relief. What I have said here, by way of preface to this opinion, is not intended as a reflection upon, or a criticism of, any of my associates, whose judgment has constrained them to differ from me, as to the conclusion and judgment in this case, or the grounds thereof. What I have thus said has been superinduced by the wide public interest manifested in cases arising under the liquor laws of this state, of which the court takes judicial notice, to the end that the public may the better understand what the province of the court is and what it is not, and to show that the courts, in disposing of cases, can no more lean to the one side than to the other, from considerations of fear, or out of deference to public opinion, or by way of conforming to personal views and opinions concerning public policy and expediency, in disposing of any case.

A preliminary but vital question in the case is whether the Legislature has power to confer upon municipal corporations sole and exclusive power to grant or refuse licenses for the sale at retail of spirituous liquors within their corporate limits. That it may do so, and, to that extent, deprive county courts of their jurisdiction in respect to such sales or traffic, has been expressly decided by this court in *Ward & Co. v. County Court*, 51 W. Va. 102, 41 S. E. 154, and *Wilson v. Ross*, 40 W. Va. 278, 21 S. E. 868; and in *Moundsville v. Fountain*, 27 W. Va. 182, Judge Green, speaking for this court, expressed the opinion that the Legislature is not restrained, by the Constitution, from taking the jurisdiction out of the hands of a county court and vesting it in a municipal corporation. What was said in *Moundsville v. Fountain* is probably an obiter dictum, but the other two cases have expressly and unequivocally enunciated the doctrine as a matter of positive and direct

adjudication; that question being in each of the cases necessarily and inevitably involved. Ward v. County Court declares, in point 2 of the syllabus: "The provision of chapter 44, p. 144, Acts 1899, that the council of the city of Grafton shall have exclusive power to grant liquor licenses within it, is not repugnant to section 24, art. 8, of the Constitution, or any other clause therein." Wilson v. Ross asserts the same proposition in the following terms: "The act of February 24, 1869, amending the charter of the town of Ceredo, confers upon the council of that town the sole power to grant, or not grant, a state license for the sale of intoxicating liquors within the limits of said town. Such act is not repugnant to the Constitution of the state (see section 46 of article 6, and section 24 of article 8, of the state Constitution), and such sole power to grant such license or not is recognized by section 11 of chapter 32 of the Code as vested in the municipal authorities of such town."

While it is undoubtedly within the power of this court to overrule its own erroneous decisions and declare them never to have been law, except for the purpose of the particular cases in which they were rendered, and though it is sometimes done, such action is never taken until after the court has become fully convinced of their unsoundness. Nothing produced in the argument of this case impresses upon my mind any serious question as to the correctness of the views and conclusions expressed by the court in the cases referred to. The argument against them is all predicated upon that portion of section 24 of article 8 of the Constitution which reads as follows [Code 1906, p. lxxiv]: "The county courts, through their clerks, shall have the custody of all deeds and other papers presented for record in their counties, and the same shall be preserved therein, or otherwise disposed of, as now is, or may be prescribed by law. \* \* \* They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties. Including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies. Provided, that no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained." If this provision stood alone, unlimited and unqualified by anything else in the Constitution relating to the sale of intoxicating liquors, the contention for exclusive jurisdiction in the county court, beyond the reach of legislative powers, would be plausible; but it does not stand alone and unqualified. Section 46 of article 6 [Code 1906, p. lxiit], relating to the powers of the Legislature under the Constitution, says: "Laws may be passed regulating or prohibit-

ing the sale of intoxicating liquors within the limits of this state." Section 24 of article 8 does not expressly say that the county courts shall have sole and exclusive power to grant or refuse licenses for such sales. In order to so hold and declare, the court would be bound to say that the matter of granting or refusing licenses belongs to the internal police and fiscal affairs of the counties, and, ordinarily, this might be true; but it was competent for the people, in adopting the Constitution, to say that, for certain purposes, among which is the matter of jurisdiction to regulate or prohibit, it shall not be deemed a part of the internal police and fiscal affairs of a county, but a part of the police and fiscal powers of the state, and left under the control of the Legislature. Section 46 of article 6 seems plainly to have been intended to effect this result, and, in the absence of any constitutional provision to the contrary, it would be so. At the time of the adoption of the Constitution, many, no doubt most, of the county courts of the state, possessed and were exercising, under the statute then in force, power to grant or refuse licenses. It was apparent, therefore, to the framers of the Constitution and the people, that, until the Legislature should see fit to exercise this power, under section 46 of article 6, the county courts would continue, under the then existing law, so to exercise jurisdiction, respecting the granting or refusing of licenses. There was a possibility that the Legislature might never see fit to remove this jurisdiction from the county courts and vest it elsewhere. In view of these considerations, the framers of the Constitution and the people deemed it wise to impose a limitation upon the powers of both the Legislature and the county courts, for the protection of municipal corporations, by ordaining the provision "that no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained." A Constitution, for the most part, may be construed as a great compact or agreement, entered into by all the people of the state, for and on behalf of themselves and those who shall come after them, until such time as it is abolished, changed, or modified.

An elementary rule of construction, applicable to every kind of written instruments, is that all parts of the instrument under consideration shall be considered, and every portion, paragraph, clause, and word given effect, if it be susceptible of such construction, and, whether it be so susceptible or not, all of its parts must be considered, and no court is warranted in expunging or declaring meaningless or ineffective any word, phrase, or clause, except in the case of irreconcilable conflict and repugnance. It is equally as well settled by authority, and consonant with reason and common sense, that no mere in-

plication, not necessary, in the sense that it is so plain that the contrary thereof cannot be supposed, can ever be permitted to overcome, break down, or cut out, as meaningless or irreconcilable, an express provision of a Constitution or any other instrument. The language of section 46 of article 6 is plain, positive, and unqualified. It says laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this state. There is no qualification or limitation as to the mode of regulation. That is left, by the language of this section, to the discretion of the Legislature. No other express provision of the Constitution seems to qualify or restrain it in any manner or to any extent, except the proviso which has been quoted from section 24 of article 8. Whether that is a limitation upon the power reserved by section 46 of article 6, we do not undertake to determine, because it is unnecessary. No such question arises in the case. But, if it is, it does not by any express terms say that jurisdiction for the granting or refusing of licenses is irrevocably vested in the county courts. It suffices the purposes of that proviso to say that, when the county courts, by virtue of laws passed by the Legislature, have the power to grant licenses, they shall not license the sale of liquors in any incorporated city, town, or village without the consent of the municipal authorities thereof first had and obtained. This gives that proviso effect, a broad effect, operative on both county courts and the Legislature, and that is all the rule of construction requires of the court. There is no authority or justification in any rule of interpretation for carrying it beyond this, so far as to cut down the word "regulating" in section 46 of article 6.

That part of section 24, art. 8, which says the county court, under such regulations as may be prescribed by law, shall have the superintendence and administration of the internal police and fiscal affairs of the counties, may also have effect, a broad sweeping effect, without cutting down or impairing the language of section 46 of article 6. Until the Legislature otherwise ordains, the matter of licenses may be, and probably is, in a legal sense, a part of the internal police and fiscal affairs of the counties. Said section 46 says, not that the Legislature shall, but that it may, pass laws regulating or prohibiting the sale of intoxicating liquors within the limits of the state. This is broad enough to authorize the Legislature to confer such power upon the county court. It would be one mode of regulating the traffic, but not the only one conceivable. It was apparent to the framers of the Constitution that this might be the mode selected by the Legislature, and, in that event, the county courts would have the superintendence and supervision of the traffic in liquors to the extent aforesaid. That, in a practical sense, the people could vest any particular power in the

county court permanently or temporarily, absolutely or conditionally, is plain. That they had the power, in adopting the Constitution, to accomplish this, is beyond question. The Constitution is the paramount law, and the people of the state were the authors of it. Their power to do anything they saw fit that did not infringe upon, or fall under the condemnation of, some provision of the Constitution of the United States, was absolutely without limit. In framing the Constitution and adopting it, they used language which, according to its literal interpretation, reserves to the Legislature unlimited power over the liquor traffic. Effectual regulation might require that the superintendence and administration of the liquor traffic be wholly withdrawn from the county courts and placed elsewhere. It was a matter which so impressed itself upon the authors of the Constitution that they felt called upon to deal with it, and provide for its regulation, by a special clause in the Constitution. If they deemed it a part of the police and fiscal affairs of the counties, they may have foreseen the necessity, at some time, of power in the Legislature to withdraw it from the county courts and commit it to some other tribunal or officer, and they used in the Constitution language of sufficient breadth, and apt phraseology, to accomplish this result, and language which cannot be made to have any other effect without qualifying or restraining it by a mere unnecessary implication, arising from language used in another part of the Constitution.

Courts are bound, in construing a Constitution, statute, or other instrument, to presume that the authors of the instrument had some purpose in inserting every clause found in it, and every word of the clause, and intended it to have some effect. If we say section 46 of article 6 only reserves to the Legislature the power to prohibit the sale of intoxicating liquors and to prescribe regulations for the government of county courts in granting or refusing licenses, we deny to so much of that clause as relates to regulation any purpose whatever. It was wholly unnecessary and vainly and futilely inserted in the Constitution, if it meant no more than this, for section 24 of article 8 made the superintendence and administration of the county courts subject to "such regulations as may be prescribed by law." Unless we say, therefore, that the power to regulate reserved to the Legislature by section 46 of article 6 meant something more than this, we must say that it means nothing, and that we are not at liberty to say, as will be shown by abundant authority hereinafter cited.

The power to regulate the traffic in liquor is, I repeat, a part of the sovereign power of the state, in the absence of some constitutional provision eliminating it therefrom and vesting it elsewhere. Such powers are not generally cut off, except by express provisions, and never by any implication, nor

less it be a necessary one. There must be something in the Constitution so plainly effecting this separation or delegation of power that the contrary cannot be reasonably supposed. Every presumption is against it. This court, in *Dillon v. County Court of Braxton Co.*, 55 S. E. 382, declared, in reference to the power of taxation, that: "It is so high and extraordinary in character that it is presumed to remain in the Legislature until the contrary is shown by express provision or the equivalent thereof. \* \* \* Hence it cannot be maintained that the people, in adopting the Constitution, recognized a legislative power of this kind in these local tribunals, which they signified their intention to leave in their hands by not expressly divesting them. No clause in the Constitution, either in express terms or by necessary implication, denies to the lawmaking body the exercise of this species of legislative power, which must reside in it, if it has not been taken away." This same rule must be applicable to a subject deemed by the people to be so important as to require a special provision, respecting it, in the organic law of the state.

The rule of contemporaneous construction also sustains the decisions of this court in *Wilson v. Ross* and *Ward v. County Court*, and the dictum in *Moundsville v. Fountain*. At the date of the adoption of the Constitution in 1872, and long before that time, certain municipal corporations of this state had the sole and exclusive power, under the statute, to grant or refuse license. This is asserted by Judge Green in *Moundsville v. Fountain*, and the act of the Legislature passed November 28, 1863 (*Laws 1863*, p. 144, c. 113) recognizes that state of affairs. Section 3 (page 145) of that act says: "Where the council of a city or town is, by its charter or any law of this state, authorized to grant or refuse licenses for any particular purpose, no license issued under this act shall be deemed to authorize any person to do any act, or carry on any business, calling or profession within the corporate limits of such city or town without having obtained license therefor as required by the by-laws or ordinances of such city or town, but all licenses granted under such by-laws or ordinances shall be assessed with and pay to the state the same taxes as other licenses of like kind, in addition to any tax payable thereon to such city or town." Section 4 of that act says: "Licenses to keep a hotel or tavern; or to sell drinks or refreshments at a public theatre; or to sell at retail spirituous liquors, wines, porter, ale, beer, or any drink of like nature; or to keep for public use or resort a bowling alley or saloon, billiard table or table of like kind, shall be issued only when authorized by resolution of the board of supervisors of the county, except where the council of a city or town are authorized, as aforesaid, to grant such licenses, in which case they shall be issued only when author-

ized by such council." Chapter 32 of the Code of 1868 recognizes the same condition of things. These laws, conferring upon certain municipal corporations sole and exclusive power to grant or refuse licenses for the sale at retail of spirituous liquors, were in force at the adoption of the Constitution. Nothing in the Constitution expressly repeals them. On the contrary, the Constitution itself provides as follows: "Such parts of the common law, and of the laws of this state as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the Legislature." Article 8, § 21 [*Code 1906*, p. lxxlii]. These statutory provisions, recognizing such powers in municipal corporations, have remained in the Code and acts of the Legislature from 1863 down to the present time, and some of these powers were held long before 1863, as in the case of the city of Wheeling. This fact signifies that the Legislature has construed the Constitution, from the very date of the adoption of that instrument down to the present time, as authorizing it to confer upon municipal corporations the power in question, and the courts and people of the state have acquiesced in that construction for more than 40 years, and even longer.

Now, the rule declared by an authority of no less renown than John Marshall, Chief Justice of the United States, in the great case of *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 421, 4 L. Ed. 579, is that this acquiescence is so potent on the question of the construction of a Constitution that courts will give heed to it and adopt it, unless it appears to be plainly wrong. After having said that the power to incorporate a national bank "being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it," he continued as follows: "The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the Constitution. The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States' is not more comprehensive, than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body." The same rule had been laid down, some 16 years before, by Mr. Justice Patterson, of the same court, in *Stuart v. Laird*, 1 Cranch (U. S.) 299, 2 L. Ed. 115, in the following terms: "Another reason for reversal is that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection,

which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381, the learned Chief Justice Gray said, concerning the constitutionality of the provisions of a certain statute, that it had been substantially re-enacted, upon each revision of the statutes of the commonwealth since 1817, a period of 60 years, and continued as follows: "They have been constantly applied in practice, and repeatedly expounded by this court, without a doubt of their validity being suggested, for nearly 60 years. After so long a practical construction and acquiescence by the Legislature, by the courts, and by all parties to judicial proceedings, it would require a very clear case to warrant the court in setting them aside as unconstitutional." See, also, *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123; *Commonwealth v. Parker*, 2 Pick. (Mass.) 550; *Cooley's Cons. Lim.* 69; *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183; *State v. Holcomb*, 46 Neb. 88, 64 N. W. 437; *Wallace v. Bradshaw*, 54 N. J. Law, 175, 23 Atl. 759.

That certain municipal corporations in the state had sole and exclusive power to grant and refuse licenses at the date of the drafting of the Constitution, and its adoption by the people, together with the absence of any express provision in the Constitution which purports to take away such sole and exclusive power, and the presence of a clause in the Constitution continuing in force all laws, operative at the date of its adoption, argues conclusively that there was no intention, on the part of the people, to put into the hands of county courts jurisdiction to grant licenses within the municipal corporations which then had such sole and exclusive jurisdiction. Hence it is thus made manifest that section 24 of article 8 of the Constitution was not intended to confer upon county courts sole and exclusive jurisdiction throughout all the counties of the state to grant or refuse licenses; and it never had, nor could have had, the application, force, and effect claimed for it by those who regard it as having lodged that jurisdiction irrevocably in the county courts. Thus, it appears that the framers of the Constitution themselves construed their own product as this court and the Legislature have since construed it.

No doubt all this reasoning and authority would have been set forth by the able judges who prepared the opinions in *Wilson v. Ross* and *Ward & Co. v. County Court*, had they deemed it necessary. It is not to be assumed, by members of the legal profession or the

public in general, that courts, in delivering opinions, set forth in every instance all the reasons that can be assigned for their conclusions, and they are not required to do so. Unfortunately, however, it has happened, in respect to these decisions, that, upon the assumption that all the reasoning was set forth in the opinions that could be given, the decisions themselves have been repeatedly called in question, and I have here discussed the matter at considerable length for the purpose of disabusing the public mind of the impression that the conclusion reached in them is unsound, or dubious in its foundation.

The remaining question is whether the Legislature, having the power, as has been shown, to confer upon municipal corporations sole and exclusive authority to grant licenses for the sale at retail of spirituous liquors, has exercised that power in respect to the town of Point Pleasant. The claim that it has done so is based upon two grounds, one of which is constituted by the provisions of chapter 40, p. 72, of the Acts of 1891. The other is an alleged amendment, made to the charter of the town of Point Pleasant, by the circuit court of Mason county, by an order entered in its chancery order book, on the 9th day of May, 1883, which amendment the court made, or attempted to make, under and by virtue of chapter 78, p. 112, of the Acts of 1877, providing for the amendment of the charters of municipal corporations containing a population of less than 2,000, which act has since been incorporated into chapter 47 of the Code as section 47a [Code 1906, p. 810, § 1895]. The material parts of the order read as follows: "It is adjudged, ordered and decreed that the charter of said town of Point Pleasant be amended as follows, to wit: 'The council of said town of Point Pleasant shall have the sole power to grant all licenses within the corporate limits of said town.' Said amendment shall go into effect from and after this day." As the authority claimed by the town is based, by this court, upon the act of 1891, what I intend to say, concerning the amendment, will be postponed, until after an examination and analysis of the provisions of the act of 1891.

The town of Point Pleasant was not incorporated by any circuit court under the provisions of chapter 47 of the Code, but by a special act of the General Assembly of Virginia, passed on the 19th day of December, 1794. This act of incorporation was amended and re-enacted by an act of the General Assembly of Virginia, passed on the 30th day of March, 1860. Acts 1859-60, p. 368, c. 201. The sections of the act, necessary to be considered upon this inquiry, read as follows:

"Sec. 35. The council shall prescribe, by ordinance, the manner in which licenses of all kinds shall be applied for and granted, and it shall require the payment of the taxes thereon before delivery to the person applying therefor.

"Sec. 36. The provisions of the twenty-

ninth section of chapter 32 of the Code of West Virginia, relating to state licenses, shall be deemed applicable to licenses of a similar character to those therein mentioned, when granted by or under authority of the council of said town. Licenses for the keeping of dogs shall also expire on the thirtieth day of April next after they are granted, and all other licenses may be for such time as the council shall determine."

"Sec. 40. All acts or parts of acts inconsistent with this act are hereby repealed; but this act shall not be construed to repeal, change, or modify any previous act not inconsistent with this act authorizing said town to contract debts, or to borrow money, or to take away any of the powers conferred upon said town, or upon the mayor or council or any of the officers thereof, conferred by general law, or by any amendment of its charter heretofore made by the circuit court of Mason county, except so far as the same may be inconsistent with the powers hereby conferred."

From the language used by the Legislature in the provisions of said act, chapter 40, considered and analyzed under, and in the light of, the rules of interpretation and construction observed and enforced by the courts of the land, the intention of the Legislature, concerning power in the council of the town of Point Pleasant to grant or refuse licenses, for state as well as for municipal purposes, must be ascertained; and, when so ascertained, it must have force and effect, no matter what views the court may entertain as to the wisdom, expediency, or morality of the statute. We are not at liberty to resort to mere surmise or conjecture as to what the Legislature intended. Except to a limited extent, and in a qualified sense, we cannot look outside of, or beyond, the language used in the act, and, in so far as it is allowable, to look beyond the terms of the act, nothing can be considered or allowed to affect the question except those matters to which the language of the statute refers in some manner. While there are presumptions which the court must keep in mind and enforce, where there is necessity for it, and where the language of the statute is such as to make them applicable, and though things not expressly mentioned, but deemed to have been within the knowledge of the Legislature, and to have been influential in the selection of the terms used by that body, may be regarded, nevertheless, everything considered, upon the inquiry for the legislative intention, must have some substantial connection with the terms used. If it be something that is not expressly mentioned, it must be manifest that, by reason of its connection with the subject-matter of the statute or its purpose and object, it entered into the deliberations of the Legislature in the passage of the act.

In determining what the language of a contract, statute, or other instrument means, it is absolutely necessary to bear in mind the

subject-matter of the instrument, and equally important to have regard to the purpose intended to be accomplished and effected concerning the thing to which the instrument relates. To illustrate, if the paper be a contract, the first inquiry is whether it relates to land, horses, cattle, or some other subject. If it appears to relate to land, the next inquiry is the identity of the land, or rather the ascertainment of what particular land it relates to. Then we look to see whether the language of the contract purports to be a lease or a conveyance of it, and, if it be a lease, we must find, from the terms of the contract, the purpose of the lease, the use to which the land is to be put. In most instances, the instrument is described as a deed, lease, or contract, as the case may be, and that necessarily has weight in determining what it is, if the other terms are uncertain in their meaning. All this is nothing more than mere common sense, formulated into rules, and it applies to statutes just as much as to ordinary instruments evidencing contracts between man and man.

The title of every statute sets forth its object and purpose and discloses its subject-matter. The title of the act now constituting the charter of the town of Point Pleasant, read in the light of the two previous acts which it amends and re-enacts, shows that the subject-matter is the municipal corporation known as the town of Point Pleasant. It also shows what purpose was intended with reference to that corporation. It says the purpose is not to deal with some particular powers of that corporation, by amending, repealing, or altering the provisions of the previous acts, but to "designate the limits of said town \* \* \* and to prescribe and define the powers and duties of the authorities thereof." It was not intended to deal specifically with that charter, but generally, comprehensively, and completely, so that, instead of looking to chapter 44 of the acts of the General Assembly of Virginia, passed on the 19th day of December, 1794, and chapter 201, p. 368, passed by said General Assembly on the 30th day of March, 1860, and chapter 47 of the Code of West Virginia, to ascertain the limits and powers and duties of the corporation, it should be necessary in the future to look only into chapter 40, p. 72, of the Acts of 1891. The rules of construction, applicable to a statute having such a purpose as this, differ from those applicable to a statute dealing specially, and in a limited sense, with its subject-matter. It becomes a substitute for all other statutes previously enacted, relating to the same subject-matter, in so far as the provisions of the previous statutes are inconsistent with its terms. By reason of its scope and purpose, it becomes, to the full extent of the express terms used, and necessarily implied, the exclusive rule and law upon that subject, and for that reason any provision of any previous statute which con-



dicts with it is repealed by implication, and this is mere matter of intention, arising by inference from the character of the act.

The rule that statutes relating to the same subject are to be construed together and harmonized, if possible, has no application in construing an act intended to be complete in itself. *Lewis' Suth. Stat. Con. § 447*. *Hamilton v. Rathbone*, 175 U. S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219, in which Mr. Justice Brown said: "Where the meaning of the Revised Statutes is plain, it [the court] cannot recur to the original statutes to see if errors were committed in revising them." And, again: "The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to solve, but not to create, an ambiguity." And further: "The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes on the subject." *Am. & Eng. Ency. Law*, vol. 26, p. 731, says: "Where the later of two acts covers the whole subject-matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant." For this, numerous cases are cited, among which is *Dist. of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60, fully sustaining the text, as well as the proposition that the old and new statutes are not regarded as laws in *pari materia*. The court said: "The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation. A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, though it contains no express words to that effect, must on principles of law, as well as in reason and common sense, operate a repeal of the former law." *Herron v. Carson*, 26 W. Va. 62. This is reiterated in exactly the same terms in *State v. Mines*, 38 W. Va. 125, 18 S. E. 470. In the opinion in the latter case, Judge Brannon said: "Where the later statute makes full and complete provision touching the subject common to both, and it is evident that the Legislature intended to review the legislation on that subject, and that the later act should be deemed a full and complete provision on the subject, the former statute is at an end." In *United States v. Claffin*, 97 U. S. 546, 24 L. Ed. 1082, 1085, the rule was declared in the following terms: "Whenever a new statute covers the whole subject-matter of an old one, and adds offenses, varying the procedure, the latter

operates by way of substitution, and not cumulatively. The former is therefore impliedly repealed." That case related to the construction of a criminal statute, but the rule is applicable to all statutes. In *Eckloff v. District of Columbia*, 135 U. S. 240, 10 Sup. Ct. 752, 34 L. Ed. 120, and in *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60, it was applied to an act of Congress, relating to the powers and duties of the commissioners of the District of Columbia, with reference to the appointment and maintenance of the police force. In the former case, Mr. Justice Brewer said: "The court below placed its decision on what we conceive to be the true significance of the act of 1878. As said by that court, it is to be regarded as an organic act, intended to dispose of the whole question of a government for this District. It is, as it were, a Constitution of the District. It is declared by its title to be an act to provide 'a permanent form of government for the District.' The word 'permanent' is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation; but is a single complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the Constitution of the District, and its grants of power are to be taken as new and independent grants, expressing in themselves both their extent and limitations. Such was the view taken by the court below, and such we believe is the true view to be taken of the statute." In the latter case, involving the same act of Congress, this was reiterated and approved. The decisions of our own court, in which the rule was enforced, involved statutes relating to civil, not criminal, matters. See, in addition to the authorities cited for the rule, *Norris v. Crocker*, 13 How. (U. S.) 429, 14 L. Ed. 210; *Michell v. Brown*, 1 Ell. & Ell. 267; *Ex parte Baker*, 2 Hurl. & N. 219; *Parry v. Croydon Gas Co.*, 15 C. B. (N. S.) 568. It is a rule by which to test a statute as to the legislative intention, and just as clearly applicable, when the question is whether new and additional matter has been incorporated, as when it is whether old matter has been eliminated. Under it, the elimination of old matter is effected by implication. The incorporation of new matter cuts out all inconsistent old matter, without express declaration of intention to do so. Before the passage of chapter 40, p. 72, of the Acts of 1891, the charter of Point Pleasant (chapter 201, p. 368, Acts Gen. Assem. 1859-60) limited the powers of the council, re-

specting licenses, to municipal licenses. Chapter 40, p. 72, of the Acts of 1891, omitted that section of the act of 1860, and substituted for it the language of sections 35 and 36 of the act of 1891. The new language, not the old, therefore, determines the legislative intention respecting that matter. The old section is thus impliedly repealed under this rule, if inconsistent with the new, as well as expressly repealed by the first clause of section 40 of the act of 1891.

To what has been said concerning the object and purpose of chapter 40 of the Acts of 1891, as disclosed by its title, it is to be added that the same intention is further evidenced by the provisions of the act, covering almost every conceivable subject of municipal power. Section 1 (page 73) constitutes certain inhabitants of the state a body politic and corporate under the name of the town of Point Pleasant. Section 2 defines the territorial limits of the town. Section 3 (page 74) divides the territory into wards. Section 4 gives power to change the boundaries of the wards and increase them in number, to not more than five. Section 5 names the officers, prescribes their qualifications, and provides for their election. Section 6 (page 75) provides for the holding of election, prescribes the qualifications of voters and trial of election contests. Section 7 fixes the terms of office. Section 8 prescribes the oaths of office. Section 9 requires the council to prescribe the powers and define the duties of its appointed officers, except in so far as they are prescribed and defined in the act, and to fix the compensation of such officers. Section 10 (page 76) relates to the general powers of the council. Section 11 (page 78) gives authority to remove elected and appointed officers and fill vacancies. Section 12 prescribes rules for meetings and procedure of the council. Section 13 (page 79) prescribes the duties of the clerk and how the records shall be kept. Section 14 lays down a rule for keeping the minutes and taking the yeas and nays. Section 15 (page 80) prescribes the duties of the mayor and fixes his salary. Section 16 relates to proceedings and enforcement of ordinances. Section 17 (page 81) provides for the enforcement of judgments. Section 18 prescribes the duties of the jailer. Section 19 (page 82) provides for the keeping of a docket by the mayor. Section 20 provides for appeals in certain classes of cases from judgments in town cases. Section 21 prescribes the mode of trial of such appeals. Section 22 prescribes the judgment in certain classes of cases, and provides for enforcement thereof. Section 23 (page 83) provides for appeals in other cases. Section 24 relates to the duties of the marshal. Section 25 (page 84) provides for arrests and trial for violation of ordinances. Section 26 prescribes how settlements shall be made by the marshal, and fixes his compensation. Section 27 (page 85) gives remedies against the marshal. Section

28 provides for deputy marshals, and makes the marshal chief of police. Section 29 prescribes the duties of the assessor. Section 30 (page 86) relates to finances and expenditures. Section 31 imposes a penalty for non-payment of taxes within the time specified. Section 32 gives a lien on real estate for taxes. Section 33 (page 87) relates to the tax duplicate. Section 34 prescribes the duties of the treasurer. Section 35 (page 88) relates to the granting of licenses. Section 36 relates to the duration of licenses. Section 37 (page 89) provides for condemnation proceedings for public purposes. Section 38 relates to pavements. Section 39 (page 90) relates to the status of the then officers and ordinances of the town. Section 40 repeals all acts or parts of acts inconsistent with said act, but preserves to the town the benefit of all previous acts, provisions of general law, and amendments previously made by the circuit court of Mason county, except so far as the same may be inconsistent with the powers conferred by said act. And section 41 requires the council to provide voting places in the several wards for holding an election on a certain day. A clause in section 10 relating to the general powers of the council provides that it shall have power to prevent "the desecration of the Sabbath Day, profane swearing, the illegal sales of intoxicating liquors, drinks, mixtures and preparations." As this clause does not purport either to give or withhold power to grant or refuse licenses, but only to give power to prevent illegal sales of intoxicating liquors, drinks, mixtures, and preparations, no consideration need be given it. It does not say how sales shall be legalized, or who shall legalize them, but only that the council may prevent illegal sales.

While chapter 40 of the Acts of 1891 is thus manifestly a complete act, covering the whole subject-matter of the corporate powers of the town of Point Pleasant, constituting the organic law of the corporation, as said by the Supreme Court of the United States, in reference to the act of Congress relating to the District of Columbia, both impliedly and expressly repealing all previous inconsistent legislation, whether general or special, it was not ordained in the passage of this act that no previously existing powers, consistent with the powers conferred by it, should not be held or exercised by the town of Point Pleasant. It was the intention, disclosed by express declaration of the Legislature, that powers conferred by such previous legislation, consistent with the powers conferred by chapter 40, p. 72, of the Acts of 1891, should thereafter be held and exercised by the town. In several instances, general statutes are expressly adopted by chapter 40. For instance, the mode of appealing from judgments of the mayor, except in cases specially provided for, shall be allowed as in similar cases before justices. Section 20 adopts the provisions of chapter

162 of the Code, relating to recognizances in criminal cases. Section 21 says the circuit court, on appeal from judgments of the mayor in the cases specially provided for, "shall proceed to try the same in its order, as appeals from justices of the peace are tried." Section 25 says the marshal and his sureties shall be liable to all the fines, penalties, and forfeitures that a constable is liable to, for any dereliction of duty in office, to be recovered in the same manner, and in the same courts, that such fines, penalties, and forfeitures are recovered against constables. Section 32 provides that, if any real estate within said town be returned delinquent for the nonpayment of taxes due thereon, a copy of such delinquent list may be certified by the council to the auditor, and the same may be sold for the town taxes and interest and commissions thereon, in the same manner, at the same time, and by the same officer, as real estate is sold for nonpayment of state taxes. These instances will serve to illustrate what is meant by saying this complete and comprehensive charter of the town of Point Pleasant has adopted and made parts of it many of the general laws of the state.

In addition to adoptions by express reference and declaration, as in the instances just specified, there is a general adoption in the peculiar clause found in the repealing section (section 40) which declares "that this act shall not be construed \* \* \* to take away any of the powers conferred upon said town, or upon the mayor or council or any of the officers thereof, conferred by general law, or by any amendment of its charter heretofore made by the circuit court of Mason county, except so far as the same may be inconsistent with the powers hereby conferred." Viewed in the light of the subject-matter and purpose of the act, as disclosed by its title and its provisions, the reasonable and fair construction of this clause is, not that it is a proviso, saving clause, or exception, but an adoption of all such special and general provisions of pre-existing law, conferring powers upon said corporation as are not inconsistent with the provisions of the act. It is not in the form of a proviso. It is introduced by the conjunction "but," and not the word "provided." Its language is not limited, and does not relate, to the saving or validation of acts done under previous laws, but to the powers which the corporation should have authority to exercise in the future. Even if it had been preceded by the word "provided," or its equivalent, its office and purpose would be determined, not by its form, but by the intention of the Legislature as gathered from the whole instrument. In *Stanley v. Colt*, 72 U. S. 119, 18 L. Ed. 502, Mr. Justice Nelson said: "It is true that the word 'proviso' is an appropriate one to constitute a common-law condition in a deed or will; but this is not the fixed and invariable meaning attached to it by

the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." And the court declared the doctrine in the syllabus of the case in these terms: "The word 'proviso' has frequently been applied as expressing simply a covenant or limitation in trust." In *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 238, 9 Sup. Ct. 47, 32 L. Ed. 377, the same court declared as follows: "The general purpose of a proviso is to except the clause covered by it from provisions of the statute, or to qualify a portion of the statute. But it is often used as a conjunction to an independent paragraph." In *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 48 L. Ed. 1144, the same doctrine was declared and applied. The distinction and principle are not unknown to this court. In *Ches. & O. Ry. Co. v. Pack*, 6 W. Va. 397, 403, Judge Hoffman said: "The proviso might, without very serious change of grammatical arrangement, be regarded, not as a part of the section re-enacted, but as an independent section following it."

In view of the clear purpose of the Legislature, as shown by the title and provisions of the statute under consideration, I have no hesitancy in saying that the object and intent of the clause found in section 40 was, not to continue in force previously existing laws, conferring, or purporting to confer, powers upon the council of the town, not inconsistent with the provisions of the act, but to make them operative and effective as new laws, by virtue of that act, and not by virtue of the statutes in which they originally appeared. I do not regard this conclusion as conflicting with the following rule laid down in *State v. Mines*, 38 W. Va. 125, 18 S. E. 470: "When a statute is amended and re-enacted with the words, 'so as to read as follows,' or words of like effect, those parts of the re-enactment embraced in the former law are not considered as repealed and re-enacted, but as law all along continuously from their original enactment." In respect to the clause now under consideration, that rule does not apply. It does not repeat the words of the general and special laws adopted, and it is not an act merely amending a part of the statute or statutes. Let it be observed, too, that the rule quoted does not say, as matter of fact and strict law, that the old law is not declared or affirmed anew, born again, but only that it is "considered" as having been in force uninterruptedly, so as to make it work out certain results as to past transactions. Here, we look at it from a different point of view, its future effect, in respect to which there is no necessity for the interposition of a fiction, and fictions can only be resorted to when necessary to work out justice and equi-

ty, never to defeat it. This statute is broader in its scope than the one on which the rule is predicated, covering a whole subject. If we say the language of the clause, "this act shall not be construed \* \* \* to take away any of the powers conferred upon said town, or upon the mayor or council or any of the officers thereof, conferred by general law, or by any amendment of its charter heretofore made by the circuit court of Mason county, except so far as the same may be inconsistent with the powers hereby conferred," means no more than that these powers shall be saved and continued in force by exception, we render it wholly useless and meaningless, for section 40 would then stand precisely as if the Legislature had stopped after saying, "all acts or parts of acts inconsistent with this act are hereby repealed." Under no rule, known to the courts, does a statute, to which there is appended such a repealing clause, do away with any pre-existing statute or law not inconsistent with it. Without a word added, the town would still have had the benefit of all powers conferred by any previous law, whether to borrow money, contract debts, or do anything else, not inconsistent with the powers specially conferred by the act. We are bound, therefore, to say that the Legislature intended something more than a mere continuation of statutes and amendments on their old footings. What could it have intended different from that, other than a redeclaration, reaffirmance, and adoption of previous laws, as new provisions or parts of the new act? Nothing else has been suggested or can be conceived, and we are bound to say that the Legislature intended this clause to have some effect. "In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make its parts harmonious, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the Legislature intended any part of the statute to be without meaning." *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78; *Lewis' Suth. Stat. Cons.* § 491, p. 919. "It is presumed, as well on the ground of good faith as on the ground that the Legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect." *Id.* § 497, p. 926. "The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso; the intention expressed is paramount to the form." *Id.* § 352, p. 674.

Besides general laws expressly adopted, others may be found to have been adopted by necessary implication. For illustration, section 32, relating to the sale of real estate for nonpayment of municipal taxes, may be taken. It does not require, in express terms, the recordation of the delinquent list in the office of the clerk of the county court. That it shall be so recorded has been

judicially declared by this court, on the theory that the duty to do so is necessarily implied in the requirement that the land shall be sold in the same manner, at the same time, and by the same officer, that real estate is sold for the nonpayment of state taxes. *Hogan v. Piggott*, 56 S. E. 189. If the Legislature, in passing chapter 40 of the Acts of 1891, had said nothing concerning the powers of the council of the town of Point Pleasant, respecting the granting or refusal of licenses, it would probably be clear that, by necessary implication, or by the terms of chapter 47 of the Code, the extent of its powers relating to that subject, and the mode of exercising them, would be prescribed and governed by that chapter. But it was not silent. It acted. What it intended, therefore, must be ascertained from the terms it used respecting the powers of the council as to such licenses. One question is whether or not it legislated on that subject, and that depends upon the meaning of the terms it used. If it did legislate on that subject, its intention must likewise be determined from the language it has used in the sections relating thereto. From the very nature and object of the act, assuming to prescribe and define the powers and duties of the authorities of the town, all of its powers and duties, so that it should be necessary only to look into the provisions of that act, including provisions expressly and impliedly adopted from other statutes, for such powers and duties, the absence of any express provision at all on so important a subject as this would be strange and unexpected. It would be contradictory of express terms and the general purport of the statute. It would be in the nature of a legislative freak, if we are at liberty to assume that there could be such a thing. In view of the presumption so raised that the Legislature did not intend to define the powers of the corporation, respecting this matter, as well as every other one that could arise, it must be assumed that the language of sections 35 and 36 of the act was intended to express the legislative will on that subject, and to constitute, together with such general provisions of law as are made applicable to the subject, by necessary implication, all the provisions of the charter of the town relating to it. Why should the Legislature, in direct contradiction of its expressed purpose, and its manifest effort, to define the powers of said corporation, all of them, fail to act on this one? Is the court at liberty to assume such stupidity on the part of the lawmaking body of the state? The Legislature spoke on the subject, and we are bound to say, not only that it intended something by the language it used, but also that it intended its language to be the sole and exclusive rule and declaration of its intention, as to the powers of the council, respecting licenses.

That the power to grant or refuse licenses

was a subject of deliberation by the Legislature, at the time of the passage of the act in question, is disclosed not only by the terms of the act, but also by the Journals of both branches of the Legislature. As originally introduced, the bill contained 43 sections, of which sections 35, 36, 37, and 38 related to the matter of licenses. Sections 35 and 36 read as follows:

"Sec. 35. The council shall also have power to grant, refuse or revoke licenses, to owners or keepers of hacks, carts or wagons, drays, and of every other description of wheeled carriage kept or used for hire in said town; to levy and collect a tax thereon, and to subject the same to such regulation as the interest or convenience of the inhabitants of said town in the opinion of the council, shall require; to grant, refuse and revoke licenses to theatrical exhibitions, public shows, musical performances, and all performances by which admission is obtained by the payment of money or other rewards; and for keeping dogs within the town, and for anything else for which a state license is now or may hereafter be required; and to levy and collect taxes on the same; and to grant, revoke and refuse any license to sell or offer for sale, and to prohibit the sale or offering for sale, of any brandy, whiskey, rum, gin, wine, porter, ale, or beer, or any other spirituous, vinous or malt liquors, or any intoxicating liquor, drink or mixture or preparation whatever, within said town or within one mile of the corporate limits thereof, and shall require a tax thereon of not less than one hundred dollars nor more than two hundred dollars, and to enforce the authority hereby granted by reasonable fines and penalties.

"Sec. 36. When any such license is granted by the council to sell or offer for sale, brandy, whiskey, rum, gin, wine, porter, ale or beer, or any other spirituous, vinous or malt liquors, or any intoxicating liquor, drink or mixture, it shall take from the person so licensed a bond, with approved security, in a penalty of not less than three thousand dollars, payable to the state of West Virginia, and conditioned as prescribed in section twenty-two, of chapter thirty-two, of the Code of West Virginia. The council may provide for the punishment of such person for the violation of any of the conditions of said bond, and suits may be brought and maintained against such person and his sureties on such bond, for the same objects, by the same persons, in the same manner and with like effect, as upon a bond taken under the section mentioned; and also, for any fines and costs that may be imposed by the mayor for any offense against the town, under its ordinances, involving a breach of the conditions of such bond, and the council may revoke any such license for a breach of any of the conditions of such bond, or for other good cause shown, but the person holding the license must first have reasonable no-

tice of the time and place of hearing and adjudicating in the matter, as well as the cause alleged, and he shall be entitled to be heard, in person or by counsel, in opposition to said revocation."

The bill passed the Senate, after amendment by inserting, before the words "and to grant, revoke and refuse any license to sell," the words "shall have the sole power." It was so passed by a vote of nineteen yeas and no nays. After it went to the House, it was referred to the judiciary committee, which reported it back with the following recommendation: "Strike out all section 35 from and after the word 'same,' in line 18 of engrossed bill, and insert the following: 'But no license to sell, offer or expose for sale any brandy, whiskey, rum, gin, porter, ale or beer, or any other spirituous, vinous or malt liquor, or any intoxicating liquor, drink, mixture or preparation thereof, within said town or within one mile of the corporate limits thereof, shall be authorized or granted except as provided in chapter 32 of the Code of West Virginia; and where any such license is granted as aforesaid, with the assent of the corporate authorities of said town, the same may be revoked by said town authorities, for good cause shown after reasonable notice of the intention to do so to the person holding said license. And the corporate authorities of said town may prescribe by ordinance the amount of town taxes to be paid upon every such license, but not less in any case than one hundred dollars. The corporate authorities shall also have power to require and take from every person to whom any such license is granted, a bond with good security, in the penalty of not less than one thousand dollars, conditioned as prescribed in section 18 of chapter 32 of the Code, and the town shall have the same remedy on said bond as is prescribed in said section.' Strike out all of section 36. And recommended that the bill pass as amended." When the bill was taken up on second reading, with the amendments proposed by the committee, the amendments proposed were, by unanimous consent, withdrawn. Then sections 35 and 36 of the bill were wholly stricken out, leaving 41 sections, instead of 43, and making sections 37 and 38 of the original bill 35 and 36 of it as so amended. It was then passed to its third reading and afterwards passed in that form, and the amendment was agreed to by the Senate.

As so passed, it contains sections 35, 36, and 40 as they now appear in chapter 40 of the Acts of 1891. These sections have been quoted. Sections 35 and 36 relate specifically to the matter of licenses. They do not adopt in express terms, by reference or otherwise, any general law on the subject, applicable to county courts or municipal corporations. They do not say or imply, by any terms used, that the licenses thereby referred to are municipal licenses. They do not say or imply

Chapter 47 of the Code. But, inasmuch as it was not all stricken out, we must determine what the remaining portion of it means, and that can only be done by the application of well-settled rules of construction. The remaining language is not ambiguous. It is merely general. It gives power by implication, rather than in express words; but the implication is an absolutely necessary one, for, without it, the terms used would be meaningless and ineffective, as has been shown. While the House struck out two sections, leaving comprehensive terms relating to the subject-matter thereof, it did not so change the title of the bill as to make its object the amendment of certain sections of the old charter act and make it a partial, incomplete law. It did not, by reference or otherwise, incorporate anything as a substitute for the matter stricken out. What reasons impelled the several members to vote for the bill in that form, or what actuated them in changing its form, the court cannot inquire. What they or any of them said on the occasion is not admissible. 28 Am. & Eng. Ency. Law, 638; *United States v. Trans-Miss. Ass'n*, 168 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Am. Net. & T. Co. v. Worthington*, 141 U. S. 473, 12 Sup. Ct. 55, 35 L. Ed. 821. Nor can we assume, or allow it to be proved, that anything was put into or taken out of the bill, by fraud, trickery, or imposition. *Slack v. Jacob*, 8 W. Va. 612. We must take the language as it is and determine what it means.

That the striking out of sections 35 and 36 of the original bill, containing the Senate amendment, is insufficient, in view of the character and purpose of the bill, and what was left in it, relating to the granting of licenses, to show that the Legislature did not intend what the remaining words import, seems manifest from the disposition made of a similar question by this court in *Coal & Coke Co. v. Tax Commissioner*, 59 W. Va. 605, 630, 631, 53 S. E. 928. In that case, the words "including chattels real," found in the bill as it passed the House, were stricken out of one clause by the Senate. This was relied upon, by counsel for the coal company, as conclusive evidence that it was not intended to put chattels real on the tax list at all, and certainly not those owned by corporations. In reply to that contention, this court said, through Judge Brannon: "Why, then, did not the Legislature strike out 'chattels real' from section 61? Why did it not strike from section 80, cl. 'a,' the words 'including chattels real,' thus charging individuals and firms not incorporated with them? Why did it still later in the consideration of the bill insert, in section 108, charging taxes, a clause reading: '(pp) The value of all chattels real of every person, firm or incorporated company'? This last most explicit language flatly says that corporations shall be taxed for chattels real." It was held that chattels

real, belonging to corporations, were taxable under the statute, notwithstanding a clause of a section said in explicit terms, after referring to clauses naming every other species of property, and omitting chattels real, that the property mentioned in them should constitute all the property on which any such corporation should be liable to pay taxes. The court very properly, in that case, as in all others, gave force and effect to the plain, explicit, and positive terms of the statute as it was finally passed, notwithstanding the circumstance that some similar language had been stricken out of the bill in its progress through the Legislature. If the language had been ambiguous, susceptible of two or more different meanings, or applications, without doing violence to its terms, the circumstance of the elimination of certain language, while the bill was pending, might be sufficient to determine which meaning or application was intended. That was not the condition of the language of the tax statute in the case just referred to, nor of the language in section 35 of chapter 40 of the Acts of 1891, which we have under consideration. It is plain and explicit and positive. The only criticism that can be made upon it is that it expresses the legislative intention in an awkward and unusual form, a matter of no consequence whatever, so long as the intention plainly appears, as it does. "The intention expressed is paramount to form" and "must have the force of law." *Lewis' Suth. Stat. Cons.* § 452; *Onesapeake & Pot. Tel. Co. v. Manning*, 186 U. S. 239, 22 Sup. Ct. 881, 46 L. Ed. 1144.

If the language used were ambiguous, so as to give room for construction or interpretation, by reference to extrinsic circumstances or facts, the same conclusion would result from a view and analysis of the language used in section 35, read in the light of the clause in section 40, relating to the amendments to the charter of the town by the circuit court of Mason county. Among these amendments was the one made on the 9th day of May, 1883, which has been quoted and purported to confer upon the council sole power to grant all licenses within the corporate limits of the town. The language of that clause is broad enough to include all amendments so made. It is presumed that the Legislature has knowledge of the subject-matter of its action. The spectacle of a Legislature, passing laws concerning a subject or thing, about the facts of which it did not have knowledge, would be strange, if not absurd. It would be repugnant to common reason, just as much so as in the case of two men, making a contract, unless the contrary affirmatively appears. Therefore the courts say that the words of a statute are to be interpreted in the light of the subject-matter. *Brewer v. Blougher*, 14 Pet. (U. S.) 178, 196, 10 L. Ed. 408; *United States v. Caldwell*, 86 U. S. 264, 22 L. Ed. 114; *Am. & Eng. Ency. Law*, 604. The charter of the town of Point Pleasant, at the

time the Legislature acted upon it, in passing chapter 40 of the Acts of 1891, appeared to have been amended by the circuit court of Mason county so as to confer this power. The act thus shows that the Legislature knew the amendment had been made. It was not its province to determine whether any of those amendments were valid or not. That is not the business of Legislatures. They have no power to determine such questions. They are judicial questions and cognizable only in a judicial forum. The Legislature therefore did not, because it could not, assume or declare expressly, or otherwise, that the amendment in question was not a valid one; in other words, that this amendment is not included in the clause of section 40, because, in the opinion of the Legislature, it was not an amendment. Courts cannot assume that a Legislature has meddled with something that, in common parlance, "is none of its business." That must be shown, before it can be considered. "The Legislature cannot authoritatively declare what the law is or has been. That is a judicial function and pertains to the court." *Lewis' Suth. Stat. Cons.* § 358, p. 688; *Ogden v. Blackledge*, 2 Cranch (U. S.) 272, 2 L. Ed. 276; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *In re Hanley's Estate*, 15 Utah, 212, 49 Pac. 829, 62 Am. St. Rep. 926, 931; *Ratliff v. Anderson*, 31 Grat. (Va.) 105, 81 Am. Rep. 716. "It is always competent to change an existing law by a declaratory statute, and, where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made, for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts." *Cooley's Con. Lim.* 11. It is not to be assumed, therefore, that the Legislature, having no power to determine whether the amendment made by the circuit court was valid or invalid, assumed that it was invalid, and therefore did not include it in its reference generally to the amendments made by the circuit court. The declaration that nothing in the act shall be construed to take away power conferred by any amendment made by the circuit court, not inconsistent with this act, is the same in meaning as if it had been that the council shall have the powers conferred by all the amendments, not inconsistent with this act, made by the circuit court. It reaches all the amendments, not merely one of them. Though negative in form, it is affirmative in meaning and effect. Can the words "any amendment" be limited

to one amendment? If so, which one? The impossibility of applying them to any one in particular proves that they extend to all. That body knew, is presumed to have known, that there was attached to the charter of the town a paper purporting to be an amendment, conferring just such power as the language contained in section 35 of the act necessarily implies. The existence of that ostensible, if not valid, amendment, was a circumstance known to the Legislature, when it used language in section 35 which purports, by necessary implication, to confer the very power which the amendment purported to give. This shows, by legislative terms, the opinion of the Legislature that the town already had that power. Courts may take cognizance of facts known to the Legislature, which tend to throw light upon the question of intent. This is settled beyond all question. *Platt v. Union Pacific Ry. Co.*, 99 U. S. 48, 25 L. Ed. 424; *Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Railway Co. v. United States*, 91 U. S. 72, 23 L. Ed. 224; *The Delaware*, 161 U. S. 472, 16 Sup. Ct. 516, 40 L. Ed. 771; *Amer. Net. & T. Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821. They may consider all the surrounding circumstances and history of the times. See, in addition to cases just cited, *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *C. & O. Ry. Co. v. Deep Water Ry. Co.*, 57 W. Va. 641, 50 S. E. 890. Here we need not look beyond the language of the statute itself, to ascertain that the Legislature knew amendments had been made by the circuit court to the charter of the town of Point Pleasant. It declared its knowledge of them in the act. One of them is disclosed by the record. It is not only a circumstance known to the Legislature, but a part of the subject-matter of the statute. This evidence of belief, on the part of the Legislature, that the town had, by virtue of the amendment, sole power to grant licenses, accompanied by the declaration of a rule of action for the council, predicated on the assumption of such power and referable to no other conceivable hypothesis, makes the legislative intention to grant such power so plain that nothing can be urged against it but mere conjecture and surmise.

Two of my associates fully concur with me in the view that section 35 of chapter 40 of the Acts of 1891, read in the light of section 40, confers upon the town council, the power in question, and we reverse the judgment of the circuit court, predicated upon the theory of a want of such power in the council. I am prepared to go further, and say that, if section 35 were not in the statute, the power claimed by the town of Point Pleasant would be sustained by section 40 alone, of chapter 40 of the Acts of 1891. It is plain, as has been pointed out, that the clause in that section relating to the amendments made by the circuit court of Mason county is not a saving clause nor an excep-

tion. It is an independent provision intended to add to the preceding sections of the act. I have shown that, unless it is so regarded, it is a futile and vain expression, effecting no purpose, and performing no function whatever, and we are not permitted, by the rules of law, to place such a construction upon it. The Legislature treated and regarded the amendments made by the circuit court, not some of them, but all of them, for it refers to all of them, as valid and conferring powers. The language used in the clause assumes that these amendments conferred powers, for it says nothing in the act shall be deemed to take away the powers conferred by them. How could there be anything to take away, in respect to this amendment, if it conferred no power, or was not regarded as conferring power? In saying power conferred by the amendment should not be taken away, the Legislature, by necessary implication, said the amendment had conferred power. The language used by the Legislature, I repeat, assumes that the amendment conferred power, whether it did or not, and deals with it as an amendment conferring power. It calls it an amendment. If it conferred any power, it could have been none other than the very power in question. In assuming that it did confer such power and declaring that nothing in the act should be construed to take it away, the Legislature clearly and positively expressed its will that the town council should have such power in the future, whether it had had it in the past or not. It is a question of intention, and, when the intention is apparent, it must be given effect without any regard to the form in which it is expressed. If the amendment was invalid, and not law, and not embodied in any act of the Legislature or Code, that circumstance is immaterial. The Legislature had the power to incorporate it into the act, and, upon its identification, wherever found, it became a part of the act.

In *Delaplane v. Crenshaw*, 15 Grat. (Va.) 457, one question was whether a certain alleged custom or usage, relating to the inspection of flour, had been incorporated into the statute, concerning the same subject. The law provided for an inspection of flour, which inspection consisted partly in boring small holes in the heads of the barrels and making a draft of flour from each hole, to be inspected. In early days, when the production of flour was not large, the draft flour thus taken out amounted to but little, and it was the practice of the inspectors to keep it, as well as receive compensation in money for the inspection. Later, when the production of flour became large, the draft flour was a matter of consequence. In the statement of the case, it is shown that at the time of the decision the inspector had received, in draft flour, about 1,500 barrels from one firm. In view of the importance of the matter, an action was brought to determine whether he was entitled to it. One of his contentions

was the intention of the Legislature, in revising the inspection statute and reducing the rate of compensation, to sanction this usage, by incorporating it into the statute. It never had been law, nor had it ever been reduced to writing in any form. Judge Lee, in delivering the opinion of the court, said: "But it is contended that if the custom cannot operate *proprio vigore* to vest the right claimed in the inspector, yet that it has been sufficiently recognized by statute, and thus has received the legislative sanction. Certainly, if it has been recognized either expressly or by necessary implication, it would thereby receive vitality, and the right claimed could well be asserted as conferred by the statute." But, upon investigation, he found that the statute had not, by any terms used, or in any manner, recognized, mentioned, or referred to the custom.

The language of the statute under consideration here is clearly within the reasoning of Judge Lee. The statute mentions the amendment. In March, 1815, Congress passed an act entitled "An act to vest more effectually in the state courts, and the District Courts of the United States, jurisdiction" in the cases therein mentioned. It will be observed that the purpose of the act, as indicated by its title, was to deal with a matter of jurisdiction in the state courts and the District Courts of the United States. No reference is made in the title to the Circuit Courts of the United States, and the jurisdiction intended to be conferred was not a jurisdiction which the Circuit Courts had under any other statute. Notwithstanding this, the fourth section of the act declared "that the District Court of the United States shall have cognizance, concurrent with the courts and magistrates of all states, and the Circuit Courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or matter in dispute, shall not amount to \$100.00." Chief Justice Marshall said: "The jurisdiction of the District Courts, then, over suits brought by the Postmaster General for debts and balances due the general post office, is unquestionable. Has the Circuit Court jurisdiction? The language of the act is that the District Court shall have cognizance concurrent with the courts and magistrates of the several states, and the Circuit Courts of the United States, of all suits, etc. What is the meaning and purport of the words 'concurrent with' the Circuit Courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the Legislature has inserted them, or are they to be taken into view, and allowed the effect of which they are capable? The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning are not to be entirely disregarded in construing



a statute. We cannot understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the Legislature that the jurisdiction was in the Circuit Courts, but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The District Court cannot take cognizance concurrent with the Circuit Courts, unless the Circuit Courts can take cognizance of the same suits. For one body to do a thing concurrently with another is to act in conjunction with that other. The phrase may imply that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention that the District Court shall have cognizance of the subject and shall take it to the same extent with the Circuit Courts. It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the Circuit Courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of state and district courts. But it is well settled that the title cannot restrain the enacting clause. It is true that the language of the section indicates the opinion that jurisdiction existed in the Circuit Courts, rather than an intention to give it; and a mistaken opinion of the Legislature concerning the law does not make law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The Legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the Legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the federal courts, as prescribed in the Constitution, and plainly within the general policy of the Legislature, the words ought to receive this construction." *Postmaster General v. Early*, 12 Wheat. (U. S.) 136, 6 L. Ed. 577.

In *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154, Mr. Justice Bradley said, in speaking of an act of the Legislature of Illinois which referred to a previous unconstitutional act as being in force: "The Legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year, for that would be an evasion of the Constitution. It could at most give it vitality as a new act from the date of the act of 1869. But this it does not profess to do. It only adopts its provisions for the purposes of the act then passed." Unlike the statute we are

construing, the new statute, discussed by Mr. Justice Bradley, simply referred to the provisions of the unconstitutional statute as having been "in force February 18, 1857." It did not purport by its terms to adopt that statute, nor to express legislative will as to its future status. If it had, it is plain from the language used by the justice that it would have been operative from the date of the passage of the act of 1869, therein incorporating it.

The doctrine of *Postmaster General v. Early* was stated with approval by Mr. Justice Strong in *United States v. Clafin*, 97 U. S. 546, 24 L. Ed. 1082-83. It is to be observed, with reference to the statute construed in *Postmaster General v. Early*, that it used no word stating in a formal manner that the Circuit Courts shall have jurisdiction. It says the District Courts shall have concurrent jurisdiction with the Circuit Courts, merely assuming that the Circuit Courts already had jurisdiction, and not saying that they should have. This is true of the statute we are considering, in so far as it relates to the amendments made by the Circuit Court; but, while it does not say in so many words the amendment shall be law in the future, it makes the amendment a part of the statute. It incorporates it into the statute. Can we say the Legislature had no purpose in doing that? The rules hereinbefore stated forbid this. Shall we say the Legislature thus adopted it to have effect in future, if the courts should determine that it originally was valid, and to have no effect if they should say it was originally invalid? This interpretation might do, if the clause in question were a mere proviso or saving clause, relating to past acts, done under the amendment; but I have shown, I think, conclusively, that it is not, but is, on the contrary, a new and independent clause, adding to what precedes it, and not merely limiting or qualifying it after the fashion of the proviso or exception. Let it be remembered that this conclusion would render the clause noneffective. If valid, it would remain so without the aid of this clause. If invalid, this clause, so construed, would still leave it invalid. How could we reconcile this view of conditional adoption with the doctrine laid down in *Postmaster General v. Early*? It would be absolutely impossible to do so. Let it be remembered, too, that the doctrine of that case is not mere obiter, but matter of express and solemn decision and application of the principle. How could we reconcile it with the expression of opinion of Judge Lee in *Dela-plane v. Crenshaw*, an obiter dictum, it is true, but one pregnant with reason and emanating from one of the ablest jurists of his time? How shall we wipe out this doctrine in the face of its recognition and approval by the Supreme Court of the United States in comparatively recent cases?

Though the authorities cited would be amply sufficient to justify the position I have

taken, they are by no means the only authorities upon that question. *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564, propounds the doctrine that, if a document of any kind be incorporated into a statute by any reference sufficient to identify it, it becomes as much a part of it, and as effective as a part of it, as if it were copied into it with positive and affirmative declarations of legislative will. In that case, the question was whether an unconstitutional statute had been validated by a statute subsequently passed. The court said: "For the purposes of this case, it may be conceded that the unconstitutional provisions referred to were inseparable from the legislative intent, so that in each case the entire statute was unconstitutional. The question raised, therefore, is fairly presented. The argument is that an unconstitutional statute is a nullity. Granting this, it does not follow that it may not be imported into valid legislation by appropriate reference. It is entirely within the legislative power to give effect to documents without their full recital. Statutes validating agreements of lease, merger, or consolidation of railroad corporations are usually cast in that form. \* \* \* The matter is one purely of identification. Surely nothing can be more definite than a reference to a document that has been regularly promulgated as a public statute." The act in question in that case was an act concerning public roads and lights and creating boards for the control and management of the same. In providing for the election of road commissioners, the statute undertook to limit the right of franchise to the freeholders of the respective townships. The Supreme Court said that, as the qualification of voters was fixed by the Constitution, and the right of franchise extended to all persons who could bring themselves within the constitutional qualifications, and the right to vote was not limited to freeholders, the statute was for that reason unconstitutional and void. In 1896, an act was passed, not incorporating the whole of that statute, nor saying that, from and after the taking effect of the act of 1896, the unconstitutional act of March, 1893, should, as amended by the act of 1896, thereafter have effect, but merely amending the objectionable sections in the act of 1893. In *Allison v. Corker*, it was held that, although the act of 1893 may have been wholly void because of the unconstitutionality of the provisions of certain sections, the elimination of these objections by the act of 1896 validated the whole of the act of 1893, although the other portions of that act were not reenacted, incorporated into the new statute, nor expressly adopted by reference. The court simply held that the intention of the Legislature to put the act into future force was plainly manifested by the striking from the void statute, of that which had made it void, although it did not use express language, or the legislative terms usually em-

ployed for that purpose. In other words, the act of 1896 did not expressly declare that the whole of the act of 1893 should thereafter have the force of law, or should be deemed to have been in effect since the 1st of March, 1893, and continue to be law, but simply amended sections of it, and put them in force, and the court said this sufficiently manifested intention to put the whole act into effect.

How much stronger is the present case? Section 40 of chapter 40 of the Acts of 1891 assumes that the amendments made by the circuit court of Mason county vested power in the town council, and says nothing in this act shall be construed to take away those powers. Add to this reasonable and common-sense view the consideration that, if the purpose of this clause was not the adoption of these amendments, it could not have had any purpose, and could not be in any sense or degree effective, and thus apply the well-settled and universal rule of construction. To this add the further consideration that the purpose of the act was the provision of a new and complete system of government for the town of Point Pleasant, and the method of executing that purpose was not the building, upon former laws as a substructure, of a mere superstructure, but the laying of new foundations, and the building from the ground up of a new and complete structure, using only such of the old materials as were deemed suitable, so that the work consisted of construction and erection, not mere alteration or remodeling, and, in all substantial respects, of the process of inclusion, not exclusion, nor of the double process of inclusion and exclusion; and the position I have taken, so well sustained by the principles adverted to, becomes immensely strengthened by another well-settled rule of interpretation.

In my opinion, it is immaterial that the amendment, admittedly void for the purposes of this part of the opinion, was in the form of a court decree, and not of a statute. Void deeds and contracts, often validated by statutes, are never in statutory form. The custom in question in *Delaplane v. Crenshaw*, cited, was not even reduced to writing; nor was there any memorandum of the supposed circuit court jurisdiction, assumed in the statute, under consideration in *Postmaster Gen. v. Early*, cited. It was a mere figment of the legislative mind. In *Chappell v. United States*, 81 Fed. 764, 26 C. C. A. 600, an act of Congress, declaring the state laws should govern the practice in the federal courts sitting in the several states, was under consideration, and the fact that the laws so adopted were not federal laws, but laws of a different jurisdiction, was regarded as immaterial. A statute of New York, adopting certain provisions of an unofficial book, known as the "Revised Statutes," and not found in the official Revised Statutes, was sustained, and the adopted matter held to be a part of it. *Will of Kavanaugh*, 125 N. Y. 418, 26 N. E.

470. Nor has section 30 of article 6 of the Constitution anything to do with the case. This is not a case of revival of a repealed statute, or amendment of an existing one, by reference to its title or otherwise. *Allison v. Corker*, cited; *State v. Cain*, 8 W. Va. 720.

In view of the conclusion to which a majority of the members of the court have come, sustaining the Harden license on the provisions of the act of 1891, I see no necessity for any discussion of the validity of the amendment made by the circuit court in 1883. The validity of no act done under that amendment between 1883 and 1891 is in question. The act of 1891 is clearly a substitute for all the laws, relating to the powers of the council of the town of Point Pleasant, that were in force and effect at the date of the passage of that act. To that act, and such other laws, general and special, as have been adopted by it, we must look in ascertaining what powers the town has, and not elsewhere. But, in view of the argument and opinion expressed by Judge Miller in a dissenting opinion, I feel constrained to say something on the subject, lest my silence should be taken, by the profession, as a concurrence in the views expressed by him, or as indicating a lack, on my part, of any good reason for not concurring. I do not want to be regarded as having been silent from mere obstinacy. Nor do I wish to feel the necessity in any way of explaining my attitude, on any future occasion, requiring action on this matter, should one arise.

The constitutionality of chapter 47 of the Code, passed by the Legislature in obedience to, and by way of execution of, section 39 of article 6 of the Constitution, requiring that body to provide, by general laws, for the incorporation of cities, towns, or villages, containing a population of less than 2,000, or for amending the charters of such cities, towns, and villages, has been declared by this court. In *Re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398, the court held as follows: "Chapter 47 of the Code, in relation to the incorporation of cities, towns, and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid." The same declaration has been made in exactly the same language in *Elder v. Incorporators of Central City*, 40 W. Va. 222, 21 S. E. 738. In both of these cases, this court declined appellate jurisdiction over proceedings in the circuit courts for the incorporation of cities, towns, and villages, under the provisions of chapter 47 of the Code, on the theory and express holding that the action of the circuit court was only quasi judicial, or that, if it was not quasi judicial, it was an administrative function, the conference of which upon circuit courts was expressly authorized by the Constitution. In the former case, Judge Dent said: "In dis-

charging these functions, the circuit court does not act under the judicial branch of the government and is not subject to its supervision, except by mandamus or prohibition in a proper case, but acts as a part of the legislative branch of government under the express authority of the Constitution, and is subject to its supervision and control only, however, by impeachment or amendment or repeal of the law. Hence its action in discharging these legislative judicial functions cannot be reviewed by this court by a writ of error or other ordinary appellate writ, notwithstanding their judicial character." The second point of the syllabus in that case declared the same doctrine in these words: "The circuit court, in the discharge of such functions, acts as a subordinate branch or tribunal of the legislative, not of the judicial, department, and is not subject to the appellate jurisdiction of the Supreme Court of Appeals of this state." This part of the syllabus is not repeated in *Elder v. Central City*, cited, nor is the language of the opinion of the court to exactly the same effect. Judge Holt says, by way of conclusion: "But the majority of the court being of opinion that the matter is only administrative, and that this court has no jurisdiction in a matter merely quasi judicial, the writ of error must be dismissed as improvidently awarded." Notwithstanding the declination of appellate jurisdiction in these two cases, they seem to decide whether or not the statute, purporting to confer jurisdiction upon the circuit court, was constitutional. Under that statute, the circuit court had, in each case, exercised jurisdiction. If the statute did not confer jurisdiction, because unconstitutional, in so far as it authorized, or attempted to authorize, action in the matter of incorporation by the circuit courts, then the circuit courts had acted without jurisdiction, and their want of jurisdiction itself and alone may have conferred appellate jurisdiction on the Supreme Court. *Freer v. Davis*, 51 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; *Clark v. County Court*, 55 W. Va. 278, 47 S. E. 162. In this last case, Judge Miller said: "Where the subject-matter in controversy is sufficient, and the bar of the statute has not intervened, the right of a party to a void judgment or decree, to have the same reviewed and reversed, if prejudiced thereby, is unquestioned." However this may be, even though these declarations, tested by strict law, be mere dicta, I think the reasoning for the conclusion is well, clearly, and correctly, but tersely, stated by Judge Holt in *Elder v. Central City*. "He says: 'The statute itself erects the local body of citizens into a municipal corporation upon their bringing themselves within its provisions and upon complying with its terms, all of which are specific and fixed therein (see *Thomp. Corp.* § 110 et seq.); and whether the facts thus required exist in the particular case, the circuit court, after

due notice to all concerned and an opportunity to be heard against the application, ascertains and determines. This is, at least, an administrative or quasi judicial function, which the circuit court may be authorized to perform. See latter clause of section 12, art. 8, Const." In saying the statute itself erects the local body of citizens into a municipal corporation, upon bringing themselves within its provisions, and upon complying with its terms, Judge Holt not only adhered to the language and spirit of the statute, but stated what is characteristic of many grants, rights, and powers made by the Legislature and conferred by the common law. His meaning is that the grant of the right to be a corporation, and to have corporate powers is complete and final so far as the Legislature is concerned; there remaining nothing to be done by it. It is a grant of a right to such people as are able to bring themselves within the conditions annexed to it, and as shall actually do so. It is not a grant without conditions. It is not a self-executing statute, it is true, but it is a grant to the people, to become effective upon their bringing themselves within its terms and conditions, without any further action on the part of the Legislature.

How broad is the application of this principle when we come to think about it! The laws of descent and distribution, the laws providing for the alienation of property by deed and will, the laws providing for the incorporation of private joint-stock companies, about the constitutionality of which there can be no possible question, involve this same principle. No person can inherit or take, under the statutes of descent and distribution, until he comes within the conditions annexed to the grant of the right of inheritance. Can we say that these statutes are self-executing, and have already vested rights to property in persons who are not yet born? As to these persons, as well as to those who are now in being, the rule declared by law exists. The only difference is that those who are now in being are within the conditions of the rule, while those who are not yet born have not come within its conditions. As to the former, the right has become concrete, absolute, and unconditional; as to the latter, it exists conditionally and in the abstract. It is a law, however, in each case, prescribed by the power of the state. It is a rule of action, actually in operation, vesting rights in persons now living, and determining in advance the rights of those who shall hereafter come into being. Take the statute providing for the incorporation of private corporations. Almost any sort of a corporation can be organized under the general laws; but they do not exist until after organization, and, in the organization of them, the Legislature does not participate. It has fully and completely performed its function by prescribing the rule and laying down the conditions to be complied with by

those who desire to avail themselves of the right which the Legislature has given to be a corporation. They must, in order to vest themselves with corporate powers, enter into an agreement, the form and substance of which is prescribed by the statute; they must sign that agreement and acknowledge it; they must deliver it to the Secretary of State, together with a certain amount of money, and he then issues the certificate of incorporation. Nobody pretends that the Secretary of State organizes the corporation or grants the power to be a corporation, or exercises any legislative power whatever. His issuance of the certificate is but the performance of one of the conditions upon which the Legislature has said, in advance, the right to be a corporation shall be dependent. Now that statute says any number of persons not less than five may form a corporation in that way. Such persons as see fit to organize corporations only avail themselves, by organizing it, of a right granted to any other equal number of persons to do the same thing. As the organization of a private corporation is always a matter of agreement, and there is nothing to settle between the parties who organize it, that they cannot settle among themselves, there was no necessity for the interposition of any third party to settle differences among them. As it must be a matter of agreement, there can be no differences to settle. It is a matter of agreement or no corporation. This is not true in the case of the incorporation of municipal corporations. If those desiring the formation of such a corporation had to wait until every man in the territory proposed to be incorporated should agree to it, very few corporations of that kind would ever be formed. That was apparent to the Legislature. Hence, the necessity for a provision to meet this exigency, differing from the provision made in the case of private corporations. But this does not betoken or argue that the principle underlying the grant of the right to be a municipal corporation differs from the principle on which the grant of the right to be a private corporation operates. It is simply a difference in the mode prescribed for taking the benefit of the grant. It is simply the requirement of compliance with an additional condition, annexed to the grant, because, from the very nature of the thing granted, it was necessary to prescribe a further condition, in order to make the grant effective and fruitful.

Now, what does the statute say? Simply that the inhabitants of any territory in any county, not less than one-quarter of one square mile in extent, and numbering not less than 100 persons, may, by pursuing a certain course, convert themselves into a body politic and corporate, for the benefit of the public, and, incidentally, themselves and such other persons as may see fit to reside in the same territory along with them, whether born or yet to be born, so long as the corporation

shall continue to exist. The various steps by which this is accomplished, the enumeration of the conditions to be complied with, to enable these people to obtain the benefit of the grant, hardly need to be fully set forth. They are required to cause a census to be taken, showing the population of the territory, a survey and map to be made, notice to be given of the intention to make application to the circuit court for the certificate of incorporation, and an election to be held, to determine whether it is the wish of a majority of the qualified voters of the territory to take advantage of the right of local self-government by means of a municipal corporation. Whether these things have been done in a given case are mere matters of fact, but it was apparent to the Legislature that there might be disagreement as to the state of facts, and attempts on the part of the minority to override the will of the majority, by means of fraud or trickery. Therefore it was necessary to authorize some person or tribunal, in addition to issuing a certificate, to settle any such disagreements, and to ascertain, in an authoritative manner, what the facts are, whether the population of the territory is sufficient, whether a fair expression of the will of the voters has been taken, and what that will is. Is not this investigation and determination such in character as is peculiar to courts, rather than to Legislatures or executive officers? Is it strange, then, that the Legislature should have chosen, for this purpose, that tribunal which the experience of all ages and all people has fixed and developed as the most appropriate and best qualified one for determining such questions and performing such functions, namely, a court of general jurisdiction? Now, as the matters to be determined by the court are not those of rights between man and man, such as property rights and relative rights of personal status, the determination of them may not, and probably is not, judicial in the full sense of the term; but, as has been said by Judge Holt, the function is in the nature of a judicial one, a quasi judicial function and jurisdiction. However that may be, the thing ultimately determined by the court is not whether the people of that territory have a right to be a corporation. That, the Legislature has said to all the people of the state, who are within the conditions annexed. The thing determined by the court is whether the people desiring to form such a corporation have put themselves within the conditions which the Legislature has said shall be complied with, before the grant shall become effective, just as it determines whether a man is within the conditions which the law says make him an heir to property. That, in awarding the certificate, the court performs a mere ministerial function, not in any sense legislative, after having incidentally determined, judicially or quasi judicially, that the conditions have been complied with, just as

the Secretary of State issues a certificate of incorporation to a joint-stock company, after having ascertained that the applicants for that certificate have performed the conditions, which the Legislature has said they should perform, as a means of availing themselves of the right granted, seems so clear to me that I do not see how any person could doubt it.

In view of the peculiar nature of a municipal corporation, and the respects in which it differs from a private corporation, the Legislature saw fit to impose another condition, not wholly dependent upon the will of those desiring to form the corporation, nor within their power to perform. That was couched in these terms: "The circuit court may, at its discretion, by an order entered of record, direct the clerk of said court to issue a certificate of the incorporation of such city, town or village"—in substantial agreement with a form prescribed by the statute. This may authorize the withholding of the certificate after all the other conditions have been complied with. Whether it does or not we are not in condition now to decide, for the question is not before the court. But, assuming that it does, what of it? Is this power to grant it or withhold it, in the discretion of the court, legislative power? Not by any means. It is a mere matter of approval or disapproval on a view of the whole situation, after having heard the parties pro and con, annexed to the grant as another condition. It is not full, nor unlimited discretion over the subject-matter. It gives no authority to issue the certificate, if the other conditions have not been performed. It is a discretion to refuse only, not to grant. Legislative discretion and power includes both. Suppose a philanthropist, in donating \$100,000 to some city or town, for the erection of a library, on condition that the city or town contribute to the fund an additional \$100,000, and agree to maintain the library, and on the further condition that some person agreed upon between him and the authorities of the town, or named by him alone, shall be of opinion that, under all the circumstances, it is advisable for the philanthropist to make that particular donation. Suppose the third party says no. Does he withhold the gift or defeat the donation? By no means. The donation is defeated under a clause in the offer or grant of the donation, by a contingency which has arisen, and which was anticipated and intended to defeat it, if it arose. Its defeat was predestined and foreordained from the inception of the transaction. Suppose the third party gives his approval, and the gift is effectuated. Now, who made that gift? Did the third party make it, or he out of whose coffers the \$100,000 came? The answer to this question is so self-evident and apparent as to make it almost useless to say the grant was made by the latter, and that he merely loaded it down with a condition. So here, the grant is made by the

state, although the approval of the circuit court was made a condition upon which it should become effective. Now, what the nature or extent of this discretion is, it is unnecessary to discuss; but it may be suggested that it was apparent to the Legislature that there might be a doubt in the mind of the court as to whether some of the conditions to be performed by the citizens had been complied with. Whether, for instance, a fair expression of the will of the people had been taken; the court being powerless to order another election. Whether the requisite territory was included; there being no authority in the court to order a new survey. Whether the census was fraudulent or true; no authority having been given to order the taking of a new census. It may be also that it occurred to the Legislature that there might be communities in which, owing to the illiterate or vicious character of the inhabitants, contrary to the normal conditions, prevailing in the state, in which the power of local self-government would be dangerous, rather than beneficial, and ought not to be had. The Legislature may well have assumed that, contrary to the usual conditions prevailing, under which the circuit court would have no hesitancy, and ought not to have any hesitancy, in complying with the expressed will of the majority. In granting a certificate of incorporation, there might be abnormal conditions in certain communities, due to the presence of a large and vicious population, inhabiting the particular territory, temporarily, in which the right of local self-government would be abused and prostituted to improper ends and purposes, injurious to the public, and in which the application, though having the form of a proper one, should not have been made in good faith. Would not this make the effectuation of the grant depend upon a question of fact or law to be determined by the circuit court, even under this clause of the statute, and not upon the arbitrary will of the court? Is it not the duty and province of courts to construe statutes and enforce them according to the legislative intention, viewing them in the light of the subject-matter and the legislative policy disclosed by the terms and purposes of the statutes? Would the rules of construction be violated or strained by saying the Legislature never intended to bestow the right under such circumstances? This construction would eliminate the element of arbitrariness on the part of the court. The court would thus declare, not its will, but the will of the Legislature. But, suppose it were dependent upon the arbitrary will of the judge of the court, would it be any the less a condition? Any man in the state has a right to operate a ferry if he puts himself within the conditions annexed by the law giving the right. Yet the courts may, in their discretion, say he shall not exercise that right—that the conditions do not war-

rant it, and that it therefore refuses the permission. Is that the exercise of legislative power? Not at all. The proceeding commences in the county court, and may be continued, by appellate process, into the Supreme Court, and yet the thing sought is nothing more than a right conditionally granted by a legislative act, and the condition is approval by the court, on a view of all the facts and circumstances. *Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107; *Williamson v. Hays*, 25 W. Va. 609. The broad discretion vested in the county court is given in these words, "to determine whether the ferry ought to be established or not." In *Ferry Co. v. Russell*, Judge Brannon, speaking for this court, said: "The evidence does not show that the travel will support three [ferries]. It shows that it will not. \* \* \* Another element in the question is that Russell had a ferry granted by authority and it is property, and the report and evidence show that it will be injured by the proposed ferry. You say that his property cannot bar the public need I say so too. It cannot bar it, but it goes into the scales." Where did the court get this? Not from any express words of the statute. It is merely the dictate of reason and common sense, which the court rightly assumed the Legislature intended to make a part of the statute, and to have weight with the court in determining whether the ferry ought to be established. It is found in the statute by construction. What rule of law forbids a like exposition and enforcement of chapter 47 of the Code? If it be so construed, how does it confer any legislative power on the court?

All discretion is not legislative discretion. Every man in the exercise of his private powers and rights exercises discretion. In doing so, he neither becomes a judge nor a law-maker. Many discretionary powers are vested in the executive officers of the state. All the courts possess and exercise discretionary powers. How often has it been said by this court that certain actions of the circuit courts were within their sound discretion, and therefore not reviewable? How often do we find matters left, by the Legislature, within the discretion of the Governor, the auditor, and other executive officers? Discretion does not belong peculiarly to any department of the government. On the contrary, it is essential to the due and effective execution of the powers of each of the three great departments. There are many instances in which the Governor has before him transactions which possess all the forms and appearances of judicial proceedings. In the execution of his power to remove subordinate officers, for cause or without cause, he often brings them before him on a specification of charges and hears evidence in some form. The hearing of interested parties, before acting in respect to any particular matter, is characteristic of the Legislature, of the

courts, and of the executive. The hearing given by the Governor in such a case, however, is not a judicial hearing, and, in removing a man from office, he does not act judicially. The function is purely an executive one. The investigation and hearing given, as a preliminary step, although judicial in form, and although quasi judicial in nature, is a mere incident of the exercise of the executive power to remove. Does the Legislature act judicially, when it gives a hearing before a committee for the purpose of obtaining information and procuring formal recommendations, concerning the subject-matter of a proposed law? Not at all. Take the case of a county court, sitting as a board of canvassers, and performing a purely ministerial function, in the ascertainment of the true returns and declaration of the result of the election. This court, in *Brazle v. Commissioners*, 25 W. Va. 213, declared that, in the performance of this ministerial duty, the commissioners incidentally perform a judicial function, but that function was so purely subordinate as not to change the character of the ministerial power to which it was incident.

Moreover, the separation of the executive, legislative, and judicial powers of the state, enjoined by the Constitution, is not such an absolute separation as to make these powers independent. They are co-ordinate, working together, and carrying into effect conjointly the sovereign power of the state. Though touching one another at all points, and knitted together just as are all parts of the human body, each performing its peculiar function, all three must be in constant operation and be to some extent united. *Lewis' Suth. Stat. Cons. § 2*, says: "This separation is deemed to be of the greatest importance, absolutely essential to the existence of a just and free government. This is not, however, such a separation as to make these departments wholly independent, but only so that one department shall not exercise the power nor perform the functions of another. They are mutually dependent, and could not subsist without the aid and co-operation of each other. Under the Constitution, the Legislature is empowered to make laws. It has that power exclusively. The executive has the power to carry them by all executive acts into effect, and the judiciary has the exclusive power to expound them as the law of the land between suitors in the administration of justice. The Legislature can do no executive acts, but it can legislate to regulate the executive office, prescribe laws to the executive which that department, and every grade of its officers, must obey. The Legislature cannot decide cases, but it can pass laws which will furnish the basis of decisions, and the courts are bound to obey them. The functions of each branch are as distinct as the stomach and lungs in our bodies. They are intended to co-operate, not to be antagonistic. They are functions in the same sys-

tem. When each functionary does its appropriate work, no interference or conflict is possible." Story, in his work on the Constitution, at section 525, says: "When we speak of a separation of the three great departments of the government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free Constitution. This has been shown with great clearness and accuracy by the author of the *Federalist*." In *Wheeling Bridge & Terminal Railway Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551, this court expressed the same idea in the following terms: "But the Constitution, within itself, after the declaration of this general doctrine, proceeds to make many laps of the various departments, so as to make them mutually dependent upon and supporting each other; thus welding them into an harmonious whole, or three distinct departments in one, for the preservation, at the smallest expense possible, of the largest freedom of individual rights consistent with the general welfare. Were it practicable to keep these three departments wholly distinct, the increase of the necessary offices and officers would be so great, and the expense thereof so burdensome, as to render the cost of the administration of the government unbearable, especially to the citizen taxpayer who must contribute, and yet not share in the distribution of the taxes. So that, while we find that the Constitution, as much as possible, keeps the heads of the three departments comparatively distinct and independent of each other, yet, as we move down the scale, these several powers become interwoven with each other, until we find the common council of every village exercising legislative, executive, and judicial functions, indiscriminately, by authority of the same Constitution which declares that these functions shall be kept distinct."

In view of this interpretation of the declaration of the Constitution that the three departments of government shall be kept separate, what does it signify that there is a scintilla of legislation in the function performed by the circuit court in granting a certificate of incorporation, if, indeed, there be one? It is not an exercise of the whole of legislative power, respecting the organization of municipal corporations. The grant of the right, by the Legislature, to the people to be a corporation is the principal element in the erection of a body politic and cor-

porate. The function performed by the court is of minor and secondary importance, and would be wholly ineffective and futile, but for the grant made to the people by the Legislature. Moreover, the court has no power of initiation. The statute gives it no power to impose, upon people who have not asked for it, the organization of a corporation. Furthermore, it has no discretion to grant, but only to refuse, the certificate. Can this be the exercise of the whole legislative power over the subject? But I do not concede that there is even a scintilla of legislation in the function performed by the circuit court. It simply hears the interested parties, those who come forward professing to represent a majority of the voters of the community, demanding, as against the minority, a right which the Legislature has given, and the remonstrances of the minority, asserting that the conditions upon which the Legislature declared the right should vest, do not exist. The latter may show, among other things, that the survey, census, and election were fraudulent. They may show, in addition to this, or without this, that the whole population of the community, with the exception of one man, are mere tenants of that one man under a lease which will expire in two years or less time, and that the sole purpose of the applicants for incorporation is the burdening of that one man's property with taxation, and that the affairs of the proposed corporation, after it shall have been organized, will be so manipulated by these people as to give themselves the benefit of the taxation, through the filling of useless lucrative offices, provided, and otherwise. To meet such a case of bad faith and abuse of the law, accidental and unusual in its circumstances, and putting the application beyond the purpose of the statute, the Legislature might well have said that the circuit court should have power to refuse the certificate of incorporation, in its discretion, and, because of the impossibility of laying down all the abnormal conditions which may be found to exist in the numerous communities of the whole state, we may well say that the Legislature necessarily employed the phrase "in its discretion," intending that the court should regard the survey, census, and expression of popular will, as making out a prima facie case, to meet conditions ordinarily found throughout the state, but to be overthrown by proof of abnormal or extraordinary conditions prevailing in a given community. This makes the function performed by the court a mere judicial determination of questions of fact, and declaration of law, according to legislative intention expressed in the statute.

What, then, does the certificate of incorporation amount to? Not the grant of the right to be a corporation. Merely a declaration, ministerial or judicial, that the conditions, annexed by the Legislature to the grant, have been found by the court to have

been performed, in so far as any duty was devolved by the act upon the inhabitants of the territory, and to have existed, in so far as they were conditions not within the control, or dependent upon the will, of the inhabitants. Is it not the duty of the court to give effect to a statute, by such construction as will make it constitutional, when it is possible to do so? Cannot the words "in the discretion of the court," being general, and necessarily so, owing to the impossibility of naming every possible exigency and condition with which the court may be confronted on these applications for incorporation, be so construed as to leave not even a modicum of legislation in its action? If necessary to do so, in order to effect such an elimination, can we not say that the Legislature intended, in the absence of the disclosure of some peculiar circumstance, showing abnormal conditions, that the court, upon an application showing the requisite territory and population and expression of the will of the voters so clearly as to leave no doubt, is bound to grant the certificate of incorporation; and that its discretion to refuse amounts to nothing more than the power of declaring judicially that the prima facie case, made by such showing, has been overcome by proof of peculiar circumstances, intended by the Legislature to overthrow it? That no mode of review has been provided is wholly unimportant. Is not the action of a justice in rendering a judgment for less than \$15, and of a circuit court in rendering one for less than \$50, judicial action? No appeal lies in either case. No doubt, scores of other illustrations could be given. Nor does it argue anything that a right of review is given in ferry cases.

It is plain, in respect to the organization of municipal corporations, that the Legislature devolves upon courts only the duty of settling questions of fact and declaring the law thereon—just what it does in cases of pure judicial cognizance. An illustration of the application of the same principle is found in the statute enforcing the power of eminent domain. The appropriation of private property to public use is made by the assertion and exercise of the power of the Legislature, not the power of the courts nor of the persons or corporations to whom the property is turned over for public use. The power of the court is interposed for no other purpose than to determine judicially whether the applicant has put himself within the conditions, annexed by the Legislature, to the grant of the right to one man to take and use the property of another for the particular purpose in question. It must be a public use or purpose. What is a public use is a question left ordinarily to the determination of the court. It cannot be taken except upon payment of just compensation. What is just compensation is left to judicial determination. In this case, the court has no power of initiation. It makes no grant of



any right. It creates nothing, ordains nothing. It merely determines questions of law and fact arising in the execution and carrying into effect of the grant made by the Legislature. Its order, declaring that the use for which the property is sought is a public use, and that the compensation ascertained is a just compensation and has been paid, is logically and substantially nothing more than a certificate to the effect that the conditions annexed to the grant have been performed or exist. Of course, the same questions do not arise in the two cases for there is a dissimilarity in the subject-matter; but is it not plain that the principle in each case is exactly the same?

Take, as another illustration, the appointment of trustees to hold the title to property belonging to religious congregations. Under section 47 of article 6 of the Constitution [Code 1906, p. lxiii], declaring that no charter of incorporation shall be granted to any church or religious denomination, but that provision may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it may be sold, used, or transferred for the purposes of such church or religious denomination, the Legislature passed chapter 57 of the Code [Code 1906, p. 1074], providing for the appointment of trustees by the circuit courts, to take and hold the legal title to such property. The object of this statute was to enable religious congregations and denominations to have a means of preserving a record of the legal title to their property, and to have that title vested in somebody, so that the property might be protected by all proper actions and legal proceedings in the name of the trustees, and conveyances thereof made, as other property is protected and handled. It was made for the benefit of religious congregations. It was a grant by the Legislature of a right to them. It was the execution by the Legislature of its sovereign power, vested by the Constitution, to regulate the holding of real property by religious denominations. It does not force upon them the duty of appointing trustees, and so fixing in them the legal title. It extends the right to do so. It is a grant of a right by the Legislature to religious denominations and congregations. They must be such bodies so as to come within the conditions prescribed by the statute, and an application must be made for appointment of trustees. Now this jurisdiction to appoint such trustees, as well as trustees for secret orders, colleges, academies, high schools, sons of temperance, orphan asylums, children's homes, and other benevolent associations, is exercised by the circuit courts throughout the state, and has been since the adoption of the Constitution and even before. The circuit court is, by this statute, made a mere ministerial agency through which such institutions may claim the right granted to them by the Legislature. It is difficult to

see any element of judicial power in them. There may be none. The duty appears to be purely ministerial, and it is vested in a court of general jurisdiction. In some instances, the exercise of this power calls for action quasi judicial in its nature. There may be controversies to settle as to whether the institution is of the kind mentioned in the statute, whether the person appearing on behalf of it has been authorized to make the application, and whether the persons designated by him for appointment are persons whom the congregation desires to have appointed. While the determination of such controversies is judicial in form and judicial in nature, it is only quasi judicial in truth and in law, because it arises in the performance of a ministerial function by the court.

Take, as another illustration, the provisions made for the sale of lands of infants, on the theory that their interests will be subserved thereby. Nobody proceeds against the land, and nobody has a debt against it or any right to put it to sale. It is not in any sense the ordinary adversary judicial proceeding. The proceeding is merely the means by which an infant exercises the right given him by the statute to make an irrevocable and binding contract of sale of his real estate, when his condition and that of his estate are such that the sale will conserve his best interest. Whether it will or not is a judicial question, referred by the statute to the court, and the court is charged with the further duty of seeing that the requirements of the law, looking to the preservation of the proceeds, are complied with. Many courts designate the function as the execution of a legislative power. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490; *Bright v. Boyd*, 1 Story (U. S.) 478, Fed. Cas. No. 1,875. This is not any more judicial perhaps than is the action of the court in condemnation proceedings or in the appointment of trustees. All these instances, and others that could be pointed out, show, however, that the work of the courts is not confined strictly and absolutely to matters of pure and unadulterated judicial action in ordinary adversary proceedings. Purely ministerial functions are cast by the Legislature on the courts, and in doing so the Legislature does not overleap any of the bounds set by the Constitution. Ministerial power belongs alike to the executive, legislative, and judicial branches. To say that the Legislature shall not confer upon the circuit court any ministerial powers, not incident to the exercise of its judicial powers, would be equivalent to erecting or declaring a fourth department of the government for the officers of which the Constitution has made no provision. It does not say the sovereign powers of the state shall be divided into four departments, viz., the executive, legislative, judicial, and ministerial, but only three.

I do not think the general principles declared by the cases, cited by Judge Miller, as

tending to cast doubt upon the constitutionality of so much of chapter 47 of the Code as confers power upon the circuit courts, are in conflict with the views here expressed; but the application of some of these general principles, made by the courts in *Norwalk Ry. Co.'s Appeals*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794, and in *Re North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638, may not be applicable here as persuasive authority, because the terms of the two statutes construed in those cases were essentially different from the language of our statute. However, I think those decisions are unsound. The question decided in the former case was stated, by the judge who delivered the opinion of the court, in the following terms: "The act of 1893 confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a railway company, to take some action within 60 days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895 confers the same powers upon the 'superior court or any judge thereof,' to be exercised on application of a railway company, and calls this application an 'appeal.' The power so conferred on the court is described in the act of 1893 as the power to approve and adopt a location and lay out a street railway, with such modifications therein as shall seem proper, in respect to the streets to be occupied, the location of the same as to grade and to the center line of the streets, and changes to be made in the street, the kind and quality of the track to be used, the motive power to be used, and the method of applying the same." The part of the statute which that court held void reads as follows: "And whenever such warden and burgesses, mayor and common council, or selectmen shall, under the provisions of section 2 of chapter 169 [page 308] of the Public Acts of 1893, be deemed to have refused to approve and accept any plan presented by any street-railway company, said street-railway company shall have a like right of appeal therefrom to said superior court, or any judge thereof; and said court or judge shall have the same powers with reference to said plan and the acceptance or modification thereof that said principal authorities would have had under the provisions of said act, and may make all such orders with reference thereto as may be deemed equitable." The powers that the principal authorities had under the statute were as follows: To "accept and adopt such plan [the plan proposed by the railway company] or make such modifications therein, as to them shall seem proper." All this had to be read in the light of another clause of the statute, which said: "No such company shall construct a railway, lay down tracks, or

change its motive power except in accordance with a plan approved by the authorities aforesaid." The court said: "The meaning of the act of 1893, relating to street railways, is uncertain in several particulars; but there can be no doubt that it confers on municipal authorities, in addition to certain executive powers, the power of establishing regulations and conditions (within the limitations prescribed) which shall control all the street railways in the state, in the location, construction, and operation of railways. There can be no doubt that making such regulations is essentially and distinctively a legislative function. It is also certain that the judicial power does not include the exercise of such a legislative function, and that the duty of making such regulations cannot be imposed upon the superior court, because it involves the exercise of legislative power by the court, and because a power in the Legislature to impose such duties is inconsistent with the existence of an independent and separate judicial department of government." It is to be observed here that the statute did not expressly give the right to the railway company to occupy the streets otherwise than conditionally. It seemed to make that right dependent solely upon the will of the council of the town. It said: "No such company shall construct such railway, lay down tracks, or change its motive power except in accordance with the plan approved by the authorities aforesaid"—meaning the corporate authorities of the town. On the refusal of permission to occupy or to alter the mode or extent of the occupation of the streets, authority was given the court to prescribe the manner and extent of the occupation or alteration. Here is where the superior court found fault with the statute and discovered what it held to be an attempted conference of legislative power upon the judiciary. It seems to me that the court might well have found the intention of the Legislature, as disclosed by the two provisions of the statute, to grant to the railway companies the right to make these alterations, by agreement with the council, if possible, and, if not, then upon compliance with such reasonable conditions as the court should find and determine to be equitable and just under the circumstances of the case. The alterations were to be made in the public highways, over which the Legislature has absolute power and control with reference to their use. The Legislature might have given the right to make such alterations as the railway companies should see fit to make, not inconsistent with the reasonable use of the highways for other purposes, independently of any action or wish of the council. Having the power to grant such absolute right, why could it not grant the same right to a limited extent, by the imposition of such restraints and restrictions, as a court might deem equitable under the circumstances? Does not the whole include every part?

The rule of conduct for the court was prescribed in the statute in these words: "May make all such orders with reference thereto as may be deemed equitable." Is not the ascertainment and determination of what is equitable more of a judicial than legislative function?

A very similar authority and power is conferred upon the courts of this state in reference to railroad crossings. Where one railroad company, desiring to lay its track across the track of another, is unable to agree upon the mode and manner of effecting the crossing, a suit in equity may be prosecuted in the circuit court for the determination of what? Not whether there is a right to cross. That, the Legislature has solemnly ordained. It is for the purpose of determining what, under the peculiar circumstances of the situation, is equitable and just between the parties, as to how the crossing shall be made, and amounts to a restriction of the grant, by the imposition of such conditions as are just and equitable under the circumstances, the ascertainment of which belongs more properly to the judiciary than to any other branch of the government. Is it anything more than is done by the statute enforcing the power of eminent domain? The fitness of a court, for determining what is a public use, and what is just compensation for property taken, was so apparent that it did not occur to the framers of the Constitution that there was necessity for authorizing the Legislature to make such a reference to it. It was merely assumed that such a reference would be the natural disposition of it, for the proviso, not the body of the section, requires the compensation to be fixed by a jury of 12 freeholders, if demanded by either of the parties. In the Norwalk Case, one member of the court dissented and filed a vigorous opinion, which seems to me to show that the decision is against the great weight of authority as well as reason. He says: "It was undoubtedly competent for the General Assembly to grant this franchise, and to guard against its improper exercise by giving the city supervisory powers. It was equally within its appropriate domain to grant an appeal to some suitable tribunal for any unreasonable conditions which the city might impose. \* \* \* I think, however, that the appeal to Judge Hall may fairly be regarded as a judicial proceeding calling for the exercise of judicial power. He was bound to dispose of it in accordance with the fundamental rules of law. \* \* \* A difference of opinion between a municipal corporation and private corporation as to what is a reasonable use of a legislative franchise affecting the public highways, which difference must be settled before the franchise can be used at all, seems to me to present a case which it is eminently proper to place within the jurisdiction of a court. \* \* \* Had the General Assembly authorized a railway company, whose plan

of construction, though duly submitted to the city authorities, had neither been approved nor disapproved, to apply to the superior court for a mandamus to compel them to act, there could have been no objection to such a remedy." This view as to legislative power has been expressed by this court in *Armstrong v. County Court*, 54 W. Va. 502, 46 S. E. 131. A conclusion exactly the opposite of that announced by a majority of the court in the Norwalk Case was declared in *Zanesville v. Zanesville Telegraph & Telephone Co.*, 64 Ohio, 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725, mentioned by Judge Miller in construing a very similar statute. The sixth and seventh points of the syllabus, conforming exactly with the views I have hereinbefore expressed, read as follows: "Telephone companies, organized under the laws of this state, have the right, by virtue of sections 3454, 3461-1, and 3471 of the Revised Statutes, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court, made in pursuance of section 3461, directing in what mode the lines shall be so constructed, when the municipal authorities and the company fail to agree, or the former unreasonably delay to enter into an agreement with the company. The power to make such order, as provided in section 3461, is not inappropriately conferred on the probate court, and that court has complete jurisdiction of a proceeding instituted therein in conformity with that section. The provision is not obnoxious to the Constitution of the state, on the ground that the power it confers is distinctively legislative or administrative, but is constitutional and valid." The statute in that case said: "And if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same." In reaching this conclusion the court quoted and applied from the opinion of Judge Selden, in *Cooper's Case*, 22 N. Y. 84, the following, which seems to me to assert the true principle: "It is certainly clear, as a general rule, that whenever the law confers a right and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." Proceeding, the Ohio court says: "It is competent for the state, through its legislative department, to grant to telephone and telegraph companies organized under its authority the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made. The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for

that purpose practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 Rev. St. The administration of that remedy does not involve the exercise of any continuing supervisory powers over the municipal or telephone corporation, nor the adoption or execution of administrative regulations for the government of either, but consists of an order made by the court in the usual manner of legal proceedings, after a hearing of the allegations and evidence of parties who are brought before the court by proper process."

The Milwaukee Case holds unconstitutional a statute very similar to ours, providing for the incorporation of municipal corporations conferring upon the court power in the following terms. "If the court after such hearing shall be satisfied of the correctness of any such survey or re-survey and census, that all the requirements of the statute have been complied with, \* \* \* it shall make an order declaring that such territory, the boundaries of which shall therein be set forth by courses and distances, and which may be enlarged or diminished by such court from the boundaries specified in such application, as justice may require, shall be an incorporated village by the name specified in such application, or by such other name as the court shall deem proper, if the electors thereof shall assent thereto as hereinafter provided." Judge Miller very well says this case is contrary to the weight of authority. It would be a useless consumption of time and waste of energy to point out and enumerate the numerous decisions which stand against it. They propound the doctrine which I have stated, and the vice of that decision lies in its departure from those principles. All the other cases cited by Judge Miller on this question affirm the principles I have stated. Hence it becomes unnecessary to analyze them. The Norwalk and Milwaukee Cases are plainly exceptional, stray, isolated, sporadic, and indefensible decisions, such as may be found occasionally standing against a host of well-considered cases, enunciating almost any proposition of law. I say this with the utmost deference to the learned judges who delivered the opinions in those cases, feeling it to be my duty not to attempt to distinguish where there is no distinction, nor to attempt to reconcile where reconciliation is impossible. Such attempts always tend to unsettle the law, and mislead.

I have discussed, analyzed, and illustrated this general principle, sustained by the great weight of authority throughout this country, at this great length, because it is the principle by which the validity of the legislative act, under which the circuit court of Mason county acted, in amending the charter of the town of Point Pleasant, must be tested. If the Legislature granted the power to the town of Point Pleasant, as well as to all oth-

er municipal corporations in the state, and not merely to the circuit court, authority to grant the power on behalf of the Legislature, then it stands upon the same footing as the power conferred upon the court in respect to the organization of municipal corporations. If it did, it was the legislative grant of power to the corporation that effected the amendment, not the action of the court, just as in the case of the organization of such corporations, and the function performed by the court was a mere judicial function, or a ministerial function, involving judicial action as an incident thereof. The act provides for alteration, change, or amendment of the charter of any city, town, or village containing a population of less than 2,000, on the application of any five or more freeholders thereof, filed, in the form of a petition, in the circuit court of the county, stating clearly the object of the petitioners, and setting forth accurately the proposed amendments, as well as any other facts necessary to enable the court to decide whether the alteration, change, or amendment shall be made as proposed. Upon the filing of the petition, the court is to enter an order in the chancery order book, stating the object of the petitioners, a copy of which order, attested by the clerk, must be posted at the front door of the courthouse and published in a newspaper, if one be published in the city, town, or village, and, if not, it shall be posted at four public places in the city, town, or village. Provision is then made for remonstrance by any of the freeholders of the city, town, or village, and for the taking of depositions and affidavits to enable the court to decide whether or not the prayer of the petitioners shall be granted. The court is vested with full power to reject the prayer of the petitioners, and if no answer is filed the court may, upon the petition alone, grant the relief prayed for or the object sought to be obtained, and have such orders entered, certificates made, and other acts done as may be necessary to enable it to decide the case fairly upon its merits. Section 5 (page 113) reads as follows: "If the court grants the amendment or amendments prayed for, it or they shall be written out in full in proper form; shall be signed by the judge of said court, and attested by the clerk, and recorded in the chancery order book of the court, and, if not inconsistent with the laws of this state, shall become part or parts of the charter of such city, town or village."

It is difficult to conceive any language better calculated to give, by way of amendment, the broadest powers that the Legislature could give, consistently with existing laws. The amendment is not confined, by the language of the statute, to any particular kind or class. It gives power to alter, change, or amend the charter. A later section assumes that the court may grant, not one amendment, but amendments. Another section implies that the object of the petition may be some-

thing other than the enlargement or diminution of the boundaries. In order to give it any effect, we must say the statute was intended to give power of amendment in respect to something other than the addition of territory, or change the boundary lines, because chapter 47, in section 48 thereof, had already made ample provision for that, and the act of 1877 did not expressly repeal it, and it has since been carried along in that chapter as a part of it. That section 48 of chapter 47, antedating the act of 1877, and the Acts of 1877, were intended to operate together and to be harmonized, is made plain by the incorporation of the act of 1877 into chapter 47 as section 47a thereof. It is not limited to the matter of amendment respecting boundaries. Its scope is defined by section 5, p. 113, of the act of 1877, which says that the amendment or amendments so made shall become part or parts of the charter, if not inconsistent with the laws of this state. What does the letter of this language of the statute import? Plainly that a municipal corporation of the class named has the right to amend its charter, so as to give itself any power, no matter what, that the Legislature itself could give, provided it be not inconsistent with some law of the state. To this extent, it is a wholesale grant of power to municipal corporations of that class. It is not a grant to the court of power to amend, any more than the grant of a right to be a corporation is a grant of power to the court. The court is not authorized to take the initiative. It cannot move in the matter except upon the application of five or more freeholders of the corporation. It has no discretion to grant, but only to refuse. It sits to determine, among other things, whether the amendment asked for is inconsistent with the laws of the state. Is not that one of the functions of a judicial tribunal? It is the only tribunal authorized by the law to determine what is, and what is not, law. If it is not inconsistent with law, that the petitioners are *prima facie* entitled to the relief asked may be the correct view to take, but this may be overthrown by the action of the remonstrants, in showing it to be against the will of a majority of the voters or freeholders, or in disclosing some peculiar condition, making the power asked oppressive, unjust, or demoralizing to the community, just as in the case of an application for a certificate of incorporation. Courts must construe statutes so as to make them effective, if possible. They cannot fold their arms and say a statute is void, merely because they do not readily, and at first blush, see what the Legislature intended. They must seek out the intention and carry it into effect as far as possible. Does it require any imagination to see that this discretion is the same kind as that conferred in reference to original incorporation? Are there not normal and abnormal conditions to be considered here, as there? Cannot a court distinguish between them?

Is the grant of the right of amendment and alteration, so made to municipal corporations, upon the conditions annexed to the grant, unconstitutional because it is a wholesale grant, because the powers so granted are not enumerated and specifically defined? Is a power of attorney void, on the ground of uncertainty or otherwise, because it gives to the attorney the power to do all things which the principal himself could do? Practically all powers of attorney are drawn in that form. Is not that certain which can be made certain?

When the Legislature says that a municipal corporation may have, by way of amendment to its charter, any power and all powers, not inconsistent with law, where is the element of uncertainty in the grant? There is a right of election, for it is not to be assumed that any one corporation would want, or could exercise, all powers, not inconsistent with general laws; but this does not make the grant uncertain. If one man sell to another any or all of the horses in a certain field, as the vendee may elect, or of a certain breed or color in such field, at a certain price per head, the contract would be an absolutely good one. So here, the powers granted are designated and defined in a general way. They are all the powers, not inconsistent with general laws, which the Legislature could grant to a corporation, if it could legislate specially for such corporation, and the corporations may, upon election, and compliance with the conditions annexed, take any of them they desire. This is the proposition decided by the Mississippi cases, cited in Judge Miller's opinion. And Judge Miller very truly and properly says the Mississippi case did not involve the question of imposing legislative duties upon the court. If there was any legislative duty, or delegation of legislative powers in it, the duty was imposed upon, or the delegation made to, the Governor or the Attorney General, executive officers, representing the executive department, and the Constitution as emphatically inhibits such delegation to the executive department as it does to the judicial department. It says the three departments shall be separate. It is plain, therefore, that there was no delegation of legislative power, either to the judicial or the executive department. There was no such delegation at all. It was a legislative grant of power, upon condition, made direct to the corporations or the people, which is not important. And the only function performed by the Governor or Attorney General was a mere ministerial one, involving the incidental exercise of discretion, a matter which belongs to all three of the departments. The Mississippi case not only sustains the position that there is no delegation of legislative power involved, but the further position that the wholesale grant of powers so made by the statute is not void for uncertainty or for want of enumeration, specification, and minute definition of each pow-

er so granted. The provision of the Mississippi Constitution was, in substance, the same as that of our Constitution. It did not reserve, independently of legislative action, to the people of any community the right to incorporate and take unto themselves all such corporate powers as were not inconsistent with general law, as does the California Constitution, which has been sustained as valid by repeated decisions of that state. It authorized the Legislature to pass general laws for the incorporation of municipalities and the amendment of their charters, just as our Constitution does. The Legislature, in passing this general law, imposed upon the Attorney General and Governor the duty which our statute, made for the purpose of carrying into effect the same kind of a constitutional provision, has imposed upon the circuit courts. If the Mississippi court had seen in this statute an attempted devolution, upon the executive department, of legislative power, it would have declared the statute void for that reason. It sustained the statute because there was no such devolution, and ours must be sustained, so far as that matter is concerned, because there is no such devolution. It sustained the statute, notwithstanding it made a wholesale grant of powers, because it was not in violation of any principle of law of which the court had any knowledge, and ours must be sustained for the same reason. It cannot be overthrown for some supposed reason which the court cannot define or state. The wisdom of such action on the part of the Legislature is not a question for judicial determination. Courts have nothing to do with the wisdom or policy of legislative action, as has been shown by authorities cited at the outset of this opinion. Such legislation may be unwise and impolitic, but it cannot be overthrown by the courts for that reason. "The courts have no right to set aside, arrest or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their notions of natural right, absolute justice, or sound morality." *Slack v. Jacob*, 8 W. Va. 612, Syl., point 5.

Something has already been said concerning the intention of the Legislature in making this conditional grant of power to municipal corporations by way of amendment to their charters. Judge Miller assumes that the amendment must not be inconsistent with chapter 47 of the Code. He says so. His argument is that chapter 47 of the Code is a law of the state, which is true, and as the amendment, in order to be effective and valid, must not be inconsistent with the laws of this state, it must not be inconsistent with chapter 47. This view, it seems to me, ignores or overlooks the important consideration that the statute granting these amendments is a part of chapter 47, which makes it impossible for any such amendment to be inconsistent with that chapter. In other words, chapter 47, embodying as a part of it the act of

1877, confers, *proprio vigore*, certain powers upon municipal corporations, constitutes the charter of these corporations, and then says it (chapter 47), viewed as the charter of the corporation, may be altered, changed, or amended, in any respect and to any extent, not inconsistent with the laws of the state. In other words, it says chapter 47 itself, being the charter of every corporation organized under it, may be altered, changed, or amended in any manner, not inconsistent with law. What else is there but chapter 47 to change, alter, or amend? Nothing. If it cannot be altered, changed, or amended, then the provision allowing amendment becomes a dead letter. Courts cannot kill statutes in any such manner. How can any amendment be inconsistent with the provisions of a chapter which gives such power to amend? When a corporation is organized under chapter 47, the provisions of that chapter constitute its charter, and that charter says the corporation may have any power, not inconsistent with the general law, which the corporation may see fit to claim or elect to take, by way of alteration, change, or amendment of its charter—its charter, chapter 47 itself, the only charter it has. This was not true of the town of Point Pleasant at the date of the amendment of its charter, because it had not been incorporated under chapter 47. It was chartered by special act of the Legislature in 1794, and its charter was amended by special act of the Legislature in 1860; but the additional powers given to corporations of its class by chapter 47 were conferred upon it by that chapter. But this act of 1877 was applicable to said town in 1877 and 1883, because it then belonged to the same constitutional class of corporations, having less than 2,000 population. To say this statute, granting amendments to the charters of municipal corporations of that class, contemplates no amendment inconsistent with chapter 47, makes it, I repeat, a nullity. It would be impossible to amend it in respect to the number of its officers or their powers and duties, or terms of office, for any change in any respect would be inconsistent with that chapter, except in a few instances in which it authorizes specific changes, such as increasing the number of wards and number of councilmen, consistently with the growth of the town. The alteration might be in respect to powers to pave streets, pave sidewalks, put in sewers, and a vast number of other things not bearing any relation to the liquor traffic. It is an important statute, the principle of which must be upheld in some form to enable the Legislature to execute a power and duty enjoined upon it by the Constitution. In dealing with it, the court must not regard it as subserving some particular purpose or interest.

Judge Miller's conclusion, that the amendment must not be inconsistent with chapter 47, is predicated largely on the clause in the certificate of incorporation, prescribed by sec-

tion 9 of chapter 47 of the Code, reading as follows: "And it appearing to the satisfaction of the court, that all of the provisions of chapter forty-seven of the Code of West Virginia have been complied with by the applicants for said incorporation, and said city (town or village) is duly authorized within the corporate limits aforesaid to exercise all the corporate powers conferred by the said chapter from and after the date of this certificate." That relates to an unamended charter. On the organization of a corporation, under chapter 47, it takes the powers enumerated and defined in that chapter. That chapter is, in one sense, the town's charter, and, in another, a general law under which other corporations may be organized. All corporations so organized have those powers, and no others. Their powers are uniform. They are all put on the same footing exactly. In the absence of any amendments, each has the powers enumerated, defined, and granted by that chapter. But that chapter, as amended by the act of 1877, gives to each of these corporations, on its organization, certain powers, and the additional power to claim and take by election other powers, additional powers, and to eliminate, by change and alteration, some of the powers given by chapter 47, and the principle of the amendment is the same as the principle under which the organization is effected in the first instance. It stands upon a grant of power direct from the Legislature to the corporation or the people thereof, to become effective upon the performance of certain conditions. These other additional and different powers do not go to the corporation at the inception of its existence. It was competent for the Legislature to have given them all in the first instance if it had seen fit to do so, and, while the court may see no particular reason why it should not have authorized them in the first instance, as did the Legislature of Mississippi, it is the province of the Legislature, and not of the court, to say whether it shall be so done or not. As the Legislature has said that a corporation shall begin its existence with certain specific and clearly defined powers, and make such changes thereafter as it may see fit to make, provided these changes do not contravene any of the general laws of the state, the courts must allow the statute to operate according to the intention of the Legislature. It was a mere matter of expediency and public policy with which the courts have nothing to do.

The argument of Judge Miller seems to rest also upon the idea that the Constitution, by implication or otherwise, requires all municipal corporations of less than 2,000 population to have uniform charters. I have found nothing in the Constitution which expressly says so, nor is there anything in it, or the circumstances under which it was adopted, from which such an implication can

arise. At the date of the adoption of the Constitution, there were numerous towns and villages in the state, falling in that class, holding charters granted by special acts of the Legislature and widely differing in the powers conferred. All these charters were continued in force. Not one of them was annulled. The Constitution therefore recognized and sanctioned, by implication, lack of uniformity in the charters of such corporations, section 39 of article 6, forbidding the passage of special laws for the incorporation of cities, towns, or villages, or amending the charter of any city, town, or village, containing a population of less than 2,000, and enjoining upon the Legislature the duty of providing, by general laws, for these and all other purposes, for which provision can be so made, does not say that the general law shall be uniform in operation as well as general. The requirement that the law be general does not imply that it be uniform in its operation and effect in the full sense of the terms. *State v. County Court of Braxton Co.*, 55 S. E. 382. But, if it did, is not this statute, conditionally granting amendments, uniform in its operation? It makes exactly the same grant to every corporation in the state falling within that class. It makes a conditional grant to each and every one of them, the right to change its charter in any respect not inconsistent with the laws of the state. It does not force this change upon any corporation. It makes it a matter of election with the corporation, or rather the freeholders. In so far as the act is carried into effect by the action of the Legislature, it is both general and uniform. It stands on exactly the same footing in this respect as the provisions of chapter 47, giving the right to incorporate. Those provisions extend to the inhabitants of every one-quarter of one square mile of territory in the state, having a population of not less than 100 persons, the right to be a body politic and corporate; and these provisions are not defeated for want of uniformity or generality, because the inhabitants of some of these territories, having the requisite population, see fit to incorporate, and others do not. Viewed in the abstract, it is both general and uniform, as is every other general law, such, for instance, as the law of inheritance. Viewed in the concrete, it is uniform and capable of becoming general, just as other general laws, operating prospectively. The purpose and object of the clause of the Constitution, above referred to, has been declared by this court to be something other than the requirement of uniformity in charters. Judge Holt said, in *Elder v. Central City*, 40 W. Va. 222, 21 S. E. 738: "In 1872, the organization of many parts of the state into municipal corporations, for the purpose of local self-government, had become a matter of frequent and urgent necessity. The framers of the Constitution thought that this

need in the great majority of cases could be met more efficiently and impartially by a general law than by a great multitude of special enactments." He regarded it as a mere matter of convenience, saving time, expense, and trouble. Ordinarily, the Legislature is in session only 45 days out of 730, and, to compel the people of a community to wait two years for an act of incorporation would have been unreasonably burdensome. It would occasion not only delay and expense, but uncertainty, owing to the great rush of matters pressed upon the Legislature in this short session, by reason of which many meritorious bills fail for want of time to consider them. Moreover, the people wanted the Legislature relieved from the useless burden of labor and consumption of time, formerly bestowed upon these charter bills, to the end that that body might have more time for the consideration of general laws and such special laws as were necessary for which general laws could not be substituted. In the case of *Town of Union Mines*, 89 W. Va. 179, 19 S. E. 398, Judge Dent, speaking for the court, said: "But the Constitution, to relieve the Legislature from being hampered with this inquiry in every case, requires the Legislature to enact a general law for the incorporation of all cities, towns, and villages of less than 2,000 inhabitants." If every amendment made by the Legislature by general law had to be carried into the charter of every corporation of that class, this plain object of the constitutional provision under consideration would be defeated, for every proposed amendment would then bring to the Legislature the representatives of every municipal corporation in the state belonging to the class named, and give them the right to be heard, for it would become part of the charter of every such corporation. Instead of minimizing the work of the Legislature and simplifying its mode of dealing with these corporations, it would complicate the matter and add to the legislative burdens. Such a construction of the provision would defeat the very thing this court has declared to have been its purpose. It would make the provision a *felo de se*. In view of these important considerations, amply justifying and vehemently calling for the insertion of this clause in the Constitution, ought the court to add on a lot more of mere fanciful suggestions of reasons, and give weight to them in the construction of that clause, so as to make it mean what it plainly does not mean, when viewed in the light of conditions which were recognized and sanctioned by it and the framers of the Constitution in which it is found, and such in character as to defeat what has been declared to be its object? If lack of uniformity in municipal corporations of this class was regarded by the people as an evil which they desired to eradicate, is it not strange that, having the power to annul all the special charters then existing, differing from one another even more than one star

differs from another, they did not do so, but, on the contrary, expressly declared that all these laws in force at the adoption of the Constitution should remain in force until altered by the Legislature? Matters of this kind, bearing on the question of intention, are not fancies, conjectures, or surmises. They are stubborn facts, not to be offset, nor the inferences arising from them overcome, by groundless suggestions of other considerations.

To me, therefore, it is perfectly clear that, by the amendment in question, the council of the town of Point Pleasant acquired the sole power to grant or refuse licenses of all kinds, unless the exercise of that power would have been inconsistent with some law of the state other than any provision of the Constitution to which attention has been directed, and other than chapter 47 of the Code. Whether it is or not, I have no occasion to inquire, since my declared purpose in writing on this branch of the case is now fully accomplished, namely, the statement of reasons for neither concurring in certain views expressed by Judge Miller, nor allowing them to pass unchallenged. Whether the amendment made by the circuit court in 1883 is inconsistent with any law of the state is not a constitutional question, but one of legislative intention to be ascertained from a view of the statutes.

As chapter 40 of the Acts of 1891 clearly vested in the council of the town of Point Pleasant sole power to grant licenses for the sale of intoxicating liquors, the license granted by it to the defendant Harden was valid. In holding it invalid, the circuit court of Mason county erred, and as the validity of his license is the only question in the case, this conclusion not only reverses the judgment and sets aside the verdict, but finally disposes of the case, under the operation of a rule lately declared by this court in *Ruffner Bros. v. Insurance Co.*, 53 S. E. 943, and other cases.

McWHORTER and MILLER, JJ., dissent, reserving the right to file opinions.

(15 N. C. 56)

BOWSER et al. v. WESCOTT.\*

(Supreme Court of North Carolina. Sept. 17, 1907.)

1. PUBLIC LANDS—LANDS OF STATE—ENTRY—PROTEST—NATURE OF PROCEEDINGS.

A protest against an entry on land alleged to belong to the state as authorized by Revisal 1905, § 1709 et seq., is not a civil action to try title to land, but is a special proceeding under the entry laws to ascertain if the entryman, so far as the protestant only is concerned, is entitled to enter the land described in the entry.

2. SAME—BURDEN OF PROOF.

Revisal 1905, § 1709, provides that, if any person shall claim title to or interest in land covered by an entry, he shall, within the time of advertisement provided in the previous section, file his protest in writing with the entry taker against the issuing of a warrant thereon, whereupon the claimant on notice by the clerk shall appear at the next term of the superior

\*See note at end of case.



court, and show cause why his entry shall not be declared inoperative and void. *Held* that, where a protest is filed under such section, the burden of proof is on the entryman to show that the land was unappropriated and subject to entry as against the protestant at the time his entry was made.

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Dare County; W. R. Allen, Judge.

Protest by Crissle Bowser and another against an entry made by George T. Wescott on land alleged to belong to the state under Revisal 1906, § 1709 et seq. From a judgment in favor of the entryman, protestants appeal. Reversed.

D. M. Stringfield and Ward & Grimes, for appellants. W. M. Bond, for appellee.

**BROWN, J.** It is contended by the learned counsel for the enterer that there are admissions in the record that the protestants have no title to the land entered, and that under the ruling in *Johnson v. Wescott*, 139 N. C. 29, 51 S. E. 784, the protest should be dismissed and the enterer permitted to take out his grant. We fail to find any such admission in the record. It is admitted that the protestants on the trial failed to connect themselves by evidence with the possession of Ben Etheridge, Barbara Frost, or Ned Bowser; but that is far from being an admission of record that protestants have no title or possession of the land in controversy, and that it is open to entry. The evidence tends to prove that protestants are in actual possession of the land and were at the time the entry was made; that there was a field cultivated on it in 1871; that Barbara Frost cleared the land and was in actual possession of it for 25 years; that Ben Etheridge moved on the land 30 years ago; and that Ned Bowser had been cutting all over the land for the same length of time. There is other evidence which it is unnecessary to discuss in the view we take of the case. Further reflection convinces us that we should adhere to our decision in *Walker v. Carpenter* (at last term) 144 N. C. —, 57 S. E. 461, by which the burden of proof is placed upon the enterer to show at least so far as the protestant is concerned that the land is unappropriated and open to entry. The question had never been presented before, nor anything analogous to it that we can find. We therefore cannot "travel with ease along the highway of precedent," and must be guided by what we think is a proper construction of the statute and the evident intent of the General Assembly in enacting it. It is a source of satisfaction to feel that if we are in error that body will doubtless correct it in due season.

In the first place, let it be understood that we do not intend to reverse the ordinary rule of proof in an action to try title to land, as this is not a civil action within the meaning of the statute. It is a simple proceeding under the entry laws to ascertain if the enterer,

so far as the protestant only is concerned, has a right to enter the land described in the entry. It is well to note the history of the protest section of the entry laws as indicating the purpose of the General Assembly to relieve what was possibly a hardship upon many landowners of the state, for it is fundamental that a statute should be so construed, if reasonably possible, as to give effect to the remedy intended. Prior to the amendment to the entry laws, when the protest proceedings were introduced, an entry could not be protested. The first enterer, by paying the small stipend required by the statute, after survey, secured his grant from the state, and became the *prima facie* owner of the land. The person who contested his right had to bring suit to vacate and set aside the grant, or, if sued himself, after the grant had been put in evidence, had still to assume the burden of making out an indefeasible title. And this is the law now where the grant has been issued and legal proceedings commenced. Thus it was in the power of land speculators to enter lands generally without the least investigation of the ownership, and, by paying a mere pittance for their grants, to put the apparent owners and possessors of the lands to proof of their title. If they failed upon some slight technicality, these enterprising land hunters acquired title. This condition of the law continued from the earliest times up to 1883, when for the first time the right to protest an entry was given, and provision made for establishing in the superior court the rights of the enterer before grant issued. Section 2765 of the Code.

We are unable to find any trace of such proceeding in the legislation of the state prior to that time. When the state had large bodies of public lands open to entry, the old law worked no great hardship, for the location of those lands was well known; but now that the state owns practically no bodies of land that are open to entry, only timber hunters, and not the state, are benefited by adhering to it. By incurring the trifling cost of an entry, and without incurring any expense whatever of investigating titles, the enterer was enabled, not only to put the owner of land to the great expense and burden of demonstrating the title in court, but to avail himself of any defect which lapse of time, death of witnesses, or lost deeds and records may occasion. To remedy this great hardship must have been the purpose of the General Assembly in adopting the provisions of the Code of 1883. What else could have been the prompting motive for such legislation? If we still place upon the protestant the burden to make out his title in order to defeat a simple entry, it seems to us we defeat the only purpose of the act, for the protestant then is in no better position in contesting an entry than he would be in seeking to vacate and set aside a grant. A grant is the solemn deed of the state under its great seal, and he who attacks it

and seeks to vacate it, should assume the burden of proof, for the presumption is that the sovereign owns the land she undertakes to convey. But, while it is presumed the state once owned the lands within its borders, there is no presumption that it remains vacant and is open to entry. Laying an entry is the act of the enterer, and not the act of the state, and there is no presumption that the lands he appropriates are open to entry. "So far as the state is concerned, it is a matter of indifference who appropriates the land, provided it to be paid for." *Ashley v. Sumner*, 57 N. C. 123. "It is not material to the state what vacant land is granted; but such entries are not allowed to interfere with the rights of other citizens." *Pearson, C. J., in McDiarmid v. McMillan*, 58 N. C. 31. We quote these extracts for the purpose of showing the state's indifference to entries of land, while, on the contrary, the interests of the citizen possibly gave him a very lively interest in them. It was therefore we think in the interests of the citizens who own and occupy land that the act of 1883 was enacted to the end that the right to make the entry may be established before a grant is issued. This act was repealed by the next General Assembly and the old law restored. Chapter 132, p. 199, Acts 1885. But we find that the General Assembly of 1891 repealed the repealing act, leaving the law as enacted in the Code of 1883, and as it now appears in the Revisal of 1905. We can see no reason for restoring the act of 1883 unless it was in some measure intended to protect a bona fide claimant and possessor of land against the hardships entailed by indiscriminate entries and to compel careful investigation before making entries. If we still place the onus probandi on the protestant in his contest with the enterer, the act of 1883 might as well not have been restored.

It is contended that we are compelling the enterer to prove a negative, to produce proof exclusively within the knowledge of the protestant and practically to perform an impossibility by showing that no one has any interest in the land entered. The first proposition is discussed in *Walker v. Carpenter*, and we will not repeat here what is there said. In that case we attempted to analyze the statute and to show that by its terms the claimant must establish on the trial his right to enter the land. With due deference for the opinions of others, we think it would be to entirely destroy the beneficial purpose of the act to hold that this requirement can be fulfilled by putting in evidence a simple entry, the ex parte act of the one who offers it.

Neither are we compelling the enterer to produce proof exclusively within some one else's knowledge or to perform an impossibility. The notice required by the act is intended to inform the neighborhood that the enterer claims a right to enter a certain piece of land, the boundaries of which are given.

If no one protests against such right, the grant issues as a matter of course, if the statute in other respects has been complied with. If a protest is filed, then the enterer must make good his right as against the protestant only, and not against all the world. If, in response to the notice, only one person protests, the law presumes that the enterer has infringed upon the rights of no one else. Under our present registration act, which bears the name of our learned Brother, Mr. Justice Connor, it is as possible for the enterer to run out the adjoining boundary of the protestant and to investigate his title deeds as it is for the protestant to do it himself. Without the registration law of 1885 we would be compelled to admit the force of the contention. Since then the record of title to land is an open book, free to the examination of all, and we suspect this consideration had something to do with the passage of the act of 1891. We think there is a marked distinction between this case and the cases cited in behalf of the enterer. *McCormick v. Monroe*, 46 N. C. 13, and *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784. The former was decided 30 years before the act we are construing was passed, and is entirely consistent with what is hereinbefore said in respect to the burden of proof when a grant is attacked. The case further holds that, where there is an exception in a grant, the onus of proof lies upon the party who would take advantage of the exception, in which ruling we fully concur. The *Makely Case* was likewise an attack upon a grant issued by the state, and the decision is in full accord with what we have herein said in respect to grants. In our opinion the ex parte act of an individual is not to be invested with that presumption of rightfulness which attends the act of the state, and there is nothing in either case which militates against this view, as we read them. We can say the same of *McNamee v. Alexander*, 109 N. C. 242, 13 S. E. 777, in which this court refused to enjoin the Secretary of State from issuing a grant upon the ground that the plaintiff had a complete remedy given by section 2786 of the Code, now section 1748 of the Revisal of 1905. In conclusion we will say that in adhering to our former opinion we are not laying down a rule of proof of our own invention, but are giving effect to legislation which has never been construed before. The effect of the decision can only be to make those who undertake to enter land more particular in making a preliminary investigation of the title to the land they seek to appropriate.

New trial.

**WALKER, J. (dissenting).** The case shows that the protestants, who are the nominal, and, as I think, the real and substantial, plaintiffs in the record, failed to show that they had any title to or interest in the land, or to prove any facts upon which they

could base a claim thereto. The presiding judge ruled, first, that the protestants must show title or interest in order to get a standing in court; and, second, that they must take the burden of proving that the land was not the subject of entry. It is impossible for me to perceive why both rulings were not correct. The first is plainly in accordance with the very words and requirements of the statute, for it is expressly provided therein, as a condition precedent to the right to file and maintain a protest, that the protestants shall have, or at least claim, title to or interest in the land covered by the entry, and this requirement is introduced by strict words of condition. "If any person shall claim title to or an interest in the land covered by the entry, he shall file his protest in writing." Revisal 1905, § 1709. The protestants have therefore failed to show themselves qualified to contest the right of the defendant under his entry. In their protest they assert that they are the owners of the land, but there was no evidence of this fact in the case, although they attempted to establish it. The claim of the protestant must, of course, be bona fide, and the evidence must in some way connect him with the title or interest. The case might well end here, I think, with an affirmance of the judgment, as to my mind at least nothing is clearer than that by the explicit language of the statute the protestant must have an interest in the controversy and for a very good reason. The state is concerned only to protect those who have acquired vested rights or interests in her lands, and, where no such private interest exists, her policy is, and ever has been, to encourage the entry of lands, so that they may be cultivated, improved, and enhanced in value, and thereby increase its wealth and prosperity. It surely was not intended to promote a litigious or vexatious spirit among the people by permitting any interloper, who may imagine that he has a grievance against his neighbor, to attack the validity of his entry. The state does not seek to encourage litigation of that kind. Its well-settled policy has been the reverse of it. "Interest reipublicæ, ut sit finis litium."

The onus of proof was properly placed upon the protestant by the court. It has, perhaps, been truly said in regard to the burden of proof that there is no one rule, or set of harmonious rules, which furnish a sure and universal test for the solution of any given case, and that there is not and cannot be any general solvent for all cases. But certain general principles have been recognized as affording sufficient aid in determining upon whom should rest the burden of proof, in view of the particular nature of the case under consideration. Some of the more important ones may be thus enumerated: (1) He who alleges an affirmative must take the burden of proving it. *Millsaps v. McCormick*, 71 N. C. 531; *Edmonston v. Shelton*, 49 N. C. 451; *Hinson v. King*, 50 N. C. 393; *Coving-*

*ton v. Leak*, 65 N. C. 594. (2) He who asserts the existence of a fact essential to his success must establish it, even though it may be alleged in a negative form. *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 634; *Nash v. Hall*, 4 Ind. 444. (3) When a fact is peculiarly within the knowledge of a party, or the evidence which will show it is more available to him, or he has more means of knowledge concerning the fact to be established than the other party, he must assume the burden of proving it. *State v. Privett*, 49 N. C. 103; *Cook v. Guirkin*, 119 N. C. 17, 25 S. E. 715, and cases cited. And this is said to be true even if the proposition involved be negative instead of affirmative. *Robinson v. Robinson*, 51 Ill. App. 317. (4) Where the burden of proof is may be determined by considering which of the parties would succeed if no evidence was offered and by the effect of striking from the record the allegation to be proved. The onus is on the party who under such a test would fail. 16 Cyc. p. 932; *Porter v. Sill*, 63 Miss. 357; *Martin v. Macey*, 4 Ky. Law Rep. 625. (5) The burden of proof is on the party alleging a breach of duty or the commission of a wrong, even though it involves a negative, so it has been said. *Baird v. Brown*, 28 La. Ann. 842. The foregoing rules are supported by *Stephen's Digest of Evidence* (May's Ed. of 1886) pp. 143, 144, 145, 146, and notes. There are, of course, other rules to the same effect which might also be considered, but those mentioned will suffice it seems to me in this case to determine upon whom is the burden of proof.

The affirmative of an allegation is not always determined by its form. Here the protestants allege that the entry is void, because the lands were not the subject of entry. The allegation would be precisely the same if he had said that the entry was not valid and thus expressed the idea negatively. But this does not destroy its affirmative character, no more than the same kind of change in the form of an allegation that a deed or other instrument is void. The statute says that, when the protest is filed, a notice shall issue to the enterer to show cause, not why his entry is valid, or why he should have a grant, as the court virtually construes it, but "why his entry shall not be declared inoperative and void." This language clearly implies that the law regards it as prima facie valid if the formalities required by the statute have been observed, as was the case here, because the law will never presume a wrong, and, upon the bare entry without any proof whatever, adjudge that the enterer has violated the law by laying his entry on land not vacant or otherwise not subject to entry; nor will it "declare" an act, which is apparently valid, to be void without some proof of its invalidity. It proceeds upon proof, and not upon mere conjecture, and gratuitously imputes evil to no man. It presumes innocence of wrong, until there is evidence to the contrary, and it will assume

that an entry which has not the appearance of any wrong, but which, on the contrary, has been shown to have been made according to the prescribed forms of the law, is rightful, and for this and other sufficient reasons it requires, not that it shall be validated by proof from the enterer, but that he should show cause why it should not be invalidated by proof from the protestant. Is there any precedent in the books for a court to declare, or to decree (which is in effect the same thing), an act which is apparently valid to be void, without at least some proof of its invalidity? If there is, it reverses the very elementary principle of all judicial procedure.

I am unable to see any practical difference between this case and *McCormick v. Monroe*, 46 N. C. 13, and *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784. In the last case, at page 35 of 139 N. C., at page 786 of 51 S. E., we said: "This is not an action to recover the realty, but is brought for the avowed purpose of removing a cloud from the plaintiffs' alleged title, and for that purpose to have vacated and canceled the grant issued by the State to the defendant. Plaintiffs are, therefore, as we have said, the actors, and they allege the affirmative of the issue to be the truth of the matter." The opinion of Pearson, J., in *McCormick v. Monroe*, seems to have a direct bearing upon this important question. In that case the defendant, in attacking a grant, relied upon an exception in it, upon the ground that the land described in the exception had previously been entered and granted. The learned judge said: "The only question is: Upon whom does the onus lie? Clearly upon the defendant." And again: "This is but an instance of the familiar rule that the affirmative must be proved." A reading of that opinion will show that practically the same question was involved as we have in this case. He further says: "Another view of the subject may be taken. Suppose no part of the land had been previously granted. If the onus be on the plaintiff (the enterer and grantee), he can never recover one acre of it, yet it is admitted that he is entitled to 250 acres of it. \* \* \* It is settled that, where the land is the subject of entry, the grant is voidable (if attacked directly for fraud, irregularity, etc.). Where the land is not the subject of entry, the grant is void, and may be so treated in ejectment or trespass." But the burden is always upon the party who attempts to assail it, as Judge Pearson demonstrates, by applying one of the cardinal maxims of the law, and he attaches no importance to the fact that a grant had actually issued upon the entry. It is the fact, upon which the attack is based, to wit, a previous entry or grant, that must be established by him who affirms the invalidity of the subsequent grant, or who would except any part of the land from the operation of the grant or from its general description by reason of the existence of that fact. This

opinion of Judge Pearson has been approved. *Gudger v. Hensley*, 82 N. C. 481; *King v. Wells*, 94 N. C. 344; *Dugger v. McKesson*, 100 N. C. 11, 6 S. E. 746; *Midgett v. Wharton*, 102 N. C. 14, 8 S. E. 778; *Manufacturing Co. v. Frey*, 112 N. C. 161, 16 S. E. 902. Many other cases might be cited illustrating and enforcing the same rule, but those we have selected will suffice to show that when a party attacks an entry or grant because the land described in it has been previously entered or granted, or because it is, for any other reason, not the subject of entry, he must prove it, or fail in his suit. There is no presumption that land has been previously entered or granted. If there is any presumption at all in such cases, it is precisely the other way, namely, that it has not been. It is for this reason, among others, that we unanimously decided in *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784, that where the plaintiff claimed that a grant was void and should be canceled because it conveyed swamp land, which was not the subject of entry, the burden was upon him to show it; and that case was not ejectment, but the suit was brought by the board of education, acting for and representing the state in its sovereign capacity, to set aside the grant. The two cases may perhaps be distinguished by reason of a slight difference in their facts, but the principle underlying them cannot be. It has always been understood that, where a grant is assailed because it was based upon an entry which in its turn was laid upon land not vacant, the burden is upon the party assailing the grant; and the decision in this case, it seems to me, shakes the foundation of all the law upon this question which has heretofore been considered as settled. In *Whitney v. Morrow*, 50 Wis. 197, 6 N. W. 494, the right of the plaintiff to recover depended upon the question whether the land had been entered or occupied in 1828, and the court said that, in the absence of proof, it could not be held that it had been so occupied, and as the existence of that fact was essential to the plaintiffs' success they should have proved it, under the general rule "that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." That case seems to furnish a clear and striking analogy to the one we now have in hand.

The second of the principles above stated, that he who asserts the existence of a fact essential to his success must prove it, is clearly applicable to this case, as the pivotal fact asserted here is, that the land was not vacant and this rendered the entry void. The same may be said of all the above remaining rules. It must be remembered that the statute requires the protestant to show that he has a title or interest; and whether he has or not is peculiarly and necessarily within his own knowledge, and the evidence to establish that fact is more available to

him than to his adversary. The plaintiffs actually allege in the protest that they are the owners of the land.

As to the fourth of the rules enumerated, it may be said that, if no evidence is offered in the case, the protestant must fail, as the entry being regular in form, under the statute, there is no presumption against it, and, there being no proof of the fact that the land was not vacant, there is nothing upon which a judgment for the protestant can be based. Finally, the law never presumes a wrong, but its maxim is that all acts are taken to have been rightly and regularly done. "*Omnia præsuntur rite esse acta.*" Under this maxim the formal requisites of the statute having been complied with, the enterer will not be presumed to have committed the wrong of having entered land which was not vacant. The entry of land under such circumstances would be not only a legal but a moral wrong, and the law never imputes wrong, and surely never convicts of it, until some proof is forthcoming from the accuser. The enterer therefore has made out a *prima facie* case, which must stand until overthrown by proof coming from the protestants.

But the crucial test in this case is that the law will not require an impossibility of any one. "*Lex non cogit ad impossibilia.*" It does not seek to compel a man to do that which it must know he cannot possibly perform. *Broom's Legal Maxims* (6th Am. Ed.) p. 184. How can the enterer show that the land was vacant or had not been entered? The protestant can easily show that he has acquired the title by entry and grant, or in some other way, or even that it had been entered by another than himself, if that were sufficient under the statute; but the enterer would be compelled to survey every entry and grant recorded in the register's office, and even then he would not have exhausted all the proof of this requisite fact, for the state's title to the land may have been acquired by another, or lost by it, in some other manner. How can it be successfully denied that to do this is practically impossible? Again, if we compare the ability of the two litigants to adduce evidence in the case, we find that the protestant's greatly exceeds that of the enterer. He is required to show only his own title to, or interest in, the land covered by the entry, and every man is conclusively presumed to be prepared with proof of that kind, because his interest is surely enlisted on that side. The law therefore charges him with knowledge of his own title and of all the facts which could tend to establish it. Every reason that can be suggested would seem to demonstrate that the protestant is the party who must assume the burden of proof in such a case as this one.

The provision of the statute that the enterer shall set forth the lines or boundaries of adjoining tracts in his entry should count for nothing, for the land may be so located as to be sufficiently described under the statute,

by natural boundaries, and, besides, the proximity of land which has already been granted to the tract in question has no tendency in law to show that the latter was not vacant when entered. Nor can I attach any importance to the argument that the enterer is the actor, for the reason that he asserts his right to enter the land. The conclusive answer is that he has already entered it, and the protestant seeks, in this proceeding, to have "the entry declared inoperative and void," to use the language of the statute. He is therefore the aggressor, or the one who affirms the invalidity of the entry, and he should by every rule of law and justice be required to prove it. In *McNamee v. Alexander*, 109 N. C. 248, 18 S. E. 777, this court, in a similar suit to vacate an entry, placed the burden of proof upon the plaintiff who attacked it.

It is indeed strange that we should disagree as to whether the enterer showed any title to or interest in the land in dispute. "It was admitted that the protestants could not connect themselves with the possession of Ben Etheridge, Barbara Frost, or Neal Benson, so far as it had been shown." Indeed, no possession was shown which operated to ripen a title in any one, whether protestants connected themselves with the possession or not. It must be borne in mind that here the only attempt was to show title by possession under color. How then can the Connor act of legislation apply? Would an investigation of the books show who had been in possession? And right here let us inquire why the burden should be put upon the enterer, even if the books did disclose the title. Is it not much easier for the protestant to carry the burden, as he is perfectly familiar with his own title?

And, again, the proof of title may be mixed, depending partly upon grants or deeds and partly upon possession, estoppel, and other elements which go to make up a good title. When the enterer lays his entry, he acquires an equitable title to, or at least an interest in or right to, the land (*Plemmons v. Fore*, 37 N. C. 312), which is sometimes denominated an inchoate right or equity, and which may be assigned and which is regarded as a valuable one and protected by the law as much so as any other vested right or estate (*Bryan v. Hodges*, 107 N. C. 492, 12 S. E. 430), and which according to ordinary rules can only be defeated by showing a better right in another. Even a subsequent enterer and grantee must take the burden of showing a superior right as against a prior entry, even when no grant has issued thereon. It is a great mistake to suppose that the title to all the public lands of the state have passed out of it by entry and grant or in any other way. The reports of the Secretary of State, which are public documents and of which we take judicial notice, will show the contrary. *State v. Railroad*, 141 N. C. 846, 54 S. E. 294. The presumption, therefore, that any lands entered are vacant, still prevails, and we can find

no case in which it has even been intimated that this presumption has ceased to operate, and we know of no reason why it should not now have its full force.

I concurred in the able dissenting opinion of Justice Hoke filed in *Walker v. Carpenter*, 144 N. C. —, 57 S. E. 461, and for the reasons therein so clearly and forcefully stated, as well as for those herein set forth by me, I am unable to agree with the majority of the court. The great importance of the question involved, and the effect of the ruling in this case upon prior decisions of this court, is my only reason for having said anything about it. That the policy of the state, which has heretofore been enforced, will be defeated by this decision, seems to me clear, and the entry of the public lands seriously embarrassed, if not prevented.

HOKE, J., concurs in the dissenting opinion of WALKER, J.

#### NOTE.

#### Grants of Public Lands.

##### I. ENTRY AND SURVEY.

[a] (U. S. 1815) Act April, 1783, c. 2, opening the land office and fixing the price of land at £10 for each 100 acres, and authorizing any citizen to enter a claim for any lands, provided such claim does not exceed 5,000 acres, does not prohibit a person from making several entries amounting in the whole to more than 5,000 acres, nor from purchasing the rights acquired by entries or from uniting several entries in one survey and patent.—*Polk v. Wendal*, 13 U. S. (9 Cranch) 87, 3 L. Ed. 665.

[b] (N. C. 1802) Lands lying in one county cannot be entered in another county.—*Avery v. Strother*, 1 N. C. 558.

[c] (N. C. 1806) The books of an entry taker are not notice of an entry having been made.—*Merrill v. Sloan*, 5 N. C. 121.

[d] (N. C. 1817) No cases in relation to the entry of vacant land are affected by the act of 1779, except those which arose from the discontinuance of land offices. In all other cases the first enterer must prevail.—*McNeil v. Lewis*, 4 N. C. 517.

[e] (N. C. 1820) By statute of 1777, every citizen of the state, or who should become such, was authorized to enter lands of the state; but the statute required them to subscribe the oath of allegiance before making the entry. Held, that an entry by one who had not taken such oath was invalid, and not rendered valid by his subsequently taking the oath.—*Thompson v. England*, 8 N. C. 137.

[f] (N. C. 1820) So, where A., being entitled to land by occupancy, but not entitled to enter the same by reason of his not having taken the oath, procured B. to enter the land on his claim, who did so, and obtained a grant to himself, on a bill filed by A., after having become a citizen of the state by taking the oath of allegiance, it was held that the transaction was an evasion of the law, and a fraud upon the state, and that the bill must be dismissed.—*Thompson v. England*, 8 N. C. 137.

[g] (N. C. 1820) A deputy surveyor cannot survey land entered by himself; and if he does so, and another deputy fraudulently makes out a plot from his field book, and obtains a grant to himself of the land, the former will

not be entitled to call upon the latter for a conveyance of the legal title to himself.—*Avery v. Walker*, 8 N. C. 140.

[h] (N. C. 1827) A grantee cannot survey his own entry.—*Greenlee v. Tate*, 12 N. C. 300.

[i] (N. C. 1842) An entry upon vacant public land creates an equity which, upon payment of the purchase money in due season, entitled the person entering to a grant, in preference to a person who has entered, and paid the price in the meantime.—*Plemmons v. Fore*, 37 N. C. 312.

[j] (N. C. 1843) The act of assembly of 1842, giving until 1845 to complete the title, by paying the price, under lapsed entries made since 1836, will not give such entries a preference over those made subsequently to such lapse, upon which the price is paid within the time allowed by the statute.—*Bryson v. Dobson*, 38 N. C. 138.

[k] (N. C. 1845) An entry taker cannot appoint a deputy, nor can the acts of one in the capacity of a deputy be rendered valid by the subsequent acquiescence of the entry taker in what he has done.—*Maxwell v. Wallace*, 38 N. C. 593.

[l] (N. C. 1847) Where a father made an entry of land in his own name, and afterwards directed the entry in his son's name, and in the meantime another entry was made, it was held that the son was not entitled to have a grant to the second enterer prior to his own set aside.—*Russ v. Hawes*, 40 N. C. 18.

[m] (N. C. 1849) One who makes an entry, and has it surveyed, cannot afterwards shift its location to the detriment of a subsequent enterer.—*Munroe v. McCormick*, 41 N. C. 85.

[n] (N. C. 1849) Where B. made an entry of land prior to a conflicting entry made by A., and before B. discovered that the land he entered, including a rock quarry, was vacant, he had agreed to purchase part of a tract of land which A. claimed, and which was supposed to include the rock quarry, but in the agreement the rock quarry was reserved to A., it was held that this formed no reason in equity why B. should not enter the rock quarry, when he found it to be vacant.—*Allen v. Gilreath*, 41 N. C. 252.

[o] (N. C. 1858) A prior entry, which is vague, acquires no priority, as against other enterers, until it is made certain by a survey.—*Currie v. Gibson*, 57 N. C. 25.

[p] (N. C. 1858) A person who makes a vague and indefinite entry of land, which he ascertains does not cover the land aimed at, cannot shift the entry to another piece of land which was entered before such attempted transfer, especially if he has notice of the prior entry.—*Ashley v. Sumner*, 57 N. C. 121.

[q] (N. C. 1859) A prior entry of vacant land, not acted on, but abandoned, under a misapprehension of its efficacy, although known to a subsequent enterer, who complies with the law and gets a grant from the state, can, in no degree, help out a still later entry and grant, for such abandoned entry becomes null and void after the time prescribed for its effectuation has expired.—*Stanly v. Biddle*, 57 N. C. 383.

[r] (N. C. 1859) There is no policy of the state which requires that an entry shall have lapsed before another can be made.—*Stanly v. Biddle*, 57 N. C. 383.

[s] (N. C. 1860) In locating a pre-emption right, under Act 1850, § 7, in respect to Cherokee land, one entitled to locate under the agent's certificate is not bound to respect the advantage or convenience of one who has an improvement in the vicinity, and who also has a certificate of a pre-emption right, obtained however subsequently to the other.—*Barnett v. Woods*, 58 N. C. 423.

[t] (N. C. 1875) Battle's Revisal, c. 41, § 2, permitting nonresidents to enter and take out grants for vacant land of the estate, provided they "comply with the laws of the state in relation to such entries," construed to require the enterer to become a resident within the time prescribed for perfecting the entry.—Mockridge v. Howerton, 72 N. C. 221.

[u] (N. C. 1877) No estate or interest in land is acquired by an entry, only a right of preference. So, where A. and B. enter land jointly, and afterwards B. declines to take out a grant from the state, and A. takes out one in his own name, paying the purchase money therefor, *held*, that B. has no estate in the land.—Hall v. Hollifield, 76 N. C. 476.

[v] (N. C. 1877) A grant issued pursuant to an entry in the name or for the benefit of a nonresident is voidable at the suit of the state.—Wilson v. Western North Carolina Land Co., 77 N. C. 445.

[w] (N. C. 1877) A grant taken out upon an entry made by a nonresident, by a person capable of taking and holding under the laws of the state, is valid.—Wilson v. Western North Carolina Land Co., 77 N. C. 445.

[x] (N. C. 1887) Plaintiff claimed land under a grant from the state. Entry on the land was made in one county, and the survey and other proceedings necessary to the issue of the grant were had in that county, and the grant described the land as situated therein. The land, however, was wholly situated in another county. *Held*, that the entry, and other proceedings in connection with it, and the grant under it, were void, as not complying with the provisions of Code, §§ 2751, 2788, prescribing what lands shall be the subject of entry, in what way entries shall be made, and appointing an entry taker for each county.—Harris v. Norman, 96 N. C. 59, 2 S. E. 72.

[y] (N. C. 1887) Code, § 2784, which provides that where a claimant makes an entry on land in one county near the county line, not knowing exactly where the line is, the entry shall extend to and include adjoining lands situated across the line in an adjoining county, and all grants issued or entries made for such lands, when the money has been paid into the state treasury, shall be valid, as against any entries thereafter made or grants issued, does not apply where the land is wholly situated in an adjoining county.—Harris v. Norman, 96 N. C. 59, 2 S. E. 72.

[z] (N. C. 1888) Under Code, § 2765, providing that public lands may be entered by the claimant producing to the entry taker a writing describing the land, a copy of which the entry taker shall enter in a book, an entry of land placed in the entry taker's book without his authority, by a claimant of the land, is of no validity.—Pearson v. Powell, 100 N. C. 86, 6 S. E. 188.

[aa] (N. C. 1890) An entry of land creates an equity in it, which, upon the payment of the prescribed purchase money to the state, within the time limited by the law (Code, § 2765; Rev. St. c. 42, § 11; Acts 1809, c. 771), will entitle the enterer to a grant.—Bryan v. Hodges, 107 N. C. 492, 12 S. E. 430.

## II. LANDS SUBJECT TO GRANT OR ENTRY.

[a] (U. S. 1827) The act of North Carolina of 1783, for the relief of officers and soldiers in the continental line, provided that certain bounties of lands shall be granted to them, and that a certain quantity of land should be granted to each head of a family, and to every single man of 21 years or upwards, provided no such land should include any salt creeks or salt springs which are hereby reserved as public property, together with 604 acres of the adjoining lands, for the common use and benefit

of the inhabitants of that county, and not subject to future appropriations. *Held*, that the commissioners appointed by the act in behalf of the state "to examine and superintend the laying of the land in one or more tracts granted to the officers and soldiers had implied power to survey and reserve a salt creek, and, having done so, the land was not subject to entry or survey as vacant land.—Edwards v. Darby, 25 U. S. (12 Wheat.) 206, 6 L. Ed. 603.

[b] (N. C. 1822) Lands covered by navigable waters are not subject to entry under the act of 1777.—Tatum v. Sawyer, 9 N. C. 226.

[c] (N. C. 1846) At common law, land covered by water was the subject of grant, except where the tide regularly ebbed and flowed.—Hatfield v. Grimstead, 29 N. C. 139.

[d] (N. C. 1858) Land lying between the high and low water lines of the tides of the ocean or a navigable stream is not subject to private appropriation, under the acts authorizing the entry and grant of lands by the state.—Ward v. Willis, 51 N. C. 183, 72 Am. Dec. 570.

[e] (N. C. 1858) All the unappropriated swamp lands in this state were, by the acts of 1825 and 1836, vested "in the Literary Board"; and the provision for entering and taking possession spoken of by the act of 1850 applies only to such lands as may have been forfeited for nonregistration of the grants by which they were held under the act of 1836, or for the nonpayment of taxes under the act of 1842.—White v. Perry, 51 N. C. 198.

[f] (N. C. 1867) Though confiscated, the lands granted by the crown in 1745 to Henry McCulloch were not in 1822 vacant and unappropriated lands in the sense of Rev. Code, c. 42, § 1, providing that no land is the subject of entry and grant except "vacant and unappropriated lands."—Hoover v. Thomas, 61 N. C. 184.

[g] (N. C. 1882) Lands once granted by the state to individual citizens do not become "vacant lands," within the meaning of Battle's Revisal, c. 41, § 1, providing for entry of state lands, where the state subsequently acquires title to them, but abandons the actual use to which they were put.—State v. Bevers, 86 N. C. 588.

[h] (N. C. 1886) Land covered by navigable water is not the subject of entry and grant.—Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242.

## III. VALIDITY OF GRANT.

[a] (N. C. 1834) A grant can only be repealed at the suit of the state or of a prior grantee.—Crow v. Holland, 15 N. C. 417; Featherston v. Mills, *Id.* 596.

[b] (N. C. 1835) Under Acts 1777, 1783 (Rev. St. cc. 114, 185), requiring grants to be recorded in the secretary's office, slight immaterial mistakes in the recording of a grant will not void it.—Den v. Pugh, 18 N. C. 210.

[c] (N. C. 1838) Under the act of 1794, a grant from a state, conveying more than 640 acres of land, is good.—Mendenhall v. Cassella, 20 N. C. 43.

[d] (N. C. 1839) If a grant covers in part land not liable to entry, or which has been previously granted, it will be good for the land comprehended in it which had not been granted and was liable to entry.—Hough v. Dumas, 20 N. C. 473.

[e] (N. C. 1848) A patent described the land by metes and bounds, which upon calculation included 8,699 acres, and after such description were the following words: "Including within its bounds 5,699 acres of land which is excepted in this grant." *Held*, that the exception, being vague and uncertain, must be inopera-



tive and cannot restrain the general terms of the grant according to the description in the patent.—*Waugh v. Richardson*, 30 N. C. 470.

[f] (N. C. 1849) There being no statute prescribing the time within which grants must be issued, where the entry money has been paid, a person who pays the entry money may take out his grant when he chooses, subject to this risk that if another person enters the same land without notice of the prior entry, and first obtains his grant, this shall be preferred.—*Kroux v. Long*, 41 N. C. 259.

[g] (N. C. 1851) Parties claiming under a junior grant cannot impeach an elder one directly, much less collaterally.—*Holland's Heirs v. Crow*, 34 N. C. 275.

[h] (N. C. 1852) A grant founded on an entry, made on land subject to entry, cannot be collaterally impeached for defects in the entry, or irregularity in any preliminary proceeding.—*Stannire v. Powell*, 35 N. C. 312.

[i] (N. C. 1852) But when the law forbids the entry of the vacant land in a particular tract of country, a grant for a part of such land is absolutely void; and that may be shown in ejectment.—*Stannire v. Powell*, 35 N. C. 312.

[j] (N. C. 1853) A grant for vacant land, issued on the certificate of commissioners authorized by law to act in the premises, cannot be impeached collaterally for fraud, mistake, or irregularity, in the proceedings before the commissioners.—*Lovinggood v. Burgess*, 44 N. C. 407.

[k] (N. C. 1854) A. made an entry which lost its priority by lapse of time, and B. made an entry of the same land which lapsed in like manner. *Held* that, under the act of 1850, both entries stood on the same footing, and that A., having obtained a grant after B.'s entry had lapsed, was entitled to the land.—*Horton v. Cook*, 54 N. C. 270.

[l] (N. C. 1856) The acts of 1783, 1819, 1836, and others, in reference to the sale of lands lying in the county of Cherokee, prior to the act of 1852, confer only a special authority upon the officers therein named, so that in order to give validity to a grant issued under these statutes, it must be shown to be strictly within their provisions.—*Harshaw v. Taylor*, 48 N. C. 513.

#### IV. EVIDENCE.

[a] (U. S. 1811) In ejectment, no evidence other than of an entry under a grant from the state of North Carolina can be received to impeach the validity of the state grant.—*Polk v. Hill*, Fed. Cas. No. 11,249 [1 *Brunner*, Col. Cas. 126].

[b] (N. C. 1835) Under Acts 1777, 1783 (Rev. St. cc. 114, 185), requiring grants to be recorded in the secretary's office, the burden of showing the recordation is on the one who makes the objection, and not on the grantee.—*Den v. Pugh*, 18 N. C. 210.

[c] (N. C. 1849) After a possession from 1802 to 1822, and from 1827 to 1845, it was *held* that a grant from the state could be presumed, notwithstanding the interruption of the possession for five years.—*Reed v. Earnhart*, 32 N. C. 516.

[d] (N. C. 1850) Where there was a continued possession of land for 47 years, though the one in possession had, during that time, declared that he did not believe there was a grant, and attempted to procure a grant from the state, it was *held* that the evidence should go to the jury whether a grant had been made, and that a grant could be presumed, notwithstanding the admissions of the one in possession.—*Bullard v. Barksdale*, 33 N. C. 461.

[e] (N. C. 1853) An agreement made by a junior grantee, in a grant from the state, in relation to his possession of a part of his land,

covered by an older grant, with the widow of the elder grantee, who continued in possession, is evidence that she had an interest in the land, and therefore the right to make an agreement; and at all events, the junior grantee, and all claiming under him, are estopped from calling the matter in question.—*Bryson v. Slagle*, 44 N. C. 449.

[f] (N. C. 1887) Where it appears by the evidence of a long series of conveyances, and supplemental oral testimony, that the successive grantees from whom plaintiffs deduced their title had exercised control in the character of owners over certain marsh and beach lands, *held*, that such evidence is sufficient to submit the question to the jury as to whether the title to the lands had been divested out of the state.—*Baum v. Currituck Shooting Club*, 96 N. C. 310, 2 S. E. 673.

[g] (N. C. 1887) In order to establish the presumption that the original title of the state to real estate has become divested by the issue of a grant, it is not necessary to show that the successive occupants were in privy of estate.—*Davidson v. Arledge*, 97 N. C. 172, 2 S. E. 378.

[h] (N. C. 1888) Where defendant claims under a grant, in 1796, of 59,000 acres, evidence is admissible that a large number of persons have settled on the land, to show that the lands were not vacant, and subject to entry, in 1881, when plaintiff's grant was issued.—*Dugger v. McKesson*, 100 N. C. 1, 6 S. E. 746.

[i] (N. C. 1893) Where a patent sets out the boundaries of a grant of land, and contains an exception that "within which bounds there hath been heretofore granted 22,360 acres," the exception is not void for uncertainty, when it can be made certain by a showing what land was included in the first grant.—*Eastern Carolina Land, Lumber & Mfg. Co. v. Frey*, 112 N. C. 153, 16 S. E. 902, distinguishing *Waugh v. Richardson* (1848) 30 N. C. 470.

#### V. RELIEF TO CLAIMANTS.

[a] (U. S. 1885) That a grant of state land in North Carolina was founded upon "a fraudulent entry, and obtained by false and fraudulent practices," cannot be availed of in an action of ejectment brought by a senior grantee to vacate such grant.—*Oliver v. Pullam* (C. C.) 24 Fed. 127.

[b] (N. C. 1806) In a bill in equity to compel defendant to convey the tract of land procured from the state in fraud of complainant's prior entry, on the question whether defendant had notice of the prior entry, proof that the surveyor who surveyed the land for defendant had notice of such prior entry is insufficient to show that defendant had such notice; the rule that notice to an agent is notice to his principal not applying to the case of surveys of entries of public lands made by public surveyors in the discharge of their duties.—*Merrill v. Sloan*, 5 N. C. 121.

[c] (N. C. 1818) A scire facias to repeal a patent should set out particularly the patent of the plaintiff, or his title derived from a patent, with its boundaries and location; also a copy of the patent, with its boundaries, granted to the defendant, or the person under whom he claims, with all their correct names, and also how the two patents conflict; and it should also aver the reasons why the defendant's patent should be canceled. If the defendant denies any of the plaintiff's allegations, issues upon those allegations and denials must be found by a jury; otherwise, the court will not give judgment.—*Holland's Heirs v. Crow*, 27 N. C. 448.

[d] (N. C. 1834) A junior patentee cannot maintain a scire facias to repeal an elder patent, though his entry was prior to that of the



patentee in the elder patent.—*Featherston v. Mills*, 15 N. C. 596.

[e] (N. C. 1837) Under the act of 1798, authorizing an entry and grant of such lands "as have not been before granted," a grantee of lands already granted to another cannot maintain proceedings to repeal the prior grant, though his entry was first, and as the record showed that the lands were already granted, he took no right, enabling him to question the validity of the prior grant.—*O'Kelly v. Clayton*, 19 N. C. 246.

[f] (N. C. 1839) Under the act of 1798, a grantee may proceed to vacate a subsequent grant fraudulently obtained, with knowledge of his previous grant, though the subsequent grant covers a part only of the land included in his grant.—*Hoyt v. Rich*, 20 N. C. 673.

[g] (N. C. 1849) The proviso in Acts 1842, c. 35, saving the rights of junior entries "for which the purchase money may have been paid," is to be construed as not preferring a lapsed entry before a junior entry, subsisting at the passing of the act, on which the purchase money was afterwards duly paid, and a grant obtained in due time.—*Buchanan v. Fitzgerald*, 41 N. C. 121.

[h] (N. C. 1851) On a petition to vacate a junior grant by several persons, of whom one only has any existing title to the premises, the misjoinder is no bar to a judgment vacating a grant.—*Holland's Heirs v. Crow*, 34 N. C. 275.

[i] (N. C. 1851) The relators have a right to this remedy whether they prove any actual damage or not; the subsequent grant being, per se, a cloud upon the owner's title.—*Holland's Heirs v. Crow*, 34 N. C. 275.

[j] (N. C. 1856) A board of commissioners for the allowance of pre-emption rights having decided against the complainant, he brought his bill, alleging that the decision was founded on "gross perjury"; that the board were mistaken in their views of law, were mistaken as to the facts, etc. *Held*, that the allegations of the complainant were not sufficiently explicit to entitle him to relief, even in a court of law, by granting a new trial; and the court doubted whether it had jurisdiction to grant relief in any case against a decision of a board of commissioners, by injunction.—*Burgess v. Lovengood*, 55 N. C. 457.

[k] (N. C. 1856) An allegation that a certificate for a pre-emption right was obtained from commissioners by perjury, without specifying such perjury, and by mistake of the commissioners both in law and fact, is not sufficient to authorize a court of equity to interfere with the action of the commissioners.—*Burgess v. Lovengood*, 55 N. C. 457.

[l] (N. C. 1860) Where a person, having made an improvement, and complied with the act of assembly, allowing a pre-emption right, got a certificate of purchase and had a survey made, but was excluded from it by a grant made to an inhabitant of another state, under a mistaken construction of the act by the state's agent, it was *held* that he had an equity to have a conveyance from such grantee for the part of his survey covered by such erroneous grant.—*Barnett v. Woods*, 58 N. C. 428.

[m] (N. C. 1887) Plaintiff claimed land under a grant from the state. Entry on the land was made in one county, and the survey and other proceedings necessary to the issue of the grant were had in that county, and the grant described the lands as situated therein. The land, however, was wholly situated in another county, and was at the time of the supposed entry and grant. *Held*, that it was not necessary to declare the grant void, in an action for that purpose, for the grant when presented in evidence would appear invalid on its face, and would therefore be inadmissible as evidence of

title.—*Harris v. Norman*, 86 N. C. 59, 2 S. E. 72.  
[n] (N. C. 1888) An injunction will not be granted to one making a junior entry on land to restrain one making a senior entry from receiving, and the secretary of state from issuing, a grant, where the application is based solely upon alleged void irregularities in the senior entry.—*Bram v. Houck*, 101 N. C. 627, 8 S. E. 365.

[o] (N. C. 1891) The claimant of title to several contiguous tracts of land cannot enjoin the Secretary of State from issuing grants thereto upon void entries, on the ground that they will prove a cloud upon his title, because he is not entitled to such relief unless in rightful possession, in which case his remedy at law is adequate, as under Code, § 1277, by recording surveys of their outer lines, so as to exhibit their outer boundaries as if the whole territory were one tract, his possession of one is possession of all, enabling him to redress an invasion of any of them; in addition to which he may under Code, § 2786, bring an action in the superior court of the county in which the land lies, to repeal and vacate grants issued "against law," or obtained "by false suggestion, surprise, or fraud."—*McNamee v. Coke*, 109 N. C. 242, 13 S. E. 777.

(145 N. C. 81)

TURNAGE et ux. v. JOYNER et al.

(Supreme Court of North Carolina. Sept. 17, 1907.)

# 1. JUDGMENT—RES JUDICATA—DEFAULT JUDGMENT.

A judgment is none the less available on the question of res judicata because it is a default judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1164.]

# 2. SAME—JUDGMENT IN EJECTMENT.

A judgment in ejectment for plaintiff, the purchaser at a sale under a power in a mortgage, against the mortgagor, the complaint alleging plaintiff was the owner in fee simple, is res judicata on the question of title, in an action by the mortgagor against such purchaser to have it decreed that the sale was void because the purchaser bought as agent for the mortgagee; equitable defenses being available in ejectment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

Appeal from Superior Court, Pitt County; Neal, Judge.

Action by M. R. Turnage and wife against Jacob Joyner and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

L. I. Moore, for appellants. Jarvis & Blow and Skinner & Whedbee, for appellees.

CLARK, C. J. W. G. Lang, mortgagee, sold the land now in controversy under a power of sale in a mortgage executed to him by M. R. Turnage and wife, plaintiffs herein. It was duly advertised and sold. The regularity of the proceedings is not questioned. J. A. Lang was purchaser of the land at said sale February 8, 1897. Soon thereafter J. A. Lang brought an action against Turnage and wife to recover said land, and in his complaint alleged that he was "the owner in fee simple" of the land

(describing it), and that Turnage and wife held possession, asking judgment to recover it and damages for the detention. The defendants filed no answer, and judgment by default final was entered at March term, 1897, of the superior court for that county, and the writ of possession issued, under which J. A. Lang was put in possession April 19, 1897. J. A. Lang conveyed to W. G. Lang March 23, 1897, and the land has been in his possession, or in the defendant's claiming under him, ever since. This action was begun January 28, 1905; the plaintiff averring that J. A. Lang bought at the mortgage sale as agent for his father, the mortgagee, claiming that hence the sale was void, and asking that the defendants be decreed trustees of the plaintiffs, and for an account of rents and profits. The answer denies that J. A. Lang bought as agent for his father, and sets up as further defense the judgment between J. A. Lang and the defendants at March term, 1897, as an estoppel; that the claim is, furthermore, a stale claim by reason of the delay for nearly eight years to assert it; and also pleaded the seven-year statute of limitations. At the close of the evidence the court intimated an opinion that the plaintiffs were estopped and could not recover, whereupon they took a nonsuit and appealed.

In the former proceeding of ejectment the judgment determined only the possession, and did not prevent another action, if it went against the plaintiff; for it did not pass upon the title. Under the present system a judgment in an action for the recovery of land is conclusive of "all matters presented by the pleadings or which may be properly predicated upon them." *Tyler v. Capehart*, 125 N. C. 64, 34 S. E. 108. The complaint in the former action, between these parties at March term of the superior court, alleged that the plaintiff therein, J. A. Lang, was the "owner, in fee simple" of the premises, that they were withheld by the defendant, and asked to recover possession. This put the title in issue. Certainly J. A. Lang was not seeking to recover possession as mortgagee; for he was not mortgagee, but was asserting his title as purchaser. The judgment by default final was as conclusive of his allegation of ownership in fee as if there had been an issue framed and the fact found by a jury thereon. It was held in *Johnson v. Pate*, 90 N. C. 334, that a "judgment rendered upon demurrer is as conclusive, by way of estoppel, as a verdict finding the facts confessed would have been." That case also holds that in an action to recover realty, if title is averred, the judgment is as conclusive thereof as if it were an action for personal property. To the same purport are many other cases: *Davis v. Higgins*, 87 N. C. 298; *Cowles v. Fer-*

*guson*, 90 N. C. 313; *Bickett v. Nash*, 101 N. C. 583, 8 S. E. 350; *Allen v. Sallinger*, 103 N. C. 14, 8 S. E. 913; *Falls v. Gamble*, 66 N. C. 462. This last case holds that if, under the present system, the plaintiff does not wish the judgment to be conclusive of the title, he must restrict his allegations to a right to the possession. *Falls v. Gamble* is cited with approval. *Isler v. Harrison*, 71 N. C. 64; *Yates v. Yates*, 81 N. C. 401. In *Tuttle v. Harrill*, 85 N. C. 461, *Ruffin, J.*, says, speaking of the estoppel by judgment there pleaded: "That was an action at law, it is true, being for the possession of the land upon the strict legal title of the then plaintiff (now defendant). Still, constituted as our courts now are, it was open to the defendant in the action to set up any equitable defenses he might have, and, if able to show a perfect equitable right in himself (such as he seeks to assert in his present action) to defeat a recovery upon the legal title of the plaintiff, it was his folly not to have asserted this claim, and he must be concluded by the judgment rendered in the cause." That case is exactly "on all fours" with this. It has been cited and approved on this point. *Davis v. Higgins*, 87 N. C. 300; *Anderson v. Rainey*, 100 N. C. 337, 5 S. E. 182; *Case Mfg. Co. v. Moore et al.*, 144 N. C. —, 57 S. E. 213. In effect, it practically overrules what was said by the same learned judge in *Wittkowski v. Watkins*, 84 N. C. 456; but it is in accord, as above shown, with the other rulings of this court, which are reaffirmed by us.

It is not necessary to pass upon the other two defenses set up; but we are inclined to think they are both valid. Even if the purchase had been by J. A. Lang, as agent for the mortgagee in point of fact, though nominally for himself, such purchase was not void, but merely voidable, and the conduct of plaintiffs in leaving the country, asserting no claim or right for eight years, until lands rose in value, would seem an abandonment of claim. There are certainly no surrounding circumstances, such as nonage, intimidation, oppression, and the like, which should induce a court of equity to overlook the lapse of time. Nor are we prepared to say that the lapse of seven years, after the ouster by judgment and an adversary holding thereunder and under the subsequent deed of J. A. Lang to W. G. Lang, is not full protection. The decree and deed are both color of title certainly, and the holding was adverse from the execution of the writ of possession in April, 1897. However, it is not necessary to pass upon either of these points, and we are not to be understood as doing so.

We hold that the judge properly decided that the former judgment between these parties was an estoppel as to the land in controversy in this action.

**Affirmed.**

(145 N. C. 71)

## FISHEL v. BROWNING et al.

(Supreme Court of North Carolina. Sept. 17, 1907.)

## 1. DOWER—RIGHTS OF WIDOW PENDING ASSIGNMENT—POSSESSION OF LANDS.

Until allotment of dower, the widow has no right to retain possession of her deceased husband's lands against the heir or those claiming under him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, § 198.]

## 2. COVENANTS—SEISIN—BREACH.

Where an intestate's land was sold by his administrator to pay debts without any assignment of dower, and the purchaser thereafter conveyed the land to plaintiff, the possession of the widow and heirs of the intestate was not a breach of the purchaser's covenant of seisin which is applicable to title and not to possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 104–109.]

## 3. SAME—COVENANT OF WARRANTY—QUIET ENJOYMENT.

A covenant of warranty in a deed is subject to the same construction as a covenant for quiet enjoyment, and is broken only by an eviction or disturbance of possession by a paramount title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 157–163.]

## 4. SAME—WARRANTY AGAINST ALL CLAIMS AND DEMANDS.

A covenant of warranty of quiet enjoyment in a deed against the claims of any and all persons whatsoever was confined to "all lawful claims and demands," and did not constitute a contract to indemnify plaintiff against claims of trespassers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 132.]

## 5. SAME—INCUMBRANCES.

Where prior to an assignment of dower intestate's land was sold by his administrator to pay debts, the widow's outstanding inchoate dower right constituted a breach of covenant against incumbrances contained in a purchaser's deed of the land so purchased to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 111–129.]

## 6. SAME—MEASURE OF DAMAGES.

In an action for breach of covenant against incumbrances consisting of a widow's unassigned dower right, plaintiff, not having suffered any actual injury nor paid anything to remove incumbrances, could only recover nominal damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 239.]

## 7. SAME.

Certain of intestate's land having been sold by his administrator to pay debts prior to an assignment of dower to intestate's widow, the purchaser conveyed the land to plaintiff with a covenant against incumbrances. Plaintiff was denied possession by intestate's widow and heirs, but recovered possession against them in an action in which it was held that they were trespassers. *Held*, that plaintiff could not recover on his covenant against incumbrances the amount paid for counsel fees in his suit to recover possession and interest on the purchase money during the time he was out of possession.

Appeal from Superior Court, Warren County; Lyon, Judge.

Action by D. A. Fishel against E. B. Browning and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

The plaintiff alleges: That the feme defendant, being the owner of the land described in the complaint, with the written assent of her husband, the male defendant, for a full and valuable consideration, conveyed said land to him by deed bearing date July 6, 1904. The said deed contains the following covenants: "And the said Howard Browning and wife covenant to and with the said D. A. Fishel, his heirs and assigns, that they are seized of said premises in fee, and have right to convey the same in fee simple, as it was conveyed to them; that the same are free from all incumbrances and that they will warrant and defend the said title to the same against the claims of all persons whatsoever." That upon the delivery of said deed to them, and in accordance with their contract with defendants, plaintiff undertook to enter upon the said land, when he was "met by the widow and heirs of one Louis Baker, who were in possession and who forbade his entrance and disputed his right and title to the same, which fact was at once reported to defendants." The feme defendant acquired title to said land by virtue of a sale, and deed pursuant thereto made by the administrator of Louis Baker, deceased, for the purpose of making assets to pay debts. The heirs of said Baker resisted the recovery by plaintiff of said land in an action brought by him, and by independent proceeding, as well as by motion in the original cause, alleging that no process was served upon them. The widow resisted recovery, alleging that she was entitled to have dower allotted in said land. That the litigation for the recovery of the land continued two years, plaintiff being finally successful. That plaintiff expended on account of said litigation \$287 in cost and counsel fees. That the interest on the purchase money during the said litigation was \$102, no part of which defendants have paid, although requested to do so. Plaintiff further alleges that the bargain, contract, and covenant of the defendant E. P. Browning set forth in said deed, to sell and deliver said lands to him and to warrant and defend the title thereto, was broken by her failure to deliver possession thereof to plaintiff; that thereby plaintiff suffered loss, and was endangered and forced and compelled to incur the expense and outlay above set out; and that the defendant E. P. Browning is liable to him therefore as the measure of his damages by reason of the breach of the said contract and covenant in failing to deliver said lands to plaintiff and in failing to defend the title. He demands judgment for the sum of \$389 and interest. Defendants demurred to the complaint, and assigned as grounds therefor, first, that said action is for alleged damages due by reason of a false covenant of warranty of title, and the plaintiff does not allege in said complaint, as a breach of contract, an ouster or eviction by paramount legal title; second, that the complaint, upon its face, discloses that the defendant's wife,

E. P. Browning, had a good and sufficient title to the property, and that the plaintiff got such title in fee by the deed of the defendant, and that the plaintiff recovered possession of the property under their said deed; third, that the complaint shows that the plaintiff was entitled under his deed from the defendant to the possession of the property, the interest of the tenant in dower (the dower not having been allotted) being subordinate to that of the heirs; fourth, that the complaint shows that the dower had not been allotted, and the tenant in dower therefore had no right to hold possession against the title of the purchaser, the plaintiff. From a judgment sustaining the demurrer plaintiff appealed.

T. T. Hicks and Tasker Polk, for appellant. Walter A. Montgomery and John H. Kerr, for appellees.

CONNOR, J. (after stating the case as above). The deed set forth in the complaint contains several covenants: (1) The covenant of seisin and right to convey. (2) Covenant against incumbrances. (3) General warranty, which is, under our decisions, a covenant for quiet enjoyment. It is not clear that the plaintiff intends to allege a breach of the covenant of seisin. Giving, however, the language of the complaint a liberal construction, for the purpose of discovering such allegation, we are of the opinion that, for the purposes of this appeal, the feme defendant was seised of the land, that she had title thereto with right of entry subject to the incumbrance of the right of dower in the widow of Louis Baker. It is conceded that, with this exception, she had the title of Baker. Whatever controversy the heirs made in regard to the validity of the proceeding by the administrator and the sale made thereunder is conceded to have been without foundation. It is further conceded that the widow was entitled to have her dower allotted in the land, and that no allotment was made. It has always been held by this court that until allotment the widow has no right to retain possession of her deceased husband's lands against the heir or those claiming under him. In *Spencer v. Weston's Heirs*, 18 N. C. 213, Daniel, J., said: "The widow has no right of dower until it has been assigned to her. \* \* \* It is not until her dower has been duly assigned that a widow acquires a vested estate for life, which will entitle her to maintain ejectment. On recovering at law, the sheriff delivers the demandant possession of her dower by metes and bounds." *Webb v. Boyle*, 63 N. C. 271. In *State v. Thompson*, 130 N. C. 680, 41 S. E. 486, defendant was indicted for forcible entry and detainer. It appearing that the prosecutrix was in possession, after the death of her husband, no dower having been assigned, Furches, C. J., said: "She was not the owner of the land from her own evidence, which tends to show, and we will

assume did show, that the land she lived on belonged to her husband before his death and descended to his heirs, as no will is alleged or shown. She was entitled to dower, but this land had not been assigned or allotted to her. And the fact that she was his widow and entitled to dower gave her no right to any part of the land." Whether in this state, in the absence of any statute, she is entitled, under chapter 7, Magna Charta, to her quarantine, is not presented on this record, for the same reason assigned in *Spencer v. Weston's Heirs*, supra, that it does not appear that the mansion house was situate on the land in controversy. 10 Am. & Eng. Enc. 148. We are of the opinion, therefore, that the possession of the heirs and widow of Baker was not a breach of the covenant of seisin, or "the right to convey in fee simple as the same was conveyed to them." The covenant of seisin refers to the title, and not the possession. Rawle on Cov. 60, 61.

Passing, for the present, the next covenant, we find in the deed the usual covenant of warranty, which, as said by Taylor, C. J., in *Herrin v. McEntyre*, 8 N. C. 410, is subject to the same construction as a covenant for quiet enjoyment. This is common learning with us. What, then, are the plaintiff's rights, treating the covenant as one for quiet enjoyment, sometimes called "the sweeping covenant"? *Howell v. Richards*, 11 East 833. A breach of this covenant occurs when there is an eviction or disturbance of the possession by title paramount. Usually the action is based upon an eviction, either actual or constructive, of the covenantee after he has entered upon or been put into possession by his covenantor. Where title passed by deeds, operating by livery of seisin, the breach could not otherwise occur because the transfer of actual possession was essential to perfecting the conveyance. After the enactment of the statute of uses, when title passed by virtue of the declaration of the use and the transfer of the possession by operation of the statute, it frequently happened that transfers of title occurred when some person other than the bargainor was in the actual occupation of the land. We are not concerned, in this discussion, with the effect of the statutes against champerty passed to prevent speculation in disputed titles. In such cases where the bargainee, whose entry was barred by an adverse occupant, called upon his bargainor, who had given him a covenant of quiet enjoyment, to make good his covenant or pay damages for its breach, he was met with the answer that he had suffered no eviction, and therefore had no right of action. The law was so held by a number of courts. Parker, C. J., said: "No entry having been made by the grantee, under his deed, an eviction could not have taken place." *Chappell v. Bull*, 17 Mass. 220. Several other courts adopted this view. In *Grist v. Hodges*, 14 N. C. 198, the question, for the first time, came before this court. Ruffin, J., said:

"The existence of an incumbrance, or the mere recovery in a possessory action, under which the bargainee has not actually been disturbed, are held for technical reasons not to be breaches of a covenant for quiet possession, or, in other words, of our warranties. But that is a very different case from this, in which the bargainee never, in fact, was in possession, but was kept out by the possession of another, under better title existing at the time of the sale and deed and ever since. \* \* \* The existence of a better title, with an actual possession, is of itself a breach of the covenant. It is manifestly just that it should be so considered, for otherwise the covenantee would have no redress, but by making himself a trespasser by an actual entry, which the law requires of nobody." The learned justice places his conclusion upon the ground that, as between the bargainor and bargainee, the statute of uses immediately, upon the execution of the deed, carries the possession to the bargainee." As between the parties, the bargainee is, on strict legal principles, in. If however, there be in reality an adverse possession, he can be so only for an instant, because "the implication against the truth will be no further than is necessary to make the title effectual for its purposes." The bargainee will be taken to have been evicted eo instanti the possession by operation of the statute takes place. Thus, by a refinement, substantial justice is done. In *Shattuck v. Lamb*, 85 N. Y. 499, 22 Am. Rep. 656, the question is ably discussed, and the same conclusion reached by Earl, C. He reviews all of the cases. Dwight, C., dissented, saying that many cases in the various states follow. *Grist v. Hodges* "in which the theory is stated with admirable force," quoting the language of Mr. Rawle. *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91.

The defendants insist that, conceding the eviction upon the authority of *Grist v. Hodges*, supra, there was no superior or paramount title in the evictors, that the right to sue arises only upon an eviction under paramount title. The plaintiff says that, conceding the general rule, his covenant is not confined to an eviction under paramount title, but extends to "the claims of all persons whatsoever," thus protecting him against damage by reason of an eviction by trespassers. This question appears to have been much mooted, and the early English authorities contradictory. The learned counsel for the plaintiff calls to our attention the form of the covenant of general warranty given by Mr. Washburn, which is confined to "all lawful claims and demands," etc., whereas, he says the covenant for quiet enjoyment includes indemnity against "the claims of any and all persons whatsoever." Mr. Rawle says: "There were several old authorities which held that a covenant thus absolutely expressed extended to all interruptions and disturbances whatsoever, whether lawful or tortious; and, although authority was not

wanting in opposition to this doctrine, the law seems not to have been settled until the case of *Hayes v. Bickerstaff*, 4 Vaughan, 118. That case decided that the covenant, however generally expressed, must be understood as applying merely to the acts of those claiming by title. In the first place, it would be unreasonable that a man should covenant against tortious acts of strangers which he could not see or prevent; secondly, the law gives a remedy against the wrongdoer; thirdly, the covenantee might thus have a double remedy, and receive a double compensation; and, fourthly, it would enable him to injure the covenantor by colluding with a stranger to make a tortious entry." *Rawle on Covenants*, 147. Certain exceptions to the rule are stated; but, as none of them apply to this appeal, it is not necessary to discuss them. In *Platt on Covenants*, 3 Law Lib. 312, a form is given, said to be in general use, concluding, as in this record: "Or any other person or persons whomsoever." The author says: "A general covenant for quiet enjoyment was, in earlier times, holden to extend to tortious evictions or interruptions, but this doctrine was never fully acquiesced in; and a different rule is now established, so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood of all men claiming by title, for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseises a purchaser, he shall not have an action against the vendor; the reason being that the law has already furnished the means of redress by giving the injured party an action of trespass against the wrongdoer." So Lord Ellenborough, C. J., in *Nash v. Palmer*, 1 Barn. & Cress. 29, says: "The rule has been correctly stated that, where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title." *Wotton v. Hele*, 2 Saund. pt. 2, 177. "The covenant for quiet enjoyment is the same as the covenant of warranty in all its practical effects. It is an assurance to the grantee that his enjoyment of the land conveyed shall not be disturbed by lawful means, but does not attempt to protect him against mere disturbances by trespassers." *Hopkins*, Real Prop. 448; *Underwood v. Birchard*, 47 Vt. 305. While the precise question has not, so far as our investigations go, been before this court, we find the general principle recognized as in *Midgett v. Brooks*, 34 N. C. 145, 55 Am. Dec. 405. *Nash, J.*, says: "The words in the deed we are considering, upon their face, import a promise or agreement on the part of the vendor that Midgett shall enjoy the premises free from disturbance from any one claiming by title paramount; and that is a covenant for quiet enjoyment." We therefore conclude that, while there was an eviction within the terms of the covenant, the plaintiff's action, upon their covenant, fails because it appears,

from the facts set forth in the complaint, that the evictors had no title. They were mere trespassers. This is shown by the result of plaintiff's action brought to eject them.

There is, however, in the deed a covenant against incumbrances. The learned counsel for defendants concede that the dower right of the widow, independent of her wrongful possession, was an incumbrance upon the title which constituted a breach of the covenant. It is well settled that the right of dower is such an incumbrance upon the land as works a breach of the covenant. *Gore v Townsend*, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443; 1 *Jones on Conveyances*, § 867. The difficulty with which plaintiff is confronted in this action is that he does not claim, or show, any damage sustained by reason of such incumbrance, but expressly excludes any such claim by alleging that his measure of damage is the amount paid by way of counsel fees and cost and the interest on the entire purchase money. This certainly cannot be correct. As said by Mr. Rawle, the rule which has been adopted as to the measure of damages for breach of this covenant is very simple. If the incumbrance is contingent in its character, and if nothing has been paid by the plaintiff towards removing or extinguishing it, and if it has inflicted no actual injury upon him, he can obtain but nominal damages, as he is not allowed to recover a certain compensation for running the risk of an uncertain injury. *Rawle on Cov.* 129; *Hale on Dam.* 369. Until dower was allotted, the widow has no right to interfere with plaintiff's possession. As she never had dower allotted he sustained no damage by reason of the existence of her right to do so. It may be that for the purpose of relieving his estate from the uncertain extent of the incumbrance the plaintiff may have filed a petition against the widow for the allotment of her dower. The heir could do so after the expiration of three months from the death of her husband. *Revisal 1905*, § 3088. Whether, without doing so, the plaintiff could sue upon the covenant, alleging that, by reason of the incumbrance, the market value of his title was depreciated in a sum either certain or capable of being made so, is not presented upon this appeal, because there is no such allegation. The complaint is drawn upon the theory that counsel fees actually paid and interest on the entire purchase money constitute the measure of damages for the breach of covenant against an incumbrance which could, in no possible event, have affected more than one-third in value of the land during the life of the widow. Issue was joined upon the demurrer. His honor was clearly correct in holding that plaintiff was not entitled to recover upon the complaint. It may be that, by an amendment of the complaint, he would have been entitled to at least nominal damages. His honor

would have permitted such amendment if so requested, but, as plaintiff elected to stand by his complaint as drawn, and as, for the reasons we have pointed out, he is not entitled to maintain his action, we can only affirm the judgment. It is well understood that, if the facts set forth in the complaint show a remediable legal wrong the action shall not be dismissed because of the relief demanded. Here, however, while the plaintiff shows that he held defendants' deed containing a covenant against incumbrances, and that a contingent incumbrance was in existence, he further shows that prior to the bringing of his action the possibility of damage by reason of such incumbrance came to an end by the death of the widow. - He says: "Plaintiff avers that the bargain, contract, and covenant \* \* \* was broken by her failure to deliver possession thereof to plaintiff," and that "thereby plaintiff suffered loss, and was endamaged and forced and compelled to incur the expense and outlay above set out, and that the defendant E. P. Browning is liable to him therefor as the measure of his damages by reason of the breach of the said contract and covenant in failing to deliver said lands to plaintiff and in failing to defend the title." This language, under the most liberal construction does not aver any damage by reason of the breach of the covenant against incumbrance.

Upon a careful consideration of the complaint, we concur with his honor in sustaining the demurrer.

**Affirmed.**

(78 S. C. 171)

**SANDERS et al. v. BELUE et al.**

(Supreme Court of South Carolina. Sept. 16, 1907.)

#### 1. OFFICERS—PUBLIC OFFICERS—DEFINITION.

Apart from the statute, the distinction between a public officer and an employé is that the former is charged with duties involving an exercise of some part of the sovereign power in the performance of which the public is concerned, and which are continuing and not occasional, while one merely performing duties required of him by persons employing him under an express contract or otherwise, though the employer is a public officer and the employment be a public work or business, is a mere employé.

[Ed. Note.—For cases in point, see *Cent Dig.* vol. 37, *Officers*, § 1.]

#### 2. PAUPERS—POOR LAW OFFICERS—POORHOUSE SUPERINTENDENT.

*Civ. Code 1902*, § 785, provides that the county board of commissioners shall have general supervision of the county poorhouse; and section 786 declares that the board shall be empowered to appoint a superintendent, with such assistance as may be needed to provide means for the employment of the inmates. *Act 1901* (23 St. at Large, p. 754) declares that the term "public officer" shall include all officers of the state previously commissioned, the trustees of the various colleges of the state, members of the various state boards, dispensary constables, and other persons whose duties are defined by law. *Held*, that a poorhouse superintendent appointed by a county board of commissioners was a public officer.

### 3. INJUNCTION—INTERFERENCE WITH OFFICER—ADEQUATE REMEDY AT LAW.

Injunction will not lie to restrain an incumbent of the office of poorhouse superintendent from interfering with any successor duly appointed by a county board of commissioners; the appointee having an adequate remedy by quo warranto.

### 4. PAUPERS—POORHOUSE SUPERINTENDENT—TERM OF OFFICE.

Under Civ Code 1902, § 786, empowering the county board of commissioners to appoint a poorhouse superintendent, but failing to fix the term of such superintendent's office, such term is coextensive with the term of the board.

### 5. OFFICERS—REMOVAL.

Const. art. 3, § 27, providing that officers shall be removed from office for incapacity, misconduct, or neglect of duties in such manner as may be provided by law, with no mode of trial or removal as provided in Constitution, does not abrogate the general rule that an appointive officer may be removed at the pleasure of the appointing power; his term of office not having been fixed by law.

### 6. SAME—IMPLIED REMOVAL.

Where the power to remove an appointive officer at the pleasure of the appointing power exists, the appointment of another person to hold the office operates as a removal of the incumbent from the time he receives notice of the new appointment.

### 7. PAUPERS—POORHOUSE SUPERINTENDENT—REMOVAL.

The custom of a retiring county board of commissioners to elect a superintendent of a poorhouse and farm for a period extending beyond their own term could not prevent the new board of commissioners from appointing a new superintendent to displace the appointee of the old board for a term coextensive with the term of office of the new board.

Appeal from Common Pleas Circuit Court of Union County; D. E. Hydrick, Judge.

Suit by Joseph Sanders and others against J. F. Belue and others. From an order refusing a temporary injunction, plaintiffs appeal. Affirmed.

J. A. Sawyer, for appellants. Townsend & Townsend, for respondents.

WOODS, J. The county board of commissioners of Union county on January 7, 1907, appointed the plaintiff S. G. Howell superintendent of the poorhouse and farm. The preceding county board of commissioners on October 15, 1906, had undertaken to appoint the defendant J. Fincher Belue superintendent for the term of one year from that date. Claiming the right to hold the position under this appointment until October 15, 1907, the defendant Belue refused to surrender to Howell the property in his charge as superintendent. Thereupon Howell and two of the county board of commissioners, Joseph Sanders and W. Fowler Bobo, brought this action to restrain the defendant Belue from interfering with Howell in taking possession of the property of the poorhouse and farm and discharging his duties as superintendent. Judge Aldrich refused the application for temporary injunction, and plaintiffs appeal.

If the superintendent of the county poorhouse and farm is an officer, then it is conceded the plaintiff Fowler has an adequate

remedy at law by quo warranto, and there would be no ground to ask for equitable relief by injunction. The only statutory provisions bearing on the question, except the statutory definition of a public officer, are these sections of the Civil Code of 1902:

"Sec. 785. The county board of commissioners shall have general supervision over the paupers and the poorhouse and farm of the county, and the said board shall provide all necessary buildings for the accommodation of the poor of the county, with sufficient tillable land to give employment to all paupers able to work, and said buildings and lands shall be designated as the poorhouse and farm of the county.

"Sec. 786. Said board shall be empowered to make all necessary rules and regulations for the government of the county poorhouse and farm, to appoint a superintendent, with such assistants as may be needed, to provide means for the employment as may be best suited to the inmates of the poorhouse, to see that every pauper able to work is employed, and to appoint one or more physicians to the poorhouse, who shall furnish medical aid to the indigent sick."

Accepting any or all of the many definitions of public office which have been laid down by jurists, it is still often difficult to say whether a particular position is an office or a mere employment. United States v. Hartwell, 73 U. S. 385, 18 L. Ed. 830; United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482; Ellason v. Coleman, 86 N. C. 235; State v. Hocker (Fla.) 63 Am. St. Rep. 181, note; Opinion of Justices, 3 Me. 481; 23 Am. & Eng. Enc. 322; McCornick v. Thatcher, 8 Utah, 294, 30 Pac. 1091, 17 L. R. A. 243, note. Laying aside for the moment the statutory definition of a public officer, we venture to think an examination of these and other authorities will lead to the approval of the following definitions as sufficiently expressing the generally accepted distinction between a public officer and an employé: One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employé. The position of superintendent of the poorhouse and farm is created by statute law, and not by the county board of commissioners. The person to be appointed to the position is designated by statute a "superintendent," and that term itself connotes the assumption of responsibility and the exercise of discretion in the details of the management of the poorhouse and farm, though sub-

ject to the general supervision of the county board of commissioners. The care for the indigent is universally recognized as falling within the sovereign power of the state, and hence the superintendent, in managing the details of the institution provided by the state for the indigent and helpless, exercises a part of the sovereign power. The public is evidently concerned in the performance of these duties; and it is equally evident the duties are not intermittent or occasional, but continuing throughout every moment from appointment to removal or resignation. The position, therefore, comes within all the terms of the generally accepted definitions of a public officer, as distinguished from an employé.

Act 1901 (23 St. at Large, p. 754) contains this definition of a public officer: "The term 'public officers' shall be construed to mean all officers of the state that have heretofore been commissioned, and trustees of the various colleges of the state, members of the various state boards, dispensary constables, and other persons whose duties are defined by law." The literal meaning of the words "other persons whose duties are defined by law" could hardly have been intended; for the duties of guardians, administrators, and other trustees are defined by law, and yet it could scarcely have been the intention to include such persons in the definition of public officers. The intention probably was to include in the definition all persons whose public duties are defined by law. But, taking the definition either in this sense or according to its literal meaning, it includes the superintendent of the poorhouse and farm. The thought will hardly be entertained for a moment that the defining of the duties necessary to make one a public officer necessarily means setting them out with such precision as to leave no room for the exercise of discretion in details of management. If this were so, very few county officers would fall within the definition. The Century Dictionary gives this meaning to the word "define," when used in connection with the duties of a public officer: "To fix, establish, or prescribe authoritatively." When the statute empowers the county board of commissioners to appoint a superintendent of the county poorhouse and farm, it is only a change of language and not of meaning to say it empowers them to appoint a person whose duties shall be to superintend the poorhouse and farm. This is defining the public duties of a person so appointed; for to superintend means to have charge and direction of. The statute, in placing upon the person appointed the duties of superintending a public institution subject to the supervision of the county board of commissioners, defines his duties with about as much accuracy as the nature of the office will admit. The statutory definition of a public officer, as well as that which was generally accepted before the

statute was passed, takes in the superintendent of the poorhouse and farm.

While it follows from this conclusion the judgment must be affirmed, the remedy of the plaintiff being by quo warranto, and not by injunction, yet the substantive question of the right of the two claimants to the office is of public interest, and should be settled without putting the parties to the delay and expense of protracted litigation. Const. art. 1, § 11, provides: "No person shall be elected or appointed to office in this state for life or during good behavior, but the terms of all officers shall be for some specified period except notaries public and officers in the militia." It will be observed this section does not require that the term of every officer shall be fixed by direct legislative enactment. The specified period may be inferred from the nature of the office and the duties of the officer. For example, when an inferior office is created, the tenure may be implied to be the same as that of the superior office to which the inferior is an adjunct. Such an implication is especially strong when the inferior officer is charged with minor matters; the general supervision and responsibility devolving on the superior officer. The statute does not in terms fix any specified period during which an appointment to the office of superintendent of the poorhouse and farm continues. But the same is also true of the offices of deputy clerk and deputy sheriff, the appointments to which continue during the pleasure of the clerk or of the sheriff making the appointment. Yet it has never been doubted, so far as we are aware, that the term of a deputy sheriff or deputy clerk ends by operation of law with the term of the sheriff or clerk by whom he was appointed. The clerk and sheriff being charged with general responsibility for the conduct of their respective offices, it is so plain that a deputy appointed by a predecessor should not hold over it was deemed unnecessary to say that the term of the deputy should end with the term of the clerk or sheriff who appointed him. So it is with the office of superintendent of the poorhouse and farm. The county board of commissioners are by law made responsible for the general supervision of the poorhouse and farm of the county, and it was never intended that the subordinate officer appointed by them for the superintendence of the institution should have a longer term than those by whom he was appointed. The statutory scheme of general supervision by the board and subordinate supervision by the superintendent repels the idea of one board having the power to impose a superintendent on a succeeding board. To sustain the power which the retiring board attempted to exercise in this case would lead to practical absurdity. If they could fix the term of the office by appointment for one year beyond their own term, they could fix it for ten years.



But it would not help the defendant Belue for the court to hold the tenure of his office not limited by legislative intendment to the term of the board making the appointment; for the absolute power of removal at pleasure is incident to the power of appointment, unless the law provides duration of the official term or mode of removal. *Ex parte Hennen*, 13 Pet. (U. S.) 259, 10 L. Ed. 138; 3 Rose's Notes, 824; 1 Supp. Rose's Notes, 811; *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574, 44 L. Ed. 774; 23 Am. & Eng. Enc. 410. It is also well settled that, where the power to remove at pleasure exists, the appointment of another person operates as a removal of the incumbent from the time he receives notice of the appointment. *Ex parte Hennen*, supra; *Blake v. United States*, 108 U. S. 227, 26 L. Ed. 466; *Commonwealth v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680. Section 27, art. 3, of the Constitution, does not make any different rule of law. It provides: "Officers shall be removed for incapacity, misconduct or neglect of duty, in such manner as may be provided by law, when no mode of trial or removal is provided in this Constitution." The requirement that officers shall be removed for incapacity, official misconduct, or neglect of duty in such manner as may be provided by law by no means implies abrogation of the general rule of law above stated that an appointed officer may be removed at the pleasure of the officer who appointed him. The affidavits tending to show that for some years the retiring county board of commissioners have been accustomed to elect a superintendent of the poorhouse and farm for a period extending beyond their own term cannot have the effect of changing the law. Nor can the court take account of the charge that Belue, though recognized as an excellent officer, was turned out of office in fulfillment of campaign promises. However unworthy and unjust such action may be, the account for it must be rendered, not to the court, but to the people at the ballot box. While the defendant Belue has no right whatever to the office of superintendent of the poorhouse and farm of Union county, the remedy of the plaintiff Howell is by quo warranto, and not injunction.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 169)

GREENWOOD GRANITE & CONST. CO. v.  
WARE SHOALS MFG. CO.

(Supreme Court of South Carolina. Sept. 16,  
1907.)

#### 1. REFERENCE—COMPULSORY REFERENCE—NATURE OF ACTION.

Where the statement of a cause of action involved allegations of a partnership relation, a complication of parties, and necessitated an examination of a long account, and the statement of another cause of action raised issues with reference to an agency, trust, and accounting, and the answer tendered issues as to a partnership and equitable issues concerning the fore-

closure of a chattel mortgage, it was a proper case for a compulsory reference as authorized by Code Civ. Proc. 1902, § 293.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 6.]

Appeal from Common Pleas Circuit Court of Greenwood County; James Aldrich, Judge.

Action by the Greenwood Granite & Construction Company against the Ware Shoals Manufacturing Company. From an order transferring the cause to the equity calendar, and referring it to a master to take and report testimony, plaintiff appeals. Affirmed.

Sheppards, Grier & Park, for appellant.  
Dial & Todd, for respondent.

WOODS, J. This is an appeal from the order of Hon. James Aldrich, holding the cause should be tried on the equity side of the court, and accordingly transferring it from calendar 1 to calendar 2, and referring it to the master to take and report testimony.

Section 274, Code Civ. Proc. 1902, provides: "An issue of fact in an action for the recovery of money only, or of specific, real or personal property, must be tried by a jury, unless a jury trial be waived, as provided in section 238, or a reference be ordered." By section 293, the court is authorized to order a reference without consent "(1) where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or (2) where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect." The circuit decree thus states the nature of the issues: "In the issues of the first cause of action there are allegations of a partnership relation and a complication of parties. In the issues of several other causes of action there is shown to be the necessity of examining a long account of the cost of certain work and for estimating a certain percentage thereon, as well as the examining of long complicated accounts in reference to payments. In one of the causes of action the issues involve the relation between the parties of agency, trust, and accounting. In the issues made by the counterclaims set up in the answer and the reply of the plaintiff thereto are involved the partnership relation and the equitable issues of the foreclosure of a chattel mortgage, and it also seems necessary to examine long and complicated accounts on both sides. A careful examination of this case convinces me that the issues are peculiarly involved, and the necessity exists for the taking and examining long and complicated accounts. I am satisfied that a trial of the issues by jury would be almost impracticable, and, in addition to the equitable issues presented, and by rea-

son of the necessity of the examination of long and complicated accounts, the remedy at law is greatly embarrassed and inadequate, and therefore, in order to properly ascertain the truth and do exact and substantial justice between the parties, the trial should be had on the equity side of this court." Inspection of the pleadings shows beyond all doubt the correctness of the conclusion of the circuit court. The power of the circuit court to transfer such a cause to calendar 2 and make an order of reference is fully sustained by authority. *Devereux v. McCrady*, 46 S. C. 143, 24 S. E. 77; *Green v. McCarter*, 64 S. C. 290, 42 S. E. 157; *Price v. Middleton*, 75 S. C. 105, 55 S. E. 156.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 249)

#### ROCHESTER et al. v. BULL.

(Supreme Court of South Carolina. Sept. 24, 1907.)

#### 1. HIGHWAYS—AUTOMOBILE ACCIDENT—NEGLIGENCE OF DRIVER—QUESTION FOR JURY.

In an action for injuries to plaintiff's wife resulting from plaintiff's mule becoming frightened at defendant's automobile, which was stopped, with the engine running, near a bridge to permit plaintiff to pass, evidence held to require submission of the question of the negligence of defendant's chauffeur to the jury.

#### 2. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where the court had previously charged that a person would not be liable unless his negligence was the proximate cause of the injury, an instruction that, if negligence of defendant's agent caused the injury, the principal would be liable, was not erroneous for failure to charge that such liability would occur only for injuries which were proximately caused by the agent's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

#### 3. MASTER AND SERVANT—ACTS OF SERVANT—LIABILITY OF MASTER.

Acts of a servant within the scope of his duties are those of the master, and the master's liability for his servant's acts is the same as if he had been acting himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1217.]

#### 4. TRIAL—SPECIFIC INSTRUCTIONS—REQUESTS.

Defendant cannot object that the instructions given were general principles of law where no specific instructions were requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge.

Action by Thomas M. Rochester and another against J. A. Bull. From a judgment for plaintiffs, defendant appeals. Affirmed.

Haynesworth & Patterson, for appellants. Blythe & Blythe, for respondent.

POPE, C. J. This action was brought by the plaintiffs, Thomas M. Rochester and his wife, Caroline Rochester, to recover damages of the defendant, J. A. Bull, for injuries alleged to have been caused by his negligence. The facts are as follows: On Au-

gust 30, 1904, the plaintiffs were going along the road leading from the city of Greenville, in the direction of Chick Springs, in a wagon drawn by a mule. As they drew near to the bridge leading across Richland creek, on coming around a sharp curve about 75 yards from the foot of the bridge, the automobile of the defendant was seen approaching, it being then just about to run off of the bridge. The plaintiff Thomas Rochester at once signaled the driver of the machine to stop. The road at this point is down a comparatively steep grade, and is narrow. On the left-hand side approaching the bridge is a high bank, while on the other side is a steep bluff leading down to the creek. The automobile, in compliance with the signal of the plaintiff, was run into a cut-out in the bank on the left-hand side, and the forward motion of the machine stopped. The motor, however, was permitted to continue running, and, according to the testimony of the plaintiffs, gave forth much noise and caused the whole machine to vibrate. The plaintiffs continued their approach; the mule becoming more or less frightened as he neared the machine. When he was almost opposite it, he became uncontrollable, and ran over to the extreme right of the road, where he struck a telephone pole, throwing the plaintiffs from the wagon, and, according to the allegations of the complaint, injuring Mrs. Rochester. At the conclusion of plaintiffs' testimony, defendant made a motion for a nonsuit, on the ground that there was absolutely no evidence showing negligence on his part. Judge Ernest Gary refused the motion, and, the case being submitted to the jury, a verdict of \$475 was returned for the plaintiffs. The defendant now comes to this court for relief.

The exceptions first raise the point as to whether or not it was error to deny the nonsuit. It is too well settled to require the citation of authority that, where there is a scintilla of evidence going to sustain a cause, a nonsuit cannot be granted. The question, therefore, resolves itself into whether or not there was any evidence in the case now before us. We think it is a fact of which courts will take judicial notice that automobiles on highways, especially where they are infrequent, have a tendency to frighten animals. The duty, therefore, devolves upon the drivers of such machines to exercise due care to prevent accidents. The amount of care necessary varies with the various circumstances. Acts which in a given case might be negligence in another might be due care. Therefore it is almost absolutely necessary that what action amounts to due care must be a question of fact. From the evidence, it would seem that the present case is one in which much care was required. The character of the ground, the exposed situation of the plaintiffs, and their little children, the fright of the mule on the present and prior occasions, the noise of the machine, were all circumstances going to call for the

exercise of much care, such care as a prudent person would exercise. Whether the defendant in the present case exercised such care is not so absolutely evident that it may be decided as a matter of law. It is a question peculiarly within the province of the jury, and the nonsuit was therefore properly refused.

The circuit judge at the close of his charge told the jury that, if negligence of the agent in charge of the automobile caused the injury, the principal would be liable. The defendant alleges error in his failing to qualify this language so as to make the principal liable only for such injuries as were caused proximately by the agent's negligence. This exception cannot be sustained. The court had previously charged that a person would not be liable, unless his negligence was the proximate cause of the injury. Now, if a person would only be liable for the proximate results of his acts when he acted himself, it would seem a queer conclusion, one which a person of ordinary reason would not draw, that, when he acted through an agent, he would be held liable for all injuries, whether proximate or not. The proposition is familiar to the ordinary mind that the acts of an agent within the scope of his duties are those of the master and the master's liability for his agent's acts are the same as if he had been acting himself. The court certainly stated correct propositions of law. True they were general principles, but, if the defendant wished anything more specific, he should have requested it.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 222)

#### MONTAGUE et al. v. HOOD.

(Supreme Court of South Carolina. Sept. 24, 1907.)

#### LANDLORD AND TENANT—RECOVERY OF POSSESSION BY LANDLORD.

Defendant having entered lands under a lease from plaintiff's vendor, and not having surrendered, but remained in possession, after termination of the lease, plaintiff's remedy is not by injunction to prevent alleged repeated trespasses but the statutory remedy against a tenant at will or holding over.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1180.]

Appeal from Common Pleas Circuit Court of Berkeley County; R. O. Purdy, Judge.

Action by R. L. Montague and another against James R. Hood. Judgment for defendant. Plaintiff appeals. Affirmed.

The decree of the trial court is as follows:

"This suit was instituted for the purpose of obtaining a permanent injunction against the defendant to prevent alleged repeated trespasses by him upon the premises referred to in the complaint. The defendant lived about three miles from the premises, but had been renting the places for several years, subletting portions of the premises to par-

ties in actual occupancy. While this state of things existed, the premises were optioned to the plaintiffs, and the options were closed by a deed of conveyance on the 29th day of March, 1905, but as a matter of fact the transaction had been finally closed prior to that date. On January 30, 1905, Mr. W. H. Warley, who had charge of the property for himself and the other owners of it, addressed a letter to the defendant as follows: 'I beg to notify you that Mt. Hope and Oakland plantations have been sold to Mr. R. L. Montague. You will please turn the property over to Mr. Montague upon presentation of this letter and will appreciate your facilitating him in any way that you can. From my conversation with Mr. Montague I think you can arrange to rent the property from him.' Mr. Tucker took this letter and presented it to Mr. Hood at his residence about the 1st or 2d of February. What took place at that time is conflicting; Mr. Tucker giving one version, and Mr. Hood and others giving a different version. Mr. Tucker contends that the result of the interview with Mr. Hood was the recognition of the right of Mr. Warley to sell the property, and also a recognition of the right of the purchasers to the possession, and says that he was authorized by Mr. Hood to submit an offer of \$400 as a rent for the property for the year 1905. Mr. Tucker wrote Mr. Hood saying that they had decided to rent it to Mr. Rogers. Mr. Hood consulted Messrs. Dennis & Mann, his attorneys, and they wrote to know if they could not arrange for Mr. Hood to plant the places for the year 1905, and concluded by expressing the hope that some arrangements could be made without being forced into the courts. This was on the 20th of February. Upon receiving a negative answer, containing also a recital of the position taken by the plaintiffs, Messrs. Dennis & Mann notified the plaintiffs on March 8th that they had advised Mr. Hood not to surrender the premises. On April 6th this action was commenced and a temporary injunction was obtained. A motion was made to set aside this injunction, but Judge Memminger, after carefully going over the situation as presented to him, declined to grant the order. The testimony having been taken before a referee, the case is submitted to me for adjudication.

"An injunction cannot be used as a means to obtain possession of property. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781. But it is now settled that, in order to prevent a multiplicity of suits and the annoyance consequent upon repeated trespasses, this means may be resorted to. *McClellan v. Taylor*, 54 S. C. 438, 32 S. E. 527; *Alderman v. Wilson*, 69 S. C. 156, 48 S. E. 85. The question naturally arises in this case as to what was the true status of the parties at the time of the sale made by Mr. Warley to the plaintiffs, and naturally, in connection therewith, whether the defendant was a trespasser. If

the defendant was a trespasser annoying the plaintiffs in the possession of the premises, then the plaintiffs would have a right to enjoin him from the repetition of such acts, but if he was in possession of the premises as a tenant, either at will, or holding over, or as rightfully a tenant under a contract, then this remedy cannot be applied for in the first two cases, there would be a statutory remedy, and in the latter case the defendant would be entitled to the premises. Mr. Warley notified the defendant, in writing, in November, 1904, that the verbal contract of lease for five years had expired, and that he could not rent to him for the year 1905 on the same terms, but that he would do nothing until the defendant could see him, and Mr. Warley says that the defendant did see him, and that the result of the conference was that the defendant was advised that the places were under option, and that the option might be closed at any time, and any planting for the year 1905 would be subject to the rights of the purchasers. There is a lack of agreement as to all of these matters from the defendant's standpoint. Be that as it may, on January 30, 1905, Mr. Warley and the plaintiffs recognized the defendant as being then in possession of the premises, and the letter addressed to the defendant is sufficient evidence of that fact, for it requests the defendant to turn over the premises to the purchasers. If he delivered the premises to the plaintiffs and recognized their rights, then he had no right upon the premises after that. That there was something said between the parties about renting the premises is manifest, and that some arrangement was sought to be made in an amicable manner with the purchasers is also manifest. One cannot escape this conclusion from reading the letter written by Mr. Tucker to the defendant, and from reading the letter of Messrs. Dennis & Mann. The first is a statement made from the plaintiff's standpoint, and the latter is a statement made from the defendant's standpoint. That the defendant had not given up the premises is evidenced by the fact that he took counsel with Messrs. Dennis & Mann, and it showed that he was then ready to enter into a treaty for the place for the year 1905, but with the reservation that he hoped this could be done without resorting to the courts. This treaty did not result in such an arrangement, and as a matter of fact the defendant did not surrender the premises to the plaintiffs; or to Mr. Rogers, their agent, and the plaintiffs, from the testimony, were not in possession and control of the premises at the time of the

commencement of this action. Such being the case, the plaintiffs were not entitled to the order of injunction, and the same should be dissolved. Having reached this conclusion, a reference, under the Code, to ascertain the damages, if any, follows, as a matter of course. *Hill v. Thomas*, 19 S. C. 235; *Mauldin v. City of Greenville*, 64 S. C. 444, 42 S. E. 202; *Lewis v. Jones*, 65 S. C. 157, 43 S. E. 525.

"It is therefore ordered, adjudged, and decreed that the temporary injunction heretofore granted herein be, and the same is hereby, dissolved, and that the complaint herein be, and the same is hereby, dismissed, with costs, and that the defendant be, and he is hereby, given leave to enter up judgment herein accordingly. It is further ordered, adjudged, and decreed that it be referred to H. W. Harvey, Esq., master of this court, to ascertain and report what damages, if any, have been sustained by reason of the said injunction, and to report the same to the court, and that at least four days' notice of the reference or references held hereunder, be given to all parties in interest in the case, or their attorney, and to the sureties named in the bonds or undertakings executed in this case.

"I think it due to Mr. Warley to say that I am satisfied that in his dealings with the plaintiffs he had entirely overlooked the fact that he had signed the written option which was afterwards produced by the defendant; but as the defendant was in the actual possession of the premises at the time of the commencement of this action, the result must be the same, whether he was holding over under the previous years' renting, or whether he was holding under the terms of the contract, and, even if he entered into a written lease for each year previous to that time, that was entirely consistent upon the terms of the contract, for it provided for a separate agreement for each year, independent of the general contract which he held. This contract was binding upon Mr. Warley, although signed only by him. 1 Chitty, Contracts (Ed. 1874) 453."

Huger Sinkler and B. A. Hagood, for appellant. M. Rutledge Rivers, for respondent.

POPE, O. J. After a careful consideration of the testimony set forth by the record in this case, this court is satisfied that the decree of the circuit judge is correct, and therefore adopts it as the opinion of this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(107 Va. 811)

SPITLER et al. v. GUY.

SAME v. HUTCHESON et al.

(Supreme Court of Appeals of Virginia. Sept. 17, 1907.)

**MANDAMUS—SUBJECTS OF RELIEF—OTHER ADEQUATE REMEDY.**

Code Va. 1904, § 86, provides that any five qualified voters of an election district, 15 days previous to the regular days of registration, may post a notice of the names of persons alleged to be improperly registered; that on the day of registration the registrar shall hear testimony as to the right of persons named in the notice on the registration books, and that, if he be satisfied that any person is not a qualified voter, he may strike his name from the books; and that from such decision any person may appeal, as provided in section 83a. Section 83a provides that any person denied registration shall have the right to appeal to the circuit court, and that a judgment in favor of him shall entitle him to registration, and that from a judgment against him a writ of error shall lie to the Supreme Court of Appeals. *Held* to provide an adequate remedy to strike the names of persons illegally registered from registration books; and hence mandamus would not lie for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 8, 21.]

Two petitions for writs of mandamus by J. W. Spitler and another, one against R. M. Guy and the other against J. A. Hutcheson, registrars, to compel them to erase the names of certain persons alleged to have been illegally registered from the registration books of their respective precincts. F. M. Merriken and another, representing themselves as registered and duly qualified voters, filed their petition, and were permitted to come into the proceeding and make defense. Writs denied.

Turner K. Hackman and Thos. Whitehead, for petitioners. Patrick & Gordon, Timberlake & Nelson, H. H. Wayt, Charles Curry, and F. B. Kennedy for respondents.

**PER CURIAM.** This day came again the parties by counsel, and the court, having maturely considered the transcript of the record of the petition aforesaid and arguments of counsel, is of opinion that the petitioners have an adequate remedy by virtue of sections 86 and 83a of the Code of Virginia of 1904, and upon the authority of *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529, the prayer of the petitioners for a writ of mandamus is denied, and it is ordered that the respondents recover of the petitioners their costs in this behalf expended.

Writs denied.

(129 Ga. 204)

WRIGHTSVILLE &amp; T. R. CO. v. GORNTON.

(Supreme Court of Georgia. Aug. 9, 1907.)

**1. DEATH—ACTION FOR—DAMAGES—EVIDENCE.**

In a suit to recover the value of a life alleged to have been destroyed by the negligence of the defendant, it is proper to prove what was the occupation of the deceased and the amount

of money which he usually made each year in his business, in order to illustrate his earning capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 88.]

**2. ERROR, WRIT OF—PRESUMPTIONS.**

Where the trial judge in his charge informs the jury that the contentions of the parties made during the trial are so and so, it will, in the absence of a certificate by him to the contrary, be presumed that his statement of such contentions was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3753.]

**3. TRIAL—INSTRUCTIONS—MATTERS OF LAW.**

If the court correctly instructs the jury as to the law applicable to the issues involved in the case, mere failure to "affirmatively" state the contentions of the parties as shown by the pleadings is not cause for a new trial.

**4. SAME—REQUESTS IN WRITING—NECESSITY—RAILROADS—ACCIDENT AT CROSSING.**

Where, in a suit to recover damages for the homicide of a person killed upon a public railroad crossing by a train of the defendant company, the court charges the jury that if they believe that the railroad company was negligent, and that the deceased by ordinary care and diligence could have avoided the consequences of such negligence, the plaintiff cannot recover, it is not error to fail to charge that the deceased was under the duty of exercising ordinary and reasonable care and diligence before entering upon the railroad crossing, when such instruction is not requested in writing by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 648.]

**5. ERROR, WRIT OF—ASSIGNMENT OF ERROR.**

There is no merit in an assignment of error that the court failed to charge the jury a certain principle of law applicable to the case, when it appears that this principle was correctly given in charge to the jury.

**6. RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS.**

In a case of the character indicated in the fourth headnote, it is not error to instruct the jury that, if they find that at the time of the occurrence in question the train of the defendant company was not running on schedule time, they can take that circumstance into consideration in determining whether or not the deceased had reason to apprehend danger at such time.

**7. TRIAL—INSTRUCTIONS.**

Where the trial judge begins his instructions as to the law applicable to a particular issue in the case with the language, "Now in this case I charge you that the plaintiff would not be entitled to recover unless," etc., the use, in such connection, of the words "in this case" is not calculated to mislead the jury into believing that the only issue in the case is the one here referred to by the court, when in the same connection and in other portions of the charge the jury is correctly instructed as to other issues.

**8. SAME—NEGLIGENCE—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.**

Upon the trial of an action of the character heretofore indicated, the court, in different portions of its charge, having read to the jury sections 2322 and 3830 of the Civil Code of 1895, subsequently instructed them: "If the deceased and the agents of the defendant company were both at fault, and the deceased may have in some way contributed to the injury which resulted in his death, but could not by the use of ordinary care and diligence have avoided the consequences caused by the negligence of the defendant, the plaintiff may recover, even if you find that the deceased was negligent, but the amount of damages would be diminished in proportion to the amount of default attributable to the negligence

of the deceased." *Held*: (a) That the charge did not instruct a recovery for the plaintiff, even though the negligence of the deceased and that of the defendant company were equal, or that of the company was less than that of the deceased; and (b) that, in view of the instructions given as above stated, the failure to charge that, if the negligence of the deceased and that of the company were equal, the plaintiff could not recover, was not cause for a new trial, no request having been made to charge on the subject of equality of negligence.

#### 9. RAILROADS—ACCIDENT AT CROSSING—EVIDENCE.

The motion for a nonsuit was properly overruled, the verdict was amply supported by the evidence, and the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by Elizabeth Gornto against the Wrightsville & Tennille Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Elizabeth Gornto brought an action for damages against the Wrightsville & Tennille Railroad Company for the alleged wrongful homicide of her husband, William C. Gornto. The petition alleged that the plaintiff's husband was traveling in a wagon, drawn by a mule which he was driving, along a public thoroughfare within the city of Wrightsville, and while crossing defendant's railroad track, on and over a public crossing in such city, a passenger train of the defendant company ran into his wagon, threw him out, and killed him, and that he was without fault. The specific acts of negligence alleged were that the train was run over the crossing, which was on a public street of the city and constantly used by travelers, at a rapid and unusual rate of speed; that the engineer in charge of the train failed to give the signals required by law for public crossings; and that he failed to check and keep checking the speed of the train, as required by law, in approaching said crossing. The earning capacity and life expectancy of the deceased were set out. The defendant denied the acts of negligence charged, denied that plaintiff's husband was without fault, and alleged that he "was then and there at fault and negligent, and guilty of such contributory negligence as [would] defeat any right to recover in said case," and "that, if the said William C. Gornto had then and there acted with that degree of care and caution which the law imposed upon him, he would have been able to avoid any and all injury to him, and the results of any act of negligence upon the part of the defendant's agents and employees." At the close of the evidence for the plaintiff the defendant moved for a nonsuit, which was refused, and the defendant excepted *pendente lite*. There was a verdict for plaintiff. The defendant moved for a new trial, which motion was overruled, and the defendant excepted, assigning error upon each of the rulings stated.

Daley & Bussey, for plaintiff in error. Jas. K. Hines and J. K. Jordan, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. A witness for the plaintiff testified that he knew the deceased, who was a good farmer and cultivated about a two-horse farm, renting one of the farms most of the time and cultivating the other one-horse farm for himself, and making from \$600 to \$700 a year, and in good crop years about \$1,000. The defendant objected to this admission of evidence on the ground of irrelevancy, and that speculative earnings of farms, according to good or bad years, could not illustrate the earning capacity of the deceased. Clearly the objections were not well taken. It was proper to show that the deceased was a farmer and the amount he usually made in his business, in order to illustrate his earning capacity.

2. In several of the grounds of the motion for a new trial complaint is made that the court erred in informing the jury that the plaintiff contended such and such to be true. It appears that the court was not referring to contentions set out in the petition, but evidently referred to contentions which arose during the trial, and which were made in rebuttal to contentions made by the defendant. Where the judge in his charge informs the jury that the contentions made by the parties during the trial are so and so, it will, in the absence of a certificate by him to the contrary, be presumed that his statement of such contentions was correct. *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017 (5). See, also, *Wilson v. Atlanta & Charlotte Ry. Co.*, 82 Ga. 383, 9 S. E. 1076 (2).

3. Complaint was made that "the court erred in failing to affirmatively state to the jury a material contention under the defendant's plea, to wit: 'Answering further to plaintiff's cause of action, defendant says that the said William C. Gornto, the person for whose death the suit was brought, was not without fault or negligence on his part killed, but was then and there at fault and negligent, and guilty of such contributory negligence as will defeat any right to recover in said case.'" As will be seen, the complaint is that the court did not affirmatively state this contention to the jury in the language of the defendant's plea. If the court, as it did in this case, correctly instructs the jury as to the law applicable to the issues involved, mere failure to formally state the contentions of the parties as shown by the pleadings is not cause for a new trial. See, in this connection, *Central R. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430 (1).

4. Another ground of the motion was that the court erred in failing to charge the jury "that the deceased, Wm. C. Gornto, was under the duty of exercising ordinary and reasonable care and diligence for his own protection at and before entering upon the

railroad crossing, and, that, if they found from the evidence that he so failed, it would be a question for them to find as to whether or not it amounted to negligence on his part and would operate to defeat a recovery." There was no merit in this ground, as the court did charge: "If the deceased could have avoided, by the exercise of ordinary care and diligence, the consequence of the railroad company's negligence, if you believe the railroad company was negligent, the plaintiff could not recover." The court several times in the charge repeated the substance of this instruction; and, if the defendant desired more specific instructions to the effect that the deceased should have exercised ordinary care and diligence at or before entering upon the railroad crossing, a timely and appropriate written request should have been made therefor.

5. Nor was there any merit in the assignment of error that the court, after instructing the jury as to the presumption of negligence arising against the defendant upon proof of the homicide as alleged, failed to charge that, if the defendant should show that it exercised all ordinary and reasonable care and diligence at the time of the casualty, the plaintiff could not recover. The court specifically instructed the jury that such presumption would be rebutted if the defendant showed that it exercised ordinary and reasonable care and diligence on the occasion in question.

6. The court instructed the jury: "If you find that the train of the defendant company at the time was not running on schedule time, you may take that into consideration in determining whether or not he [the deceased] had reason to apprehend danger at the time of the occurrence." This was alleged to be error, "because unsupported by the pleadings and contrary to law, and as imposing a more stringent rule against defendant than fixed by law." The criticism upon this charge we do not consider just. If the train was not on schedule time, surely this fact was a circumstance which the jury might properly consider in determining whether the husband of the plaintiff, in approaching the crossing, had reason to apprehend danger.

7. Complaint was also made of the following instruction to the jury: "Now in this case I charge you the plaintiff would not be entitled to recover unless it should appear that the deceased by ordinary care could not have avoided the consequences of the defendant's negligence, after such negligence had become apparent to the deceased, or if he had reason to apprehend that there was danger." The only exception to this charge referred to in the brief of counsel for plaintiff in error is: "Because the issue therein submitted was calculated to mislead the jury into believing it the only issue to be considered, as the court used in stating the charge excepted to the words 'In this case.' \* \* \* By using

these words, the jury were restricted in the determination of the case to the sole issue charged in connection with the words 'in this case,' etc." In our opinion, this exception was not well taken, when other parts of the charge are considered in connection with the instruction which we are now considering. In the sentence next preceding the charge here excepted to, the court instructed the jury that, while a widow may sue for the homicide of her husband, whatever would have been a good defense to an action brought by him for the injury, had he lived, would be a good defense to an action brought by her; and then the court proceeded, in the charge excepted to, to give, in effect, one of the instances in which the widow could not recover. Subsequently the court, in its instructions, gave the jury another instance in which the widow could not recover, viz.: If neither the deceased nor the railroad company were negligent; that is, if the injury was the result of a mere accident. And in another part of the charge the jury was instructed that "if a person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence." The charge was full and fair on all the issues in the case, and that portion thereof with which we are now dealing, when considered in connection with the whole charge, was not calculated to mislead the jury into believing that the only issue to be considered was whether or not the husband of the plaintiff could, by the use of ordinary care and diligence, have avoided the consequences of the defendant's negligence.

8. The court instructed the jury: "If the deceased and the agents of the defendant company were both at fault, and the deceased may have in some way contributed to the injury which resulted in his death, but could not by the use of ordinary care and diligence have avoided the consequences caused by the negligence of the defendant, the plaintiff may recover, even if you find that the deceased was negligent; but the amount of the damages would be diminished in proportion to the amount of default attributable to the negligence of the deceased. In other words, if you believe that the railroad company was negligent and that the deceased was negligent, but the deceased could not have avoided the consequences of the defendant's negligence by the exercise of ordinary and reasonable care and diligence, if you believe that to be the truth of the transaction, then I charge you the plaintiff in this case would be entitled to recover, but the amount of the recovery would be reduced by the amount of negligence attributable to the deceased, William Gornto." This charge was excepted to, "on the grounds that it instructs a recovery for the plaintiff in this case, provided both parties were negligent, regardless of the degrees of negligence attributable to them, respectively; fails to require a finding of greater

**4. SAME—POWERS—BORROWING MONEY.**

A municipal corporation may borrow money to be used for the purposes of government, or for such other purposes as may be authorized by the Constitution and laws, when the power to borrow is delegated in the charter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 11,019.]

**5. TAXATION—PROPERTY SUBJECT—MUNICIPAL BONDS.**

Bonds issued by a municipal corporation as evidence of a loan made to it are instrumentalities of the government which creates the municipal corporation. Laws providing for the collection of taxes will not be so construed as to authorize the collection of a tax upon such instrumentalities of government, unless there is in the law clear language declaring that such was the intent of the lawmaking power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 300.]

**6. SAME—STATUTES—CONSTRUCTION.**

General terms and expressions in the Constitution, or in the statutes providing for the collection of taxes, are never allowed their full literal import, if the effect of such construction is to require that to be done which the law does not authorize, or to violate a fundamental principle upon which the government is founded and operated.

**7. SAME—"PROPERTY."**

The word "property," in that clause of the Constitution of this state which declares "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," properly construed, does not require the taxing of public property or any of the lawful instrumentalities of government.

**8. SAME—PUBLIC BONDS.**

There is not, in the tax law of this state, any terms which expressly declare that the bonds of the state, or its various political subdivisions, are subject to tax, nor any language in such laws which clearly indicates that it was the intention of the General Assembly to subject these instrumentalities of government to taxation, either by the state or any county thereof.

**9. SAME.**

Bonds issued by a municipal corporation of this state in the hands of a resident of the state are not taxable by this state or any county thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 300.]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by L. T. Penick, tax collector, against F. C. Foster, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

Penick, as tax collector of Morgan county, brought an equitable petition against Foster, as executor, alleging that the defendant had recently received, in payment of the principal and interest on 10 municipal bonds of the city of Atlanta, of \$1,000 each, bearing interest at 8 per cent. per annum, the sum of \$27,600. The bonds were purchased by the testator of the defendant and deposited in a bank in the city of New York in the year 1880, then being of the value of \$10,000. The plaintiff has, in accordance with the law, assessed this property as the property of the testator of the defendant, for the years 1880 to 1904, inclusive, and issued tax executions

against the executor for each of these years; the aggregate amount of such executions being \$9,512.27. The plaintiff knows of no other property of the testator of the defendant except the money above referred to. The executor is under no bond, is insolvent, and denies the right of the county of Morgan and the state of Georgia to tax the bonds, and refuses to pay the taxes. Unless the executor is restrained from distributing the funds among the legatees of the estate without paying the taxes, the plaintiff, as a tax officer, will be without a legal remedy, and will be forced to resort to a multiplicity of suits against the legatees. The prayer is that a receiver be appointed to take charge of the funds and pay them out under an order of court, and that the executor be enjoined from paying out any of the funds under the will of the testator until he has fully paid off and discharged the tax executions, and for general relief. The defendant, in his answer, alleges that the bonds were purchased by his testator of the fiscal agent of the city of Atlanta in the city of New York, and that they remained in the city of New York until paid off, on February 7, 1905; and the right of the county of Morgan and state of Georgia to tax the bonds is denied. It is alleged that the defendant, before he had any notice of the granting of the restraining order, or of the filing of the petition, distributed the funds in his hands among the legatees under the will of his testator. It is alleged that, shortly after he deposited the bonds in the bank in the city of New York, his testator died in the state of Maine; that the defendant qualified as executor on August 2, 1880, and had no knowledge of the depositing of the bonds, and never acquired any knowledge of the same until two or three weeks before he collected the amount of the bonds; that he had no knowledge that the assets of his testator included these bonds, and there was nothing among his papers indicating the same. The defendant pleads the statute of limitations of four years, as well as the statute of limitations of seven years, against the collection of the taxes against the bonds. At the hearing the judge refused to grant the injunction prayed for, and stated in his order that the injunction was refused solely upon the ground that the bonds were not taxable by the state and county. The plaintiff excepted.

George & Anderson, for plaintiff in error. Saml. H. Sibley, for defendant in error.

COBB, P. J. (after stating the facts as above). This case was heard on a petition and answer; both being verified by affidavits. There was no other evidence before the judge. The pleadings raised an issue of fact as to whether the funds in controversy were still in the hands of the executor, or had been distributed among the legatees. The order of the judge shows that he did not determine this issue of fact. He refused the



injunction for the reason that he was of the opinion that the bonds were not taxable by the state and county, and the decision of this question of law is at the foundation of his judgment. Under such circumstances, the question for review by this court is whether the judge has correctly decided the question of law upon which he based the judgment refusing the injunction. See, in this connection, *High Shoals Mfg. Co. v. Penick*, 127 Ga. 504, 56 S. E. 648 (3); *Hill v. Wadley Southern Railway Co.*, 128 Ga. 705, 57 S. E. 795. The single question therefore to be determined is whether bonds issued by a municipality of this state are taxable in the hands of a citizen and resident of this state and county.

A county is a mere political division of the state. For convenience the state delegates to certain officers within the county the right to exercise certain powers of sovereignty. A municipality is also a mere political subdivision of the state. It is a public corporation having for its object the administration of a portion of the powers of government delegated to it for that purpose. Civ. Code 1895, § 1833. They are mere creatures of the law-making power, and may be created and abolished at its will. The extent to which they shall be permitted to exercise the powers of government is, under the Constitution, left largely to the discretion of the General Assembly. Within the limits of their charter they may exercise the powers of sovereignty. "The right of taxation is a sovereign right, inalienable, indestructible, is the life of the state, and rightfully belongs to the people in all republican governments." Civ. Code 1895, § 5796. This right may be exercised by the state directly, subject to the limitations in the Constitution; and this right may be exercised by the counties and municipalities of the state to the extent that such power is delegated to these political subdivisions, and within the limits fixed by the Constitution or laws passed in pursuance thereof. The government, whether it be the state or one of its political subdivisions, is dependent, for the due exercise of its powers, on certain instrumentalities needful and proper in the matter with which it is dealing. Credit is absolutely indispensable to any government, whether it exists in the form of a state government or in the form of the government of one of the political subdivisions of the state. It becomes necessary, in the life of a state, as well as of its political subdivisions, to be able to establish credit in order to carry on successfully and properly the governmental functions. One of the most usual and ordinary methods of using the credit of a government is by the issue of securities and placing them in the markets of the world for sale. The state can borrow money in this way within the limitations of the Constitution. The counties may do likewise, and so may municipal corporations. A municipal corporation may not, however, borrow money for any purpose other than the

purposes of government, unless such power is expressly delegated in its charter, and such delegation of power is consistent with the provisions of the Constitution. Hence, whenever a municipal corporation makes a loan of money, it is either to use the money for the purpose of carrying on the functions of government, or to effectuate an enterprise which the General Assembly has, by law passed in pursuance of the Constitution, authorized it to engage in. Every loan made by a municipal corporation is therefore in the exercise of the governmental powers and to effectuate the governmental object. If a municipal corporation issues, in conformity to law, a negotiable instrument in order to raise money to effectuate a governmental purpose, the paper issued by it is an instrumentality of government. It is the means resorted to by the governmental officers to effectuate the powers of government.

In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, it was held that Congress had the power to incorporate a bank as a proper means of exercising the powers of government given by the Constitution, and that, as such bank was an instrumentality of the federal government, a state in which a branch was located could not levy a tax thereon without violating the Constitution. In *Weston v. Charleston*, 2 Pet. (U. S.) 449, 7 L. Ed. 481, it was held that a tax imposed by the law of a state on notes issued on loans made to the United States was unconstitutional. In *Dobbins v. Erie County*, 16 Pet. (U. S.) 435, 10 L. Ed. 1022, it was held that a tax imposed upon the office of a captain of a United States revenue cutter, which had the effect to diminish the compensation which he would receive as fixed by Congress, was unauthorized by law. In *Banks v. Mayor*, 74 U. S. 16,<sup>1</sup> it was held that certificates of indebtedness, issued by the United States to creditors of the government for supplies furnished for carrying on war, were beyond the taxing power of the state. In *Van Brocklin v. Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845, land purchased by the United States at a sale for direct taxes, and afterwards sold, was held not to be taxable so long as it was owned by the United States. See, also, in this connection, *Burrough on Taxation*, 120. It is also well settled that the United States government cannot tax the governmental instrumentalities of the different states. *Burrough on Taxation*, 505. In *Collector v. Day*, 78 U. S. 113, 20 L. Ed. 122, it was held that Congress had no power to impose a tax upon the salary of a judicial officer of a state. In *Pollock v. Farmers' Loan Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, it was held that a tax upon rents or income derived from the interest on bonds issued by a municipal corporation is a tax upon the powers of the state and its instrumentalities to borrow money. In *United States v. Railroad Co.*, 84 U. S. 322, 21 L. Ed. 597, a municipal corporation is held to

<sup>1</sup> 19 L. Ed. 57.

be a portion of the sovereign power of the state, and not subject to taxation by Congress upon its municipal revenues. It may be safely asserted that nothing is better settled than that securities issued by the government are as much the instrumentalities of the government as other means adopted by it to perform its functions. It is immaterial whether the security be issued by the state, or by a county, or by a municipality. It is, in all cases, an instrumentality of the government. It is issued for the purpose of effectuating those objects for which governments exist. In *City Council v. Dunbar*, 50 Ga. 387, Judge McCay says: "It is a question of some doubt whether a state can tax its own bonds. At any rate, it is a matter of serious question whether it is right to do so. If a state contracts to pay a fixed interest on its bonds, it is rather a loose compliance with that contract to tax the bond 1 or 2 per cent. We will not say a state cannot tax its own bonds." In that case it was held that a municipal corporation could not levy a tax on bonds issued by the state, unless there was clear language in the charter of the city conferring that power. In *Miller v. Wilson*, 60 Ga. 505, it was held that a general tax act of the state would not be so construed as to authorize the assessment and levy of a tax upon state bonds, unless there was clear language declaring that such was the legislative intent. Hence, where the act contains, as descriptive of the property subject to taxation, only the words, "the taxable property of this state," the act would be construed not to embrace state bonds owned by a citizen and resident of this state. It is to be noted, in passing, that both of the decisions just referred to were rendered in cases arising prior to the adoption of the Constitution of 1877. That instrument declares: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax." Civ. Code 1895, § 5883. This provision of the Constitution has been so construed as to declare that all property within the limits of the state is subject to taxation, except such as the Constitution expressly authorizes the General Assembly to exempt from taxation. *Georgia Railroad Co. v. Wright*, 125 Ga. 589, 54 S. E. 52. The Constitution expressly authorizes the exemption of public property. Civ. Code 1895, § 5884.

Let it be conceded, for the purposes of this case, that the state, either directly or through its counties and municipalities, may tax public securities in the hands of individuals. The question then arises whether the words "all property subject to be taxed," in the Constitution, embraces bonds issued by the state or its political subdivisions. If it does, there is no power to exempt them from taxation. If it does not, the question as to whether they shall be so subjected is a mat-

ter left to the discretion of the General Assembly. If a municipal bond is property which the Constitution taxes of its own force, and the General Assembly has no authority to exempt the same from taxation, then a county bond is likewise taxable, and, for a similar reason, a state bond itself. If the Constitution, by virtue of its own terms, makes such bonds subject to tax, then no other legislation is necessary to provide for the collection of the tax than that which has been enacted for the purpose of collecting taxes upon other property of a similar character. If the tax acts provide machinery ample in its nature to collect taxes on notes and choses in action, such machinery will be ample for the purpose of collecting taxes upon choses in action issued by the state or one of its political subdivisions. *Atlanta National Building & Loan Ass'n v. Stewart*, 109 Ga. 80, 35 S. E. 73. If the Constitution, of its own force, requires the state to collect the taxes upon municipal bonds, by parity of reasoning it requires a county or municipality to collect taxes upon state bonds. If it does not require a municipality to collect the taxes on its own bonds, then it would not require the state to collect the taxes upon the bonds of its municipalities.

In *Mayor of Macon v. Jones*, 67 Ga. 489, it was held that the grant of a power in a charter of a municipality "to tax all property, real and personal, within the corporate limits of the city," would not be construed to include the taxing of its own bonds, in the absence of express authority for that purpose. It is to be noted that this case was decided after the Constitution of 1877 was adopted. If a municipal bond is "property," within the meaning of that term as used in the Constitution, and is made subject to taxation by the terms of the Constitution itself, such bond is subject to taxation in the hands of a resident of the municipality issuing it, as well as elsewhere in the state. The ruling in the case could not have been made except upon the theory that a municipal bond was not required to be taxed under the Constitution. The language of the decision indicates that the court was of opinion that this is a matter left to the discretion of the General Assembly. In *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 700, it was held that a municipal corporation, when it borrows money and promises to repay it with interest, cannot, by its own ordinances, under the guise of taxation, relieve itself from performing to the lender all that it has expressly promised to its creditors. An ordinance of the city of Charleston, which authorized the retention of a part of the interest as taxes, was held to be invalid; but the court recognized the fact that after the interest was paid to the holder of the bond, and came into his possession, the money in his possession was subject to taxation in common with other similar property. There is, in the Constitution of Louisiana, language similar to that which appears

In our present Constitution in reference to what property shall be subject to taxation. In the case of *State of Louisiana v. Board of Assessors*, 35 La. Ann. 651, it was held that the words "all property" were not to be construed as requiring a tax by the state upon bonds issued by one of its municipalities, *Fenner, J.*, after reaching this conclusion, says: "Nor can it be successfully opposed to this view that the words, 'all property shall be taxed,' are too clear and unambiguous to leave room for construction. On the contrary, such general terms and expressions are constantly subjected to construction, and it may be said that they are never allowed their full literal import. To do so would be to extend their intent to subjects which the state has clearly no power to tax, such as bonds of the United States, and other means and instruments for the exercise of the powers delegated to the federal government; and to other subjects, such as the salaries of judges, public property (although this is expressly exempted), and the like, which, though it is within the power of the state to tax, are yet considered on fundamental principles to be nontaxable." It is true that two judges dissented in this case but in a later case (*State v. Board of Assessors*, 111 La. 982, 36 South. 91) the conclusions reached in the earlier case were adopted by a unanimous court. The following language, taken from a most valuable work, is in point at this stage of the discussion: "It is well settled, as a general rule, that public property and the various instrumentalities of government, whether, in England and her colonies, appertaining to the crown, or, in the United States, to the federal government, the various states, or the political subdivisions of the state, are not subject to taxation. This immunity is in almost all jurisdictions confirmed by some express constitutional or statutory grant of exemption, but it is by no means dependent thereon, for it rests upon the most fundamental principles of government, being necessary in order that the functions of government be not duly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself, which money could be raised only by other taxation; and the express exemptions are considered to be inserted in the tax laws only from abundant caution, and because the assessment of taxes is made by local officers, who, though skilled in the valuation of property, are presumably unlearned in legal distinctions." 12 Am. & Eng. Enc. L. (2d. Ed.) 367 et seq.

There is nothing in the various tax acts, from 1880 down to the present time, which, either in express terms, or by necessary implication, indicates that it was the purpose of the General Assembly to levy a tax for state and county purposes upon the bonds of the state, or any of its political subdivisions. Such general terms as "taxable property" appear in these acts, and these terms have

been interpreted, as we have seen, not to embrace state bonds, and not to embrace the bonds of a municipality owned by a citizen residing in that municipality. See, in this connection, the opinion of the Honorable Jno. C. Hart, Attorney General, of February 26, 1903. The conclusion reached by us therefore is that the municipality being a mere political subdivision of the state, to which is delegated a certain portion of the powers of government, a bond issued by it is merely a governmental instrumentality; that it is not taxable by the force of the Constitution itself, and, if taxable at all, it is only so when the General Assembly, either in express terms, or in such language that no other conclusion can be reached than that such was the intention of that body. A municipal corporation occupying, for many purposes, the same position as the state, so far as the taxing of its instrumentalities are concerned, it is not within the operation of a tax law unless expressly named, or there is clear language indicating such an intent. See, in this connection, *Butler v. Merritt*, 113 Ga. 233, 38 S. E. 751, and cases cited.

Judgment affirmed. All the Justices concur.

(2 Ga. App. 521)

MOSELEY v. DINKINS. (No. 393.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

ERROR, WRIT OF—REVIEW.

The errors of law complained of being wholly immaterial as affecting the merits of the case, and the verdict being amply supported by the facts and approved by the trial judge, this court will not interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

(Syllabus by the Court.)

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Action between W. M. Moseley and Elizabeth Dinkins. From the judgment, Moseley brings error. Affirmed.

Saffold & Larsen, for plaintiff in error.  
Henry R. Daniel, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 526)

UNITED STATES FIDELITY & GUARANTY CO. v. DAVIS. (No. 418.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

1. GUARDIAN AND WARD—ACTIONS—EVIDENCE—RETURN OF GUARDIAN.

The return of a guardian made under oath to the ordinary charging himself with having received assets of the estate is *prima facie* evidence both against him and his sureties, and, unless met by proof of a legal disposition of the assets so admitted to have been received, is sufficient to show a devastavit.

2. SAME—BOND—COMPLIANCE WITH STATUTE.

A guardian's bond containing the conditions that the "guardian shall well and truly maintain, and clothe and educate said orphans according to their circumstances, and shall take good and lawful care of their persons and prop-

erty according to the laws of this state, and shall annually make a just and true return of all his actings and doings herein unto said ordinary, and pay over all assets that may remain in his hands when said guardianship shall legally terminate" and payable to the "ordinary, his successors and assigns," is a good statutory bond, and is in substantial compliance with the provisions of section 2528 of the Civil Code of 1895. Under the conditions of this bond as controlled by the law of this state, the guardian was not authorized, without the approval of the ordinary, to apply the corpus of the estate to the maintenance and education of his wards.

#### 8. SAME—ACTION AGAINST SURETY—DEMAND—NECESSITY.

Where the guardian is dead and his estate unrepresented, suit may be instituted on his bond against the sureties alone at the instance of his ward, or a new guardian, or any other person interested. In such case it is not necessary to make a demand on the surety before suit, for its liability is proved by the breach of the bond by its principal, the guardian, for whose legal discharge of duty it became surety.

#### 4. ERROR, WRIT OF—REVIEW.

No material error of law was committed, and the evidence fully supports the verdict.

(Syllabus by the Court.)

Error from City Court, Floyd County; Harper Hamilton, Judge.

Action by J. P. Davis, as ordinary, for the use of one Treadaway, guardian, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Denny & Harris and R. T. Fouché, for plaintiff in error. F. W. Copeland and W. M. Henry, for defendant in error.

HILL, C. J. Davis, as ordinary of Floyd county, brought suit for the use of Treadaway, guardian of the three named minor children of one Mark Smith, against the United States Fidelity & Guaranty Company, security on the bond of J. A. Carroll, deceased, guardian of said minor children. The jury found a verdict for the plaintiff, and, to the judgment of the court denying its motion for a new trial, error is assigned by the defendant.

The case made by the plaintiff, briefly stated, is as follows: The appointment and qualification of J. A. Carroll as guardian of said three minor children November 15, 1899. The execution of the bond sued on with the defendant as the only security. Exemplifications of returns made by Carroll as such guardian to the ordinary duly sworn to, dated and filed November 11, 1902, showing in his hands as such guardian the sum of \$328.97 in cash. The death of said Carroll September 14, 1903, in Floyd county intestate, without assets and insolvent, leaving a widow and four minor children. The setting apart as a year's support to the widow and four minor children all the property left by deceased appraised at from \$250 to \$300. That the estate of Carroll was without any representation. It was also shown that neither one of the minor children had received any property from the guardian coming into his hands from the estate of their father. The defendant introduced no evi-

dence and practically admitted the case made by plaintiff, but denied his right to recover under the facts shown and the law: (1) Because there was no evidence showing a devastavit, the returns of the guardian made in November, 1902, being insufficient for that purpose when he died in March, 1903; that this return only showed a receipt by the guardian of the money sued for and in his possession November, 1902, but did not show the condition of his accounts as guardian at the date of his death in March, 1903. (2) Because the instrument sued on was a voluntary, and not a statutory, bond, and could not be sued on as a statutory bond. The bond was made payable to Davis as ordinary, his successors and assigns, "and no negotiable or assignable instrument can be made a statutory obligation"; the statute requiring a guardian bond to be "payable to the ordinary and his successors in office," and that the condition of a statutory guardian's bond is "for the faithful discharge of his duty as guardian," and the conditions of the bond sued on are: The "guardian shall well and truly maintain, and clothe and educate said orphans according to their circumstances, and shall take good and lawful care of their persons and property according to the laws of the state, and shall annually make a just and true return of all his actings and doings herein, unto said ordinary, and pay over all assets that may remain in his hands when said guardianship shall legally terminate." (3) That under the conditions of this bond, the guardian was authorized to apply the corpus to the maintenance of his wards, that a compliance with the special conditions stated in the bond would satisfy it, and the burden was on the plaintiff to show that such conditions had not been complied with, which had not been done, but, on the contrary, the evidence for the plaintiff showed that the wards had lived with and been maintained by the guardian. (4) That, under the facts of this case, a demand was a condition precedent to plaintiff's right to recover, and, as the guardian was dead, an administrator of his estate was necessary in order that such demand could have been made. These are the positions covered by the able counsel in his argument and brief.

1. The evidence clearly proved a devastavit by the guardian. His returns as such guardian, filed November, 1902, were prima facie evidence against him and his surety as to the amount in his hands appearing therefrom. 2 Brandt on Suretyship (2d Ed.) § 628; Dowling v. Feeley, 72 Ga. 558 (3); Bailey v. McAlpin, 122 Ga. 632, 50 S. E. 388 (15). It is insisted that while the returns might show the condition of the guardian's account at the date when made, to wit, November, 1902, this did not show its condition in 1903, the date of the guardian's death. This proof was supplemented by the positive and uncontroverted testimony that neither one of the wards had received any part of their funds

which this guardian admitted he had in his hands in November, 1902. When it is shown that the guardian had at any time during the trust received assets belonging to his wards, the burden is upon him or his surety to show that a legal disposition of such assets had been made. *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165 (3). If the guardian had made any legal disposition of the fund in his hands in November, 1902, prior to his death in March, 1903, the fact was easily susceptible of proof. He could not have paid to the minors any part of it, or expended any part of it in their maintenance beyond the interest and income without the approval of the ordinary. Civ. Code 1895, §§ 2541, 2542; *Dowling v. Feeley*, 72 Ga. 558 (2).

2. The bond in this case was a sufficient compliance with section 2528, Civ. Code 1895. This section provides that a guardian shall "give bond with good and sufficient security, to be approved by the ordinary, in double the amount of the supposed value of the property of the ward for the faithful discharge of his duty as guardian; such bond shall be payable to the ordinary and his successor. A substantial compliance as to all matters of form shall be sufficient." The condition as stated in the statute is "for the faithful discharge of his duty as guardian." The condition in the bond sued on sets out with particularity the duties of the guardian as comprehensively included in the general phrase of the statute. In this bond the obligations of the guardian are that he "shall well and truly maintain, and clothe and educate said orphans according to their circumstances, and shall take good and lawful care of their persons and property according to the laws of the state, and shall annually make a just and true return of all of his actings and doings herein unto said ordinary, and to pay over all assets that may remain in his hands when said guardianship shall legally terminate." Surely all these things are embraced in the general condition, "faithful discharge of his duty as guardian." The language of this bond, while somewhat fuller than the language of the statute, means no more or no less. We are not impressed with the argument that the condition of this bond permitted the guardian to expend the corpus in the maintenance of his wards. This clause must be construed as qualified by the right of the guardian under the law to use only the interest or income for that purpose without the approval of the ordinary. In this case it is also immaterial that the bond is payable to the ordinary, his successors and assigns. The suit is by the ordinary, the original obligee in the bond. The policy of the law as to all bonds required by statute, and especially as to bonds of guardians, administrators, and like trustees, is to disregard mere formalities, and to require only substantial compliance to secure all statutory remedies to persons in-

jured by their breach. Civ. Code 1895, § 2535; Pol. Code 1895, § 263.

3. Under the law as it now stands in this state, when "the guardian is dead and his estate unrepresented," suit may be brought on the guardian's bond against his sureties alone. Civ. Code 1895, § 2535. Prior to the act of 1820, suit could not be brought against the surety on the bond until a judgment had been obtained against the guardian. *Prince's Digest*, p. 44. Under that act both might be joined in the same action, but no suit could be brought against the surety in the first instance, unless the guardian was without the limits of the state. But, as stated, the present Code gives the right to sue the surety alone when the "guardian is dead and his estate unrepresented." In such case, no demand is necessary, as there is no one upon whom a demand could be made. The right to sue the surety is based on a breach of the bond by the guardian. When the evidence shows a devastavit by the guardian, a breach of the bond is shown, and the liability of the surety is established. In this case, the devastavit by the guardian was proved. The guardian died intestate and insolvent, and his estate was unrepresented. There was nothing to administer, as all the property he died possessed of had been set apart to his widow as a year's support, a right superior to that of these wards or their new guardian. The only possible recourse to the wards was their guardian's bond executed for the express purpose of protecting them in just such an extremity.

We think, under the undisputed facts and the law, no other verdict could have been justly rendered, and that the judgment refusing the new trial should be affirmed.

Affirmed.

(2 Ga. App. 530)

#### HARDY v. HARDY. (No. 434.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

#### 1. JUSTICES OF THE PEACE—CERTIORARI—EXCEPTIONS TO ANSWER.

Exceptions to the answer of the magistrate to a writ of certiorari, timely made in writing, and specifically pointing out the defects in said answer, should be sustained, where it appears that the omissions of the answer are of matters essential and material to a proper decision of the case by the reviewing court.

The return of the magistrate to the writ of certiorari should include all the proceedings in the cause.

#### 2. ARBITRATION AND AWARD—REPEAL OF ARBITRATORS.

An unsworn verbal report made to the court by three persons selected by the parties to pending litigation to settle the matters therein in controversy between them cannot legally be made the judgment of the court, where it appears that there was no order of the court referring the case to the three persons, and that said report was simply the opinion of the three persons formed without hearing evidence, or giving the party against whom the report was made an opportunity of being heard, or of contesting the truth of such report.

### 3. JUSTICES OF THE PEACE—JUDGMENT.

A judgment of a justice of the peace in a suit on an open account, not verified by the plaintiff, or proved by evidence, is unauthorized, and should be set aside on certiorari.  
(Syllabus by the Court.)

Error from Superior Court, Jasper County;  
H. G. Lewis, Judge.

Action by W. G. Hardy against A. J. Hardy. Judgment for defendant was affirmed on certiorari, and he brings error. Reversed.

A. Y. Clement, for plaintiff in error. Doyle Campbell, for defendant in error.

HILL, C. J. W. G. Hardy sued Mrs. A. J. Hardy upon an open account in the justice court. On the day set for the trial, neither party being represented by counsel, they agreed to submit the matter in controversy to three arbitrators who were to make an investigation of the facts and make a report to the court, which report was to be made the judgment of the court. The three arbitrators so called, without hearing any evidence, after a personal examination of the matters in controversy upon which the account was based, made a verbal report to the court, which report was made the judgment of the court. This report was made without giving either party any notice thereof or without any opportunity to be heard. Thereupon the defendant, against whom the report was made and judgment was entered, petitioned the superior court for writ of certiorari, which was granted. This petition set forth the following assignments of error: "(1) The court erred in rendering judgment against petitioner, because after said case was submitted to arbitration by agreement of parties as hereinbefore set out, said case being withdrawn from court for that purpose, said court had no jurisdiction to render judgment therein. (2) The court erred in rendering judgment against petitioner because, after agreement of withdrawal and submission to arbitration in the presence of the presiding magistrate, petitioner, having filed no plea, did not file one after said agreement, the purpose and effect of said agreement being to transfer said case from said court to said arbitrators chosen for adjudication, and consequently said court had no jurisdiction at the time it rendered said judgment, and petitioner was deprived of an opportunity to defend, and has not had her day in court. (3) The court erred in rendering judgment because the presiding magistrate was from an adjoining district, it not appearing that M. P. Stone, notary public and ex officio justice of the peace, was not present and was disqualified to sit; said presiding magistrate sitting in said case without the knowledge or consent of petitioner, and after consent to arbitration as aforesaid and petitioner had left the court grounds. (4) The court erred in rendering said judgment because there was no evidence or testimony under oath whatever upon which to base the

judgment. (5) The court erred in rendering said judgment upon the unsworn statement of said three unsworn arbitrators who themselves had not heard one syllable of the evidence and based their opinion solely upon rumor and their personal knowledge. (6) The court erred in making the said unsworn statement of said unsworn arbitrators the judgment of the court. (7) The court erred in making the opinion of said arbitrators the judgment of the court, because they had not determined and passed upon matters in controversy according to law, of which fact the court was cognizant, defendant not having any of her rights to a fair and impartial trial before said arbitrators." The judge of the superior court granted the writ, and the presiding magistrate made the following answer: "Replying specifically to the allegations in said petition, respondent says (1) that M. P. Stone asked me to preside in the case, he being disqualified, and I was present on the day of the trial, and, when court was opened before the case was called, Mr. Gordon Hardy and Mr. Will Smith prevailed with Mrs. A. J. Hardy and W. G. Hardy to pick three men from the crowd present to go out to Mrs. Hardy's house, and estimate what lumber had not been used on the house and to report back to court, and also damage on any lumber used on house, if any. The men were Jin. Pope, William Lloyd, and Walter Evans. W. G. Hardy agreed to take back all lumber unused at the price she was to pay for it delivered at the house, and also whatever damages they said to give credit for it, and Mrs. Hardy agreed to the proposition and agreed to acknowledge to judgment to the balance, and they came back and reported to the court the lumber unused, but not any damages on house, and it was deducted and judgment entered up for the balance and costs." Before the call of the certiorari in the superior court, the plaintiff in certiorari filed written exceptions to the answer, on the ground that it was "insufficient and did not reply specifically to the allegations in the petition; that said answer did not deny or admit the material allegations in paragraphs 2, 3, and 4 of the petition—paragraph 2 alleging that the said judgment complained of was rendered by a notary public and ex officio justice of the peace of an adjoining district, and without knowledge or consent of petitioner, after the verbal agreement to submit the case to arbitration, and after petitioner relying upon said agreement had gone home; paragraph 3 alleging that petitioner had not filed any plea to said suit in court because she regarded the arbitrators as the tribunal to pass upon the matters in controversy, and had gone home, and she expected said arbitrators to notify her when and where they would hear evidence and determine the matter, and she did not know that they were going to report the matter to court without evidence, but thought they would hear her evidence and determine the matter out of

court and give due notice to all parties; paragraph 4 alleging that neither party was represented by counsel, that submission to arbitration was in parol, that said arbitrators were not sworn, no evidence or sworn testimony was submitted to them, and petitioner was not notified when and where said arbitrators would hear evidence and pass upon the matters in controversy, and that said arbitrators made a verbal report to the court without having heard any evidence, said statement or report not having been under oath, whereupon judgment was rendered against petitioner by the presiding justice; that petitioner was not notified by the arbitrators nor by the court, and had no opportunity to present her case to the arbitrators or to the court." Petitioner further excepted to the answer, on the ground that said answer did not embrace nor was there sent up with it any copy or copies of the proceedings had in the case. On hearing the exceptions, the court overruled the same, and rendered a judgment that the certiorari be not sustained, and also rendered final judgment against the plaintiff in certiorari.

1. We think the answer of the magistrate was incomplete in the particulars specified by the exceptions. The allegations of the petition as contained in paragraphs 2, 3, and 4 were material to the proper decision of the plaintiff's case, and she was entitled to a specific answer fully verifying those allegations. The allegations in a certiorari ought either to be fully answered or assumed as true for the purpose of the decision, and, if the answers filed are not full, they should be made so. Civ. Code 1895, § 4647; *Marchman v. Todd*, 15 Ga. 25. We think, also, that the return of the magistrate was incomplete, in that it failed to certify and send up any of the proceedings in the case. Civ. Code 1895, § 4637.

2. It is manifest that the so-called arbitration was in no sense statutory. If, under the facts stated and verified by the answer of the magistrate, the selection of the three men to make a report on the matter in controversy between the parties could be considered as a common-law submission of such matters to arbitration, surely a verbal report, made without having heard any evidence and unsupported even by the verification of the arbitrators themselves, was wholly insufficient upon which to base a judgment against the defendant. Under an arbitration at common law, the award is binding on the party submitting, but the award in such case can only be made the foundation of an action, and is not entitled to be made a judgment of the court. *Crane v. Barry*, 47 Ga. 478; *Sisson v. Pittman*, 118 Ga. 163, 38 S. E. 315. There is no order of the court in this case submitting the matters in controversy, and the judgment is based upon the unsworn statement of three men selected by the parties who arrive at their conclusion without evidence and without giving the parties an

opportunity to be heard. The account sued on seems not to have been verified by the plaintiff in the justice court. The alleged agreement by the defendant, plaintiff in certiorari, that she would "acknowledge the judgment" the report of the three men selected, appears to have been made in the personal and not in the judicial presence of the justice, and was not therefore binding upon her as an admission made on the trial of the case in judicio.

We conclude that the justice erred in entering up judgment against the defendant, and that the judge of the superior court erred in not sustaining the certiorari and setting aside the judgment and remanding the case to the justice court to be tried according to some legal procedure.

Judgment reversed.

(2 Ga. App. 534)

#### GRIFFIN v. STATE. (No. 538.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

#### 1. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE.

While the guilt of a defendant charged with crime may be inferred from circumstances satisfactorily proved which are inconsistent with innocence, the circumstances relied upon must be affirmatively established and legally proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1259-1261.]

#### 2. GAMING—EVIDENCE.

Evidence that the defendant was present at a game of cards, and ran upon the approach of officers armed with pistols, is not (in the absence of evidence that such defendant either played or bet for money, had in his hands or near him either cards or money) sufficient to establish the guilt of such defendant beyond a reasonable doubt, within the meaning of section 984, Pen. Code 1895. Neither presence nor flight, nor both together, without more, is conclusive of guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 291-298.]

#### 3. CRIMINAL LAW—EVIDENCE.

The belief of a witness cannot supply the place of substantive material facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1036.]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Tom Griffin was convicted of gambling, and brings error. Reversed.

E. W. Ryman, for plaintiff in error. W. F. George, Sol. Gen., E. D. Graham, Sol. Gen., and A. J. McDonald, County Sol., for the State.

RUSSELL, J. The defendant was accused of gaming. The evidence showed that he was in company with others, some of whom were undoubtedly engaged in playing and betting at cards for money. Upon the approach of the chief of police of Fitzgerald and an assistant, who presented a pistol and called to the negroes "to hold up," the defendant incontinently fled, and the chief of police tore the defendant's shirt in the strug-

gle to retain the prisoner. The defendant was convicted. A fact can be proved by circumstantial evidence as well as by direct proof. Gaming is one of those offenses which ordinarily must be proved by circumstantial evidence, if at all; and so well is the taste of some of our African citizens for petty gambling known that a nocturnal gathering in a secluded spot where the tableau is presented of several negroes seated or squatted around a quilt on which are cards and money raises a violent suspicion of guilt against any one of the number who may be in proximity to the quilt, the cards, or the money. But the law does not authorize conviction upon suspicion, no matter how violent, nor relax the rule laid in section 984 of the Penal Code of 1895 for the mere reason that gambling is detestable, that gamblers should be punished, and that proof of guilt is hard to obtain. The same rule applies to gaming as to all other offenses. "To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused." Circumstances which authorize a mere conjecture of guilt are not sufficient to warrant a conviction, and the evidence, when entirely circumstantial, should connect the defendant with the criminal act. The only facts positively proved in this case were that the defendant was present where gambling was going on, and that he ran when accosted to the accompaniment of a pistol. True, one of the witnesses for the state testified that: "All of them seemed to be engaged in a game of cards. The cards had been dealt around, and all of the men looked like had cards, either in his hands or in front of him on the quilt, and most, if not all, had money in front of them." But, upon cross-examination, the same witness testified, as did the only other witness for the state, in effect: "I cannot swear positively that the defendant had cards in his hands or money in front of him, or that he was actually playing and betting in the game." The witness' entire knowledge with reference to the defendant's connection with the game, if he had any, is summed up in the statement following: That "he saw the others in a circle around the quilt." The gratuitous statement that he appeared to be engaged in the game was only an expression of opinion on the part of the witness prejudicial to the defendant, and not proper evidence to be considered by the jury. As pointed out in *Mims v. State* (Ga. App.) 58 S. E. 499, the word "seem" may be opinionative or positive according to the context.

Admitting that gambling was going on in the hallway and that the defendant was present, it seems to us that the defendant should have been connected with the gambling in some way, that the state should have proved, not that others had cards, but that this defendant handled some card in the

game, not that others had money, but that this defendant had some interest, present or prospective, in some portion, at least, of the money seen by the officers. While the main witness for the state testified that they all seemed to be engaged in the game, he positively declined to swear that "the defendant had cards in his hand or money in front of him." If the witness did not pretend to know these facts, how could the jury know them? And, if the jury did not know at least this much, how could they infer participation and guilty presence?

Nor do we think the circumstances of flight, under the facts disclosed in the record, adds any very great weight to the evidence of guilt. Proof of flight is at best only equivocal evidence and subject to explanation. We think this defendant's flight, whether he was guilty or innocent, is easily explained when we consider the fact that the gathering (whether this defendant was one of the illegal participants or not) was suddenly surprised by an unexpected visitor who had noiselessly reached the top of the stairway, shouted for attention, and presented to their astonished eyes a gleaming revolver. Had the defendant been ever so innocent, it would have been hard for him to resist the contagious impulse, which overwhelmed those who were guilty, to fly because they fled. In *Harmon v. State*, 120 Ga. 197, 47 S. E. 547, it was held that "evidence that the defendant and three others were lying on the ground in a secluded spot with money before them, that each had cards in his hands, and that, upon being discovered, all attempted to escape, was sufficient to sustain a verdict that the defendant was playing and betting at a game played with cards for money." And it has been decided by this court in *Hicks v. State*, 1 Ga. App. 722, 57 S. E. 958, following the decision in *Pacetti v. State*, 82 Ga. 297, 7 S. E. 967, that inculpatory facts will authorize convictions of gaming. But in all cases the facts must be connected with the defendant. If this defendant had been shown to have been in possession of cards, as was shown in the *Harmon Case*, or the keeper of the room embellished with gaming devices and accessories, as shown in the *Pacetti and Hicks Cases*, the verdict of guilty would have been authorized. But mere presence or flight to avoid arrest, or both together, are not inconsistent with innocence.

Judgment reversed.

(2 Ga. App. 516)

GEORGIA SOUTHERN & FLORIDA RY.  
CO. v. GREER. (No. 349.)

(Court of Appeals of Georgia. Oct. 8, 1907.)  
1. CARRIERS—FREIGHT SHIPMENT—LIMITING LIABILITY.

Where a shipper signs a contract limiting the liability of the common carrier, said contract reciting that it was made in consideration of a reduced rate of freight, such recital



is prima facie true, and the burden is upon the shipper to prove the contrary. The burden was not successfully carried in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 724.]

## 2. SAME—LIVE STOCK SHIPMENT.

A carrier of live stock can, by special contract, be released from liability for injuries to such stock arising from named causes, and can as to these, and all other incidents of transportation, by such contract stipulate liability only in the event of damages and loss by the gross negligence of its servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 934.]

## 3. SAME—PRESUMPTION OF NEGLIGENCE.

Even where there was a special contract shown limiting the liability of the carrier of live stock where the plaintiff proved that the stock was lost or injured while in the possession of the carrier, the law would raise a presumption of negligence against the carrier, which must be rebutted by proof showing the exercise of that degree of diligence required by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 957.]

## 4. SAME—EVIDENCE.

Where it appears that the cars in which the stock was carried were suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, and that there was no fault or negligence in any respect on the part of the carrier in handling the stock or in the running and management of the train, and the exercise by the servants of the carrier of that degree of care demanded by the terms of its contract and required by the nature of the stock, any presumption of negligence would be fully rebutted, and the carrier would not be liable for loss or damage to the stock while in transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 960.]

## 5. SAME—INJURY TO STOCK.

The evidence in this case clearly showed that the death of the stock was due to the negligent manner in which it was loaded by the shipper. The verdict against the carrier must be set aside, as without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Turner County;  
W. N. Spence, Judge.

Action by W. A. Greer against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hall & Hall and R. C. Jordan, for plaintiff in error. H. C. McKenzie, T. R. Perry, and J. H. Tipton, for defendant in error.

HILL, C. J. This was a suit for \$90, the alleged value of nine head of cattle which the defendant undertook to transport for the plaintiff from Dakota, Ga., to Cleveland, Fla. The specific allegations were that the plaintiff delivered to the defendant, a common carrier, at Dakota, Ga., 200 head of cattle, in good order, to be transported to Cleveland, Fla.; that, when said cattle arrived at the point of destination, there were only 191, and that 9 had been lost or destroyed while in the possession of the defendant, and they were worth at the point of destination in the market \$10 a head. There is no allegation of any specific negligence by the carrier, but

only the general allegation of negligence. The defendant answered, denying all the material allegations of the petition. The jury found a verdict in favor of the plaintiff for the full amount, and defendant's motion for a new trial was overruled. The evidence for the plaintiff, briefly stated, made the following case: The 200 head of cattle were delivered to the defendant by the plaintiff at Dakota under a through bill of lading issued by the defendant covering the shipment of said cattle from said point of delivery to Cleveland, Fla., and, when the cattle arrived at Cleveland, Fla., there were 191 delivered to the consignee. The plaintiff relied for a recovery upon the presumption of liability which arises against the carrier under the statute of this state. Civ. Code 1895, § 2264. In cases of loss, the presumption of law is against the common carrier, and no excuse avails him, unless such loss was occasioned by the act of God, or the public enemy of the state. The defendant introduced in evidence a live-stock contract of shipment entered into between it and the plaintiff, whereby the plaintiff agreed to release the defendant from liability in case of loss or injury to the stock by reason of a number of named causes, to wit, "in consequence of overloading, heat, suffocation, fright, viciousness, and from all other damages incidental to railroad transportation which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railway, having the stock in charge, and the owner or shipper is to look to the company on whose line damage occurred for compensation for such damage." It was recited in this contract that the consideration therefor to the plaintiff was a reduced rate of freight. The plaintiff admitted the execution of this contract by him, but stated that he had not asked for a reduced rate and had received none. Besides the explicit recitals in the contract signed by the plaintiff that the rate of freight was a reduced rate, there was written in said contract the letters, "Rel," which meant that the contract was a release shipment. These letters were also written across the bill of lading issued the plaintiff by the defendant, which indicated that it was a release bill of lading, and in all such contracts, according to the evidence, there is a material difference in the rate charged, being less than when the shipment is made at the carrier's risk. The plaintiff further testified that he had been shipping cattle for 10 or 12 years and always under the release contract similar to the one he signed in the present case.

1. When a shipper signs a contract containing stipulations limiting the liability of the carrier, and reciting that such limitation was made because of a reduced rate of freight, the burden is upon him to show that the consideration therefor and therein recited was not true, and that, as matter of fact,

he had received no consideration for such limitation. This burden was not successfully carried by the plaintiff in this case; but the evidence clearly established the making by him of this special contract in question and the giving of a reduced rate of freight as the consideration for said contract.

2. The special contract was therefore valid under the laws of this state, and the plaintiff was bound by its terms. Civ. Code 1895, § 2276; *Cooper v. R. & G. R. Co.*, 110 Ga. 662, 36 S. E. 240; *Georgia R. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81.

3. But the rule of presumption against the carrier, notwithstanding said special contract, still arose, and the burden was upon the company to rebut this presumption; but the contract diminished the onerous character of this burden, for under its terms the carrier was required to exercise only slight diligence, and was only liable for gross negligence. *Columbus R. Co. v. Kennedy*, 78 Ga. 653, 3 S. E. 267; *Cooper v. R. & G. R. Co.*, 110 Ga. 663, 36 S. E. 240.

4. As before stated, the plaintiff did not show by his evidence any specific negligence against the defendant, but only relied upon the presumption against the carrier. Did the defendant, under the evidence in this case, meet and overcome this presumption up to the degree of diligence required of it under the terms of the special contract? Under the special contract, the railroad company was only liable for the gross negligence of its servants in connection with said shipment. The evidence introduced by the defendant was, in our opinion, entirely sufficient to rebut the presumption of negligence. It appeared from this evidence that the cars in which the stock were transported were suitable for the purpose; that the track was in good condition; that the equipment and appliances of the train were adequate; that there was no collision, no sudden jerking of the cars, and no delay in transportation; and that the agents of the carrier exercised all proper care in handling the stock. In addition to this evidence, which certainly largely tended to relieve the carrier of the presumption of negligence, the facts further presented by a very large preponderance of the testimony at least show a cause for the loss of the cattle in the carelessness of the plaintiff himself. The cattle at the point of shipment were loaded on the cars by the shipper; he being responsible for the manner in which the loading was done. The cars into which the cattle were loaded were 42 feet long. In one car there were crowded 56 head, and in another 57 head, and in the third 87 head of cattle. The shipper said that this was, considering the size and condition of the cattle, not overcrowded. The testimony of his witnesses did not fully support this statement, and the overwhelming testimony of the defendant's witnesses was that the cattle were greatly overcrowded on these three cars. Besides this evidence, the physical condition

of the cattle when the train reached Valdosta, Ga., showed much suffering, apparently from suffocation, due to the crowded condition of the cars, and when the train reached Jasper, Fla., this physical condition induced the agents of the company, in order to relieve the cattle, to unload two of the cars and re-load the cattle into three cars.

5. We think that the conclusion is irresistible from all the evidence in this case that the death of the cattle for which suit was brought could only have been reasonably attributed to the manner in which they were loaded, and that the defendant fully exercised, in connection with the transportation of the cattle, that degree of care which the terms of his contract with the plaintiff required. The learned judge of the trial court submitted the issues made by the pleadings and evidence fairly, fully, and aptly to the jury. We are constrained to believe that the verdict was based upon the idea that the defendant had not rebutted the presumption of liability against it under the general law, and that the special contract, limiting such liability and which was clearly proved, was not considered by them. Even under the general law, certain exceptions have grown up in favor of common carriers in the case of live-stock carriage, arising from the nature of the property transported. *Cooper v. Railroad Co.*, supra; 5 Amer. & Eng. Enc. of L. (2d Ed.) 443. The cattle that died in this case while in transportation had no physical marks indicating injuries resulting from any violence. The evidence showed that the servants of the carrier exercised that degree of care which the nature of the property required, and, if the facts did not in our opinion point out as the cause of the death physical injury due to overcrowding by the shipper, the only rational theory under the evidence would be that they died from some natural disease superinduced and aggravated by the crowded condition, and not from any want of vigilance and care by the servants of the defendant.

We think the verdict should be set aside, because without any evidence to support it. Judgment reversed.

(2 Ga. App. 521)

**BOWEN v. E. A. WAXELBAUM & BRO.**  
(No. 404.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

1. CONTRACTS—FRAUD—ELEMENTS—INJURY.

Fraud in the promisor, without injury to the promisee, is not sufficient to invalidate a contract, and constitutes no defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 424.]

2. BILLS AND NOTES—FRAUD.

A debtor who gives his note to a creditor for a valid subsisting debt, induced to do so by certain statements of the creditor, cannot set up as a defense to said note that such statements were false and fraudulent, without also alleging and proving injury and damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 233.]

### 3. ACCORD AND SATISFACTION—EXECUTION—NECESSITY.

"An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debtor, or some other new consideration."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, §§ 60-65.]

### 4. EVIDENCE—PAROL EVIDENCE CONTRADICTING WRITTEN INSTRUMENT—NOTE.

Parol evidence being inadmissible to add to, take from, or vary a written contract, an answer to a suit on a promissory note that the payee at the time the note was executed verbally promised to take less than the face of the note in payment thereof constituted no defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2048.]

### 5. TRIAL—DIRECTION OF VERDICT.

The pleas having been properly stricken, except as to attorney's fees, there was no error in directing a verdict for the plaintiffs for principal and interest of the note, and submitting the issue relating to attorney's fees to the jury. The verdict on this issue was fully supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by E. A. Waxelbaum & Bro. against M. J. Bowen. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Deal and Fred T. Lanier, for plaintiff in error. Johnston & Cone and Harde-man & Jones, for defendant in error.

HILL, C. J. This was a suit on a promissory note made by the defendant under seal and payable to the order of the plaintiffs.

The defendant filed the following answer: "(1) Defendant admits the execution of the note sued on, and that plaintiff is the legal owner and holder of the same. (2) Defendant alleges that on June 19, 1905, there was held at Savannah, Ga., a meeting of defendant's creditors; that plaintiff was present at said meeting, and at that time defendant owed plaintiff \$202 on an open account. Defendant shows that at the date of said meeting he was insolvent; that at said meeting he made his creditors a proposition to pay 50 cents on the dollar in full settlement of what he owed them, and advised said creditors that, unless some compromise as that was made, that he, defendant, would be forced into a court of bankruptcy. (3) Defendant showed that in consideration of his not going into bankruptcy, and the further consideration of his insolvency, that plaintiff agreed to accept \$101 in settlement of the \$202 which defendant then owed plaintiff. (4) Defendant shows that, after the above terms had been agreed upon between him and plaintiff, that plaintiff told defendant that he would fill out a note for \$202, and desired defendant to sign said note, but that immediately upon his signing the same that he, plaintiff, would turn over said note to J. W. Olliff for defendant. Plaintiff claimed that he would

abide by his former agreement to take \$101 in settlement of his former claim; but said that he only wanted the note to show what amount had been compromised, and that he would then and there deliver said note to the defendant or to J. W. Olliff for defendant. (5) Defendant, relying on the statement of the plaintiff that he would turn said note over to J. W. Olliff, signed said note. (6) Defendant shows that after he signed the note sued on that plaintiff, in violation of his contract, refused to deliver to defendant or to J. W. Olliff said note, or to accept \$101 in settlement of his claim as he agreed to do before, and at the time of signing the same. (7) Defendant alleges that said note was procured by fraud; that the deceptions used and the misrepresentations made were used and made for the purpose of cheating defendant, and that the same deceived, misled, and actually defrauded defendant; that he would not have signed said note except upon the agreement of plaintiff to accept the \$101 in settlement of what defendant owed plaintiff, and his agreement to deliver said note to defendant then and there. (8) Defendant shows that, at the time said note was signed, he was ready to perform his part of the contract with plaintiff; that he was ready then to pay plaintiff the \$101 in settlement of plaintiff's claim against defendant, that he offered to pay plaintiff said \$101 before the filing of this suit, and that he now tenders the \$101 into court."

Defendant amended this plea by adding thereto the following: "Defendant shows that the note sued on was gotten possession of by the plaintiffs through fraud, and the signing of the note was induced by the fraud of the plaintiffs, said fraud consisting as follows: The plaintiff told defendant to sign the note for the full amount of the account for \$202, and that the plaintiffs would deliver the note for defendant to J. W. Olliff and accept 50 per cent. of the same in settlement of the note. Defendant shows that the omission to recite in the note the fact that it would be settled for 50 per cent. of its face value was due to the fraud of the plaintiffs as above set out. Defendant shows that at the time said note was executed he was only due the plaintiffs \$101, and would not have executed the note but for the fraud of the plaintiff as heretofore set out, to wit, that he would turn the note over to J. W. Olliff for defendant, and accept \$101 in settlement of same." Defendant also amended by denying the allegation of paragraph 4 of the plaintiffs, relative to the claim of attorney's fees, and says that the notice required by law before suit for attorney's fees, contracted to be paid in notes, was not given.

On the trial of the case the plaintiffs demurred to the plea and answer, except as to paragraph 4 and as to the paragraph in reference to attorney's fees, and the court sustained the demurrer, and struck all said pleas and answer, and error is assigned to

this judgment of the court. The court thereupon directed a verdict for the plaintiffs for the principal and interest sued for, and submitted to the jury the issue of fact made relating to attorney's fees, which issue of fact the jury found in favor of the plaintiffs. The defendant also filed a motion for a new trial, alleging error in the judgment of the court in sustaining the demurrer filed to his answer and pleas, and in directing a verdict for the plaintiffs, and on the general grounds, which motion was overruled, and defendant excepted.

1. The defendant's plea is that the note is void because fraudulently obtained, and it charges the fraud to consist in certain promises made by the plaintiffs to induce him to give the note. The plea admits that at the time he gave the note he owed the plaintiff on account the exact amount of the note, and the plea fails to show how the defendant was injured or damaged by his written promise to pay what he in fact owed. The defendant was under no duty to execute the note, but he was under a duty to pay the debt, and, unless his written promise deprived him of some legal right, or in some way injured him, he has no right to complain. He does not allege how the giving of the note injured or damaged him. Admitting that the plaintiffs did make the promises set out in the plea, they constituted no fraud in any legal or equitable sense. A sufficient defense cannot be predicated upon fraud, unless such fraud results in some injury. Both fraud and injury must exist to invalidate a written contract. The principle of *damnum absque injuria* applies. *Austell v. Rice*, 5 Ga. 472; *Strickland v. Parlin & Orendorf Company*, 118 Ga. 213 (4), 44 S. E. 997.

2. The facts alleged in the answer are not sufficient to show accord and satisfaction. Most favorably considered for the defendant, these facts simply showed a promise or agreement by his creditor to accept an amount less than his debt. This agreement was not executed by the payment of the money, or the giving of additional security or some other new consideration. Civ. Code 1895, § 3735.

3. The answer was also in direct conflict with the elemental principle of law that the terms of a written contract cannot be varied by a contemporaneous parol agreement. The note was for \$202; and an alleged agreement with the plaintiffs to accept less could not be shown. Civ. Code 1895, § 3675 (1); *Patterson v. Ramspeck*, 81 Ga. 808, 10 S. E. 390.

4. After the plea was stricken, the case was undefended except as to the issue relating to the attorneys' fees. The court thereupon properly directed a verdict in favor of the plaintiffs for the principal and interest of the note, and submitted to the jury the issue as to the attorney's fees. The verdict in favor of the plaintiff on this issue is fully supported by the evidence.

Judgment affirmed.

(2 Ga. App. 530)

**U. S. HIRSCH & CO. v. DOZIER LUMBER CO. (No. 372.)**

(Court of Appeals of Georgia. Oct. 3, 1907.)

**1. NEW TRIAL—PROCEEDINGS TO PROCURE BRIEF OF EVIDENCE.**

The brief of the evidence in this case is not a compliance with the mandatory requirements of sections 5484 and 5488 of the Civil Code of 1895. There is apparently an attempt to abbreviate the oral testimony from the stenographic report, but many "immaterial questions and answers and parts thereof" are not stricken. The documentary testimony, consisting of statements of accounts and numerous letters between the parties, is given in full, with no attempt to brief the same. *Hathcock v. McGouirk*, 119 Ga. 973, 47 S. E. 563; *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420; *George v. State*, 123 Ga. 504, 51 S. E. 504; *Smith v. State*, 118 Ga. 83, 44 S. E. 827; and numerous decisions by the Supreme Court.

**2. SAME.**

The trend of legislation in this state is to insure the hearing of cases by reviewing courts on the merits; but the statutory requirements that in motions for new trial there "shall be a condensed and succinct brief of the material portions of the oral testimony" and "the substance of all material portions of documentary evidence" have never been modified.

**3. WRIT OF ERROR—BRIEF OF EVIDENCE—COMPLIANCE WITH STATUTE—NECESSITY.**

A compliance with the statute as to a brief of the evidence is an essential condition precedent to the determination of any assignment of error depending on a consideration of the evidence. *Bowe v. Gress Lumber Co.*, 86 Ga. 18, 12 S. E. 177; *Jones v. State*, 125 Ga. 49, 53 S. E. 583; 13 Enc. Dig. Ga. Rep. (Michie) 240.

**4. SAME.**

Proper briefs of evidence, restricted to an elucidation of the issues involved and pertinent to the errors assigned, are of incalculable benefit in securing correct decisions, and in affording relief to overworked courts. This much the statute demands, and the courts have the right to require, of counsel.

**5. SAME—DETERMINATION AND DISPOSITION OF CAUSE—AFFIRMANCE.**

No question being presented for decision which can be determined without reference to the evidence, the judgment of the court refusing a new trial must be affirmed.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action between C. S. Hirsch & Co. and the Dozier Lumber Company. From the judgment, Hirsch & Co. bring error. Affirmed.

Osborne & Lawrence, for plaintiffs in error. Geo. W. Owens, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 455)

**WEAVER v. DAVIS et al. (Nos. 288, 289.)**

(Court of Appeals of Georgia. May 16, 1907.)

**LIMITATION OF ACTIONS—EXCEPTIONS—ABSENCE FROM STATE.**

As a general principle, statutes of limitation are subject to no exceptions, unless such exceptions be expressed.

(a) Notwithstanding this general rule, the courts will imply judicial exceptions from "invincible necessity," where it is legally impossible for the plaintiff to sue within the time limited.

(b) The absence or the removal of the defend-

ant from the state is a statutory, and not a judicial, exception.

(c) The limitation statute of March 16, 1869 (Laws 1869, p. 133), wherein all causes of action which accrued prior to June 1, 1865, were required to be sued prior to January 1, 1870, contained no exception saving from its operation suits against defendants who had removed beyond the limits of the state, and no such exception can be implied as to actions falling within its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 13, 440.]

Russell, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Actions by Julia Davis and others against J. S. Weaver. Judgment for defendant in the county court was reversed on certiorari, and defendant brings error. Reversed.

Cornwell & Gunn, Greene F. Johnson, and J. D. Kilpatrick, for plaintiff in error. Rogers & Knox, for defendant in error.

POWELL, J. On February 5, 1862, Weaver executed his two promissory notes, payable to Nancy Weaver or bearer, due 12 months after date, for \$175 each. The notes afterwards became the property of the plaintiffs. In 1866 Weaver left the state of Georgia, and went to the state of Texas, and has never returned to reside in this state. In 1905 Weaver became entitled, by will, to a legacy of the value of some \$3,000 in the hands of an executor in this state; and the plaintiffs sued out an attachment and garnishment. The declaration in attachment set out the facts stated above. The defendant resisted the action, by demurrer, asserting that the cause of action having accrued prior to June 1, 1865, the same became barred on January 1, 1870, by virtue of the fourth section of the limitation statute of March 16, 1869. Laws 1869, p. 133. The county judge sustained the demurrer. The plaintiffs brought certiorari. In the superior court the certiorari was sustained, and the judgment of the county court reversed. To this judgment of the superior court the defendant excepted, and brings error to this court.

The statute of March 16, 1869, was drastic in terms. It was broad and sweeping. In substance, it provided that all suits upon causes of action which accrued prior to June 1, 1865, should be brought by January 1, 1870, and not thereafter. No exceptions were made, save only cases against certain fiduciaries for fraudulent conduct. No reference was made in the act to any of the ordinary exceptions to the running of limitation appearing then, as now, in the Code. It is contended by the plaintiff in error that it was not the intention of the Legislature to repeal, or to render unavailing, the provision then existing in the Code and now contained in Civ. Code 1895, § 3783, viz.: "If the defendant in any of the cases here-

in named shall remove from the state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." At first blush, this view seemed to us to be tenable, but, after a thorough examination of the decisions which have been rendered in relation to this act (and the Supreme Court had the statute before them for consideration very frequently during the decade immediately following its passage), we have reached the conclusion that the county judge was correct, and that the statute is subject to no exceptions other than those contained therein, save only that class of exceptions applicable from necessity to all limitation laws and known as "judicial exceptions." His honor, Samuel H. Sibley, judge of the county court of Greene county, presided at the trial of the cause, and filed with his judgment sustaining the demurrer an opinion. This eminent young jurist has gone into the question so carefully, and has collated and distinguished the authorities so well, that we are content to incorporate his opinion herein, with only a few additional remarks. Judge Sibley's opinion is as follows.

"The note sued upon is not under seal, is dated February 5, 1862, and is due one year thereafter. In February, 1863, limitation began to run, until suspended by the Legislature of 1864. In 1866 the defendant removed to Texas, and has since resided there. Under the act of 1855 and the Code provisions since, this removal suspended the statute of limitation, even after the repeal of the suspending statutes passed during the war; and made an attachment of the debtor's effects in this state possible at any time prior to the expiration of the limitation period after his return to reside in this state. *Whitman v. McClure*, 51 Ga. 590. The attachment in this case, though sued out 45 years after the maturity of the debt and the accrual of the cause of action thereon, would be in time, unless barred by the provision of the act of 1869. That act, stated generally, provides that actions not barred in March, 1869, on notes maturing prior to June 1, 1865, should be brought by January 1, 1870, or the right of the party plaintiff, and all right of action for its enforcement, should be forever barred. In its last section the act provides that causes of action accruing since June 1, 1865, should be 'controlled and governed by the limitation laws as set forth in the revised code of Georgia.' It does not appear in the pleadings whether at all times since the removal of the defendant from the state he has had property here capable of attachment; nor is that question material. The note is the cause of action, even where the special remedy by attachment is pursued; and it must be concluded that this is an action on a note 'accruing prior to June 1, 1865,' and within the provisions of the act of 1869, and

not within the 'limitation laws as set forth in the Code.'

"Is the act of 1869 a statute whose only purpose was to make a uniform and short period of limitation, equal to 9 months and 15 days, for the classes of action dealt with by it, in substitution of the varying and longer periods named in the Code, leaving all other provisions of the limitation laws, and especially the 'exceptions and disabilities,' applicable to this new period so prescribed? Or was it intended to be, for the classes of actions covered by it, generally described as 'ante bellum claims,' the exhaustive and only limitation law, without other exceptions than stated in its face? As an original proposition, I think the latter was its purpose; that it was intended to meet a situation unprecedented, and to compose and set at rest all contention dating beyond that period, that saw not only political, but financial revolution, that had altered all conditions and disturbed all calculations, removed from life probably nine tenths both of parties and witnesses to disputes, and made imperative a complete readjustment of all business affairs—that it was intended to be as near a statute of bankruptcy as the state could enact. Constitutional considerations, however, have made this purpose not free from embarrassment, and have produced interpretations of the statute by our Supreme Court, perhaps not free from contradiction. In *Hobbs v. Cody*, 45 Ga. 478, it was held that a ward arriving at majority in September, 1869, was not barred in August, 1870, from suing her guardian for her estate, received in 1860. This case has been cited in *Lake v. Hardee*, 57 Ga. 459, 467, as authority for the proposition that the act of 1869 did not run during a plaintiff's minority. It really ruled that the plaintiff's right of action against her guardian did not accrue until maturity gave her the right to demand possession of her estate. It has been pointed out, too, that the suit was for the estate as it was in 1869, and not for a devastavit prior to June, 1865, and so not within the act of 1869. *Jordan v. Ticknor*, 62 Ga. 129. Compare *Windsor v. Bell*, 61 Ga. 671 (2).

"In *Adams v. Davis*, 47 Ga. 339, the question was whether a suit, validly begun within the period named by the act of 1869, could be renewed within six months of its dismissal after January 1, 1870, by reason of the exception to that effect found in section 2881 of the Code of 1868. That section is in title 7, c. 9, art. 9 of that Code, which article is entitled, 'Limitations of actions on contracts.' The article is subdivided into three sections: 'Periods of Limitations,' 'Exceptions and Disabilities,' and 'New Promise.' Section 2881 is one of the paragraphs of the second section named. The question was squarely made whether the act of 1869 merely substituted the first of these sections as to the period of limitation, or whether it was as to the actions covered by it the sole law on the sub-

ject of limitation. A majority of the court reached the latter conclusion, on reasoning that would eliminate the whole of the statutory provisions contained in the second and third sections of the article of the Code in question. This conclusion was followed by the same majority in the cases of *Macon R. R. v. Bass*, and *McConnell v. Fain*, 52 Ga. 13, and affirmed by a full court in *Goss v. Roberts*, 54 Ga. 494. The reasoning is repeated and enforced, and the conclusion followed again in *Reese v. Tollerson*, 70 Ga. 443. Meanwhile, in *Seminary v. Atwood*, 50 Ga. 382, the question arose whether the 12 months' exemption from suit of the debtor's administrator was an excuse for not suing by January 1, 1870, but it was not decided. In this case attention is given to the constitutional phase involved, as to giving a plaintiff a reasonable time to assert his right against the debtor. At the previous term in the case of *George v. Gardner*, 49 Ga. 441, it had been held that the 9 months and 15 days allowed by the act was, in ordinary cases, reasonable, and that the statute was constitutional. In *Simmons v. Moseley*, 55 Ga. 35, where the maker of a note due before June, 1865, had moved to Texas and died, a suit against a Georgia administrator who became subject to suit was held barred. It was stated that the case was within 'the letter of the statute'—that is, the suit had not been filed by January 1, 1870—and it was further stated that, if there was an implied exception because of the death and want of representation of the debtor, the spirit of the statute would still bar it. [The suit was not brought until more than 9 months and 15 days after the judicial exception brought about by the death of the debtor had ended.] In *Jordan v. Ticknor*, 62 Ga. 123, it was stated that, section 2875 of the Code of 1868 (section 2926 of the Code of 1873) being one of the 'exceptions and disabilities' referred to above, its provisions saved a minor from the operation of the act of 1869 during his minority, being unrepealed by that act. The suit was nevertheless held barred. In both of these cases it was held that the act barred the suit. The recognition of exceptions and disabilities therefore, did not in any way alter the result reached and the judgment rendered, and the expressions of opinion in that respect might be treated as obiter. In the former case the removal to Texas did not figure at all in the case. The debtor was dead before 1865. In *Edwards v. Ross*, 58 Ga. 147, lunacy and nonresidence of the debtor existed, but it is not even asserted that they would have tolled the act of 1869. In this, as in other cases, however, 9 months and 15 days had elapsed since the removal of impediment to suit, and the suit was held in any case to be barred. It will therefore be seen that there has been no judicial opinion, even obiter, expressed to the effect that removal from the state of the debtor would save a claim from this act. \* \* \*

"The recognition of exceptions in favor of infants and unrepresented estates, and the exemption of administrators from suit for 12 months, has been obiter, except in the case of *Lake v. Hardee*, 57 Ga. 460 (6). It was held there, in the headnote, that the cause of action 'did not accrue until majority or the appointment of a guardian.' This language, whether good law or not, would not amount to a holding that all the exceptions and disabilities of the Code applied to the act of 1869, nor even that that in reference to minors applied; but it was the simple construction of the word 'accruing' in the act. The expression in the opinion that the act of 1869 did not run against minors, for which *Hobbs v. Cody*, 45 Ga. 478, is cited as authority, is utterly unjustified by the case cited, which did not involve a liability to which the act was applicable at all. See *Jordan v. Ticknor*, 62 Ga. 129. But, if the cases in 55 Ga. 35, 57 Ga. 460, and 62 Ga. 123, *supra*, are authority that the exceptions of the Code there dealt with were of force as against the act of 1869, and therefore the exception as to nonresidence is by analogy to be held of force, it must be replied that it has with greater positiveness been held that the exception as to renewal in six months was not of force; and the same analogy would exclude the exception as to removal from the state. The latter point having been ruled by a unanimous court in *Goss v. Roberts*, 54 Ga. 494, and that decision never having been reviewed or overruled, any conflict in the principle of that decision and that of the other decisions referred to must result in adherence to the earlier ruling.

"The constitutional requirement that a limitation statute should give a plaintiff a reasonable time to enforce his right might necessitate the recognition of some exceptions to the requirement that suits should be commenced by January 1, 1870. This seems to have influenced the court in some of the expressions recognizing such exceptions. There was no such reason for giving a plaintiff a second chance under the renewal exception; and it was denied. It may be equally said that, in the case of removal from the state, naturally and logically the action follows the debtor to his new home. Georgia is under no constitutional or other obligation to afford any remedy against the removed debtor in her courts. The remedy here by attachment might constitutionally be abolished altogether. To refuse to preserve the right to sue a removed debtor, as against the ordinary statute of limitations, in ordinary circumstances, was never considered an anomaly, either in England or in Georgia. *Bishop v. Sanford*, 15 Ga. 1. In the extraordinary circumstances engendered by the war, there was certainly no constitu-

tional or other legal necessity or propriety in recognizing such an exception to the limitations prescribed. There is less hardship in requiring the creditor to follow his debtor to his new residence to enforce his debt than in requiring the debtor to answer nearly a half century afterwards, when even the common law would presume payment in 20 years. The act of 1869 was pre-eminently intended as a 'statute of repose.' Its object was not only to protect defendants from their ancient misfortunes, but also, as a matter of public policy, to protect our courts from controversies over these old, uncertain, perhaps inequitable demands of other days. If the want of a defendant to be proceeded against in Georgia is to hold off the act of 1869, there is no reason why 50 years hence an administrator upon some estate of a long-deceased nonresident debtor might not be appointed, and the property administered to such claims. There being no authority to the contrary, and no constitutional difficulty to be encountered, I conclude that a plaintiff, himself under no disability, and having in March, 1869, an unimpeded right to sue his debtor resident in another state in the courts of that state, lost his remedies in the Georgia courts by a failure to enforce his debt by action taken prior to January 1, 1870."

We will only add that it is a general rule that limitation laws are subject to no exceptions, unless expressly provided. Notwithstanding this rule, a limited class of exceptions not provided by statute, but arising out of invincible necessity, are universally recognized. 19 Am. & Eng. Enc. Law (2d Ed.) 212 et seq. Exceptions of this latter class arise where such a state of affairs exists as to render it legally impossible for the plaintiff to sue within the time limited. Of this class are those cases wherein the plaintiff is prevented from exercising his remedy by a paramount power, as injunction or other process of a court, direct or indirect legislative action, the death of either of the parties, the abolition of a city's charter (as to suits by its creditors), the existence of a state of war, nonexistence of a court wherein the suit may be brought. Absence of the defendant from the state or beyond the seas has never been regarded, either at common law or in American jurisprudence, as such an exception. An examination of the authorities cited by the defendant in error will show that, while the Supreme Court in these cases recognized the judicial exceptions as applicable to the statute of 1869, it has never, except in certain mere statements, obiter, recognized any other exceptions.

Judgment reversed.

RUSSELL, J., dissents.

(2 Ga. App. 493)

DE LOACH MILL MFG. CO. v. TUTWEIL-  
ER COAL, COKE & IRON CO. (No. 16.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

**1. SALES—WARRANTIES—EXPRESS WARRANTY—STATEMENTS CONSTITUTING WARRANTY—EXCLUSION OF IMPLIED WARRANTIES.**

An express warranty may be created as a part of a contract of sale by the use of such terms of description of the article sold as preclude any danger of mistaking or confusing that article with any other. An express warranty is exclusive of all warranties arising by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 727-730, 760.]

**2. SAME—IMPLIED WARRANTY—FITNESS FOR PURPOSE INTENDED.**

Where a manufacturer sells iron as "standard Alabama No. 1 soft and Alabama foundry No. 2 pig iron," and the purchaser relies upon the description, there is an express warranty only that the articles sold shall be equal to the description. There is no implied warranty in such case that the brands of iron thus purchased shall be reasonably suited for any particular purpose. The description in the invoice by which the iron was bought and sold is equivalent to an express warranty that the goods purchased are what they are described to be, and it is immaterial whether the purchaser knew the purpose for which the buyer intended to use the iron, or whether, in fact, the iron was suitable for the purpose intended by the buyer, provided the seller furnished the article described; the buyer in such case having preferred an express warranty to those implied by law in the absence of express warranty.

**3. ERROR, WRIT OF—REVIEW—DISCRETION OF COURT—RECEPTION OF EVIDENCE—EXPERIMENTS.**

The admission of evidence of experiments is largely in the discretion of the trial court, and this discretion, unless manifestly abused, will not be controlled. For evidence of experiments to be admissible, there must be substantial similarity as to the essential and material facts affecting the comparison. If the comparison be predicated upon substantially different facts, the evidence will not be only irrelevant, but tend to confuse the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3849; vol. 20, Evidence, § 439.]

**4. SALES—WARRANTIES—IMPLIED—WAIVER.**

An implied warranty may be deemed to have been waived where the article or commodity purchased (after full opportunity for examination, discovery of its defects, and rejection) is accepted and used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 818.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Tutweiler Coal, Coke & Iron Company against the De Loach Mill Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. K. Hines and J. K. Jordan, for plaintiff in error. Du Bignon & Alston, for defendant in error.

RUSSELL, J. The bill of exceptions calls for a review of the judgment of the lower court in striking the fourth and fifth paragraphs of the defendant's answer and in refusing a new trial. The paragraphs which

were stricken (exceptions being taken pendente lite) were as follows: "(4) For further plea in this behalf, this defendant says that on February 6, 1904, this defendant purchased from the plaintiff, through its agents and brokers, Rogers, Brown & Co., 125 tons of standard Alabama No. 2 foundry pig iron, at the price of \$10 per ton of 2,240 pounds f. o. b. cars furnace, Birmingham, Ala., and on the same day this defendant purchased from plaintiff, through its said agents and brokers, 125 tons of standard Alabama No. 1 soft pig iron, at the price of \$10.50 per ton, 2,240 pounds, f. o. b. furnace Birmingham, Ala. The amount mentioned in plaintiff's petition was made and contracted by defendant solely for and on account of said iron so sold and to be delivered to it by plaintiff, and without any other consideration therefor. Said goods were purchased by defendant, as plaintiff then well knew, for the purpose of being manufactured by this defendant at the foundry into various castings used by this defendant in machines made and manufactured by it in its factory in the city of Atlanta, and plaintiff, as a part of the contract of sale and consideration of said account, impliedly warranted and represented that said goods were fit, proper, and reasonably suited for such purposes. Defendant accepted and purchased said goods for the purpose of manufacturing the same into castings for machines, so made and manufactured by it at its said factory, trusting in said representations and warranty for plaintiff, as plaintiff well knew. Said iron was not fit for said purpose, and was not reasonably suited therefor, the same being dirty iron and containing too little silicon and too much graphitic carbon, and the said iron has always been and is altogether useless and worthless to this defendant. (5) For further plea in this behalf, this defendant says that it began using said iron in its said foundry in making said castings on or about May 15, 1904. The output of its foundry was 13 tons per diem. The necessary cost and expense to this defendant of making each day's output was \$100. By reason of said iron so sold and delivered by plaintiff to defendant, and so used by it in its foundry in making castings as aforesaid, being dirty, nor fit and reasonably suited for the purpose of being moulded into said castings, the defendant buying said iron from the plaintiff for the said purpose, and the plaintiff well knowing that the defendant purchased it for said purpose, one-third of said output was absolutely worthless and a total waste in the foundry, whereby this defendant sustained a daily loss of \$33.33½ for the period of 30 days, making a total loss to this defendant of \$1,000. This defendant was put to this necessary expense and loss in attempting to use said iron for the purpose aforesaid, and for the purpose for which the same



was bought, and before this defendant knew that the defects in said castings were due to the inferior castings of said iron. Said loss and damage to this defendant arise naturally and according to the usual course of things from the failure of the plaintiff to deliver to this defendant the iron which it purchased from the plaintiff, and was such as the parties contemplated when such contract was made as the probable result of its breach. Said loss and expense in attempting to use said iron and in converting the same into castings was due solely and directly to said breach of plaintiff's contract to furnish to this defendant standard Alabama No. 2 foundry pig iron and standard Alabama No. 1 soft pig iron reasonably suited for the purpose aforesaid, for which this defendant purchased the same. This defendant recoups said loss and damage against the account of the plaintiff sued on in this case."

The effect of the judge's ruling in striking paragraph 4 was a holding that the contract was one of express warranty, and therefore excluded any implied warranty. The fifth paragraph was stricken, because, in the judgment of the court, the defendant's damages, if any, were not to be measured by the rule which defendant was endeavoring to apply, if, indeed, they were not too remote for recovery at all. We have no difficulty in sustaining the judgment of the lower court in striking paragraph 4 of the answer. Alabama iron No. 1 soft, and Alabama No. 2 foundry, are as apt terms of description for two grades of iron, as distinctive and as well understood by those engaged in the iron business—as the different grades of cotton are known by those engaged in the cotton business. If a term is well known as conveying the idea of identity and individuality of characteristics, quality, and use, and is understood by buyer and seller as such (while this understanding is not always necessary) it may import a warranty. Words of description do not always import an express warranty, but they do when (as in the contract in this case) they have reference to an article of property whose features and qualities are so well known to those engaged in the business of producing or selling such article that it cannot be mistaken for any other thing. As we have heretofore remarked in the Crankshaw Case,<sup>1</sup> it is often difficult to determine the line of demarcation between implied conditions and such descriptions as will constitute an express warranty and thereby exclude the warranty implied by law. The determination of the question depends often on the fullness and particularity of the description.

If one contracts for quinine, we have an article whose appearance, taste, and effects identify it and distinguish it from other articles, but an implied warranty would exist that the quinine was reasonably suited for

the purposes intended; but, if I contract for Powers & Weightman's quinine, the express warranty on the part of the seller that the quinine shall be of a particular manufacture or brand excludes any other warranty. In our opinion the rule excluding all implied warranties (where there is any express warranty) is illogical, and sometimes works injustice, but it is the settled rule in this state and nearly all of the states of the Union. In *Johnson v. Latimer*, 71 Ga. 470 (2), the court ruled that "it is only in the absence of an express warranty that resort can be had to an implied warranty, and, where there was an express warranty, the court could refuse to charge on the subject of implied warranty."

If the defendant had purchased 175 tons of iron, the law would have implied that it was merchantable and reasonably suited for all the purposes for which it was intended. Section 3555, Civ. Code 1895. But, when the buyer specified that he wanted standard Alabama No. 1 soft pig iron, and standard Alabama No. 2 foundry pig iron, the seller expressly warranted that the iron to be delivered would be those two grades of iron, and no other, and the presence of the express warranty excluded any implied warranty whatsoever. The very particularity of description created an express warranty. The buyer relied upon his own judgment exclusively as to the purposes to which the particular iron selected was fit, and relieved the seller of any concern or responsibility, except that he should furnish the exact kind and grade of iron selected by the buyer, identified in the manner indicated by the descriptive term used and the custom of the iron trade. *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657. It may be insisted that the fact that in the exercise of the right of choice we have purchased Powers & Weightman's quinine, or No. 2 corn or Alabama No. 2 foundry pig iron, should not relieve the seller from furnishing quinine that will cure or corn that will make good white meal, or iron that will make good castings. The question is: Did we buy an article whose identity was so well established by description that it could not be mistaken for anything else, and were we furnished with that article? Standard Alabama No. 1 soft pig iron and standard Alabama No. 2 foundry pig iron was what the seller contracted to deliver and the purchaser to pay for. Standard Alabama No. 1 soft pig iron is determined by fracture and inspection. The only question, then, that could arise was: Was the iron that the De Loach mills received standard No. 1 and foundry No. 2?

The court was right in striking the fourth paragraph of the answer, and we think the fifth paragraph would go with it; for, even if the damages sought are not too remote, the measure of damages which could be accepted would be the difference between the

contract price of the iron ordered and the market price of the iron delivered when it was delivered at Atlanta.

In view of the defendant's admissions, it is profitless to discuss any of the grounds of error insisted upon in the motion, except those which pertain to the admission or exclusion of evidence which would illustrate the issue as to whether the iron ordered was that purchased. Under the admissions of the defendant, the verdict rendered was inevitable, unless the defendant proved that the iron delivered was not standard Alabama No. 1, and standard Alabama No. 2 foundry, and this it failed to do. The admission to entitle to open and conclude is contained in paragraph 3 of defendant's amended answer, and is as follows: "This defendant admits the purchase of the iron for the recovery of the price of which this suit is brought from the plaintiff at the price set out in said petition, its delivery to this defendant, the making of the account sued on, that the plaintiff is the holder and owner thereof, that said account is past due, and that plaintiff is entitled to recover the amount sued for, unless the defendant makes good its defense set out in said answer."

There was only one question left in the case. Was the iron delivered standard Alabama No. 1 soft pig iron and standard Alabama No. 2 foundry pig iron? The defendant having assumed the burden of proof, unless it showed that the iron delivered was not standard Alabama No. 1 soft pig iron and standard Alabama No. 2 foundry pig iron, the plaintiff was entitled to recover the unpaid balance of the purchase price in full. If the defendant was not furnished the grades of iron it bought, and proved that fact, then it would be entitled to recoup as damages the difference between the market value at the time and place of delivery and the price paid. The defendant failed to show that the iron was not that it bought, and hence the question of damages could not arise.

In the first and second grounds of the amendment to the motion it is insisted that the court erred in refusing to let a witness testify that standard Alabama No. 1 and standard Alabama No. 2 iron had been used in the same way as the iron bought from plaintiff and made good castings, and that the iron bought from defendants did not make good castings. This testimony was addressed to the point in issue, whether the iron delivered was the iron bought, and, had we been presiding, we think we should have allowed the testimony. But we are not prepared to hold that the judge erred in rejecting this testimony of experiment, especially in view of the admission of a prima facie case by the defendant, and the further fact that the defendant had used all of the iron in its business. The admission of evidence of experiment, as held by this court in *Hudson v. Atlanta & West Point R. R. Co.*, 58 S. E.

500, is a matter peculiarly within the discretion of the trial judge, and this discretion will not be interfered with, unless it be apparent that it has been abused.

In our view of this case a discussion of the remaining grounds of the motion would be profitless. The errors assigned would not warrant a new trial. The verdict was right, and should not be set aside. Under the admissions of the defendant, a verdict in favor of the plaintiff was inevitable. The turning point in the case was whether the contract of sale included an express warranty or did not. Upon this subject, see *Henderson Elevator Co. v. Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Miller v. Moore*, 83 Ga. 684 (1), 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Biddle on Warranties*, § 111; *Bradford v. Manly*, 13 Mass. 144, 7 Am. Dec. 122; *Seltz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Borrekens v. Bevan*, 3 Rawle (Pa.) 37, 23 Am. Dec. 85; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595, and citations; *White v. Miller*, 71 N. Y. 129, 27 Am. Rep. 13. And in the well-considered case of *Dounce v. Dow*, 64 N. Y. 411, the facts are practically the same as in this case.

Even if the trial court had been in error in holding that the implied warranty of suitability was excluded by the express warranty, still the judge did not err in refusing a new trial, because all implied warranties could well be deemed to have been waived by the defendant, who, instead of rejecting the iron, used it after full opportunity to examine it and ascertain whether it was merchantable, and suited for the purposes intended or not. *Henderson v. Milling Co.*, supra.

Judgment affirmed.

(145 N. C. 92)

**STRICKLAND et al. v. T. M. PERKINS & CO.**

(Supreme Court of North Carolina. Sept. 25, 1907.)

**APPEAL—REVIEW—CONCLUSIVENESS OF VERDICT—SUFFICIENCY OF EVIDENCE.**

Where there is any evidence to go to the jury, and no error of law appears in the conduct of the case, the judgment below must be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3923.]

Appeal from Superior Court, Franklin County; Cooke, Judge.

Action by D. C. Strickland and others against T. M. Perkins & Co. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. H. Ruffin, F. S. Sprull, and Armistead Jones & Son, for appellant. W. H. Yarborough, Jr., and T. W. Bickett, for appellees.

WALKER, J. The only question in this case is, it seems to us, after a most careful examination of the record, substantially and

essentially one of fact. The learned judge who presided at the trial presented the questions at issue fairly to the jury, giving each party the full benefit of every principle of law applicable to his contention upon the evidence. Let us see if this is not true. The defendant, who is a pork packer, contracted to sell, by and through its agent and broker, W. B. Green, and to deliver to the plaintiffs, 10,000 pounds of dried salt ribs at the price of \$8.20 per 100 pounds, and, in the execution of this contract, defendants actually delivered only 4,013 pounds at or about the time of the purchase. The plaintiffs paid at the time of the purchase the full price of the goods, which was \$820 for the entire quantity agreed to be delivered, and brought this suit to recover the price of the salt ribs which were not delivered and for which he had paid. The defendants allege, and there was evidence tending to show, that they delivered the lot of ribs of 10,000 pounds to their broker, W. B. Green, and that it was thereafter agreed between him and the plaintiffs that the ribs should be delivered to them at such times and in such quantities as called for, and for this purpose they were stored by the broker in the warehouse. There was also evidence to the contrary; the plaintiffs contending, and introducing evidence to show, that the sale and delivery were to take effect as a completed transaction presently, or at the time of the purchase, and that they never received the goods according to the stipulations of the contract, and, in order to establish their contention, they relied partly upon the testimony of the defendants' witnesses. The court was fair, at least to the defendants, in submitting the case to the jury, giving them the benefit of every conceivable ground upon which they could defeat the plaintiffs' claim or recovery upon the evidence, and presenting the case to the jury in its every phase. It appears to us, upon a close scrutiny of the testimony, that even the evidence introduced by the defendants was sufficient to sustain the verdict of the jury, as we have discovered some expressions which fell from their witnesses and which give countenance to the plaintiffs' theory. It is a familiar rule in an appellate court that where there is any evidence to go to the jury, and no error in law appears in the conduct of the case, there is nothing to do but affirm the judgment below, so far as the application of the law to the case is concerned. We have not been able to see any departure from the principles applicable to cases of this kind, although we have diligently searched for the same, as counsel were earnest and zealous in arguing that error had been committed. The matter resolves itself into this: That the defendants have, upon the evidence, and with a charge which presented their contention to the jury in the most favorable aspect for them, failed to convince the triors of the fact that their view of the case was the correct one, and that is all.

There is no question of subsequent ap-

proval or ratification of an agent's acts in this case, and no serious question is presented as to the extent or limitation of the powers of a special agent within the rules laid down in *Brittain v. Westhall*, 135 N. C. 496, 47 S. E. 616, and *Id.*, 137 N. C. 34, 49 S. E. 54, and *Briggs v. Insurance Co.*, 88 N. C. 143, which cases were cited by the defendants at the bar. Those cases and *Williams v. Whiting*, 92 N. C. 691, which was also relied on, have no application, as the jury were against the defendants upon the bald question of fact, as to whether the sale of the ribs was made directly and immediately to the plaintiffs through the broker or whether, after the defendants had sold them to the plaintiffs, there was a new agreement between the broker and themselves as to the delivery.

No good purpose would be served by examining the various objections to evidence in detail. When they are properly analyzed and considered, with reference to the material matters at issue in the case and the main question involved, they will be found to be clearly without merit; and, indeed, we think they are in themselves untenable when viewed separate and apart from the real issue.

The case was ably and ingeniously argued by the counsel for the defendants and they presented many plausible reasons for their contentions, but, when the case is stripped of all superfluous matter, it will be found that there is no real ground upon which they can succeed.

We affirm the judgment of the court below.  
No error.

(145 N. C. 37)

# ALLEN-FLEMING CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Sept. 11, 1907.)

## 1. JUSTICES OF THE PEACE—ISSUING PROCESS TO ANOTHER COUNTY—FOREIGN CORPORATIONS.

Notwithstanding Revisal 1905, § 1447, providing that no process shall be issued by a justice to any county other than his own, unless a bona fide defendant reside in and a bona fide defendant reside out of, his county, he may, though no defendant reside in the county, acquire jurisdiction of a foreign corporation by service on it outside his county, pursuant to section 1448, providing that when an action, of which a justice has jurisdiction, is brought against a foreign corporation, required to maintain a process agent in the state, the summons, certified in a prescribed manner, to be under the hand of such justice, may be issued to the sheriff of the county in which such process agent resides, and such sheriff shall serve it.

## 2. CORPORATIONS—ACTIONS AGAINST—VENUE.

By express provision of Revisal 1905, § 423, an action against a foreign corporation may be brought in the county in which the cause of action arose, or where plaintiff resides.

## 3. RAILROAD—ACTIONS AGAINST—VENUE.

By express provision of Revisal 1905, § 424, any action against a railroad may be tried in the county where the cause of action arose, or where plaintiff then resided.

#### 4. VENUE—ACTION BROUGHT IN WRONG COUNTY—REMEDY—DISMISSAL.

A defendant may not have an action dismissed because brought in the wrong county; Revisal 1905, § 423, providing that, though it is so brought, it may be tried therein, unless defendant demand a change of venue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 28, 30.]

#### 5. SAME—PARTIES ENTITLED TO COMPLAIN.

A defendant as to whom the venue of an action is proper cannot complain as to the propriety of the venue as to another defendant.

#### 6. PARTIES—MISJOINDER—MODE OF OBJECTION.

A defendant can object to misjoinder of another defendant only by demurrer to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 150.]

#### 7. CARRIERS—CONNECTING CARRIERS—DELAY IN TRANSPORTATION—BURDEN OF PROOF.

Where, in the course of carriage of goods by connecting carriers, there is an unreasonable delay, the initial carrier has the burden of showing delivery, without such delay, to the next carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 835, 842.]

#### 8. JUSTICES OF THE PEACE—APPEARANCE—SPECIAL APPEARANCE.

Defendant does not make a special appearance in a justice court by merely making such appearance before the commissioner in taking a deposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 266-268.]

#### 9. APPEARANCE—GENERAL APPEARANCE—APPEAL.

Defendant, not having theretofore entered a special appearance to the justice court where the action was brought, could not, after judgment there, enter a special appearance by his appeal to the superior court.

Appeal from Superior Court, Warren County; Lyon, Judge.

Action by the Allen-Fleming Company against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Busbee & Son and W. B. Rodman, for appellant. T. M. Pittman and J. H. Kerr, for appellee.

CLARK, C. J. This was an action begun before a justice of the peace in Warren county against the Southern Railroad Company and Seaboard Air Line Railroad Company for the penalty for unreasonable delay in transportation of goods shipped January 22, 1907, from High Point, N. C., on line of former road, and delivered to the consignee, the plaintiff, at Warrenton, a station on the last-named road February 14, 1907. The summons was issued March 9, 1907, returnable April 8, 1907, and duly served in the manner required by law upon both companies. The summons, duly certified as required by Revisal 1905, § 1448, was served upon the agent of the Southern Railroad Company at Henderson, in Vance county, March 11, 1907. The Southern Railroad Company made no appearance at the trial before the justice, though it did appear at the taking of a deposition, and entered a special appearance as to

that. At the trial before the justice June 3, 1907, judgment was rendered in favor of the Seaboard Air Line Railroad Company and against the Southern Railroad Company. On June 8th, the latter served notice of appeal as follows: "The Southern Railroad Company enters a special appearance and appeals from the judgment," on the ground, recited in the notice, that "the justice had no jurisdiction of the action, that the parties were improperly joined, and that the judgment was contrary to the law and the facts." On the trial in the superior court a jury was waived, and the judge found the facts that the shipment was received by Southern Railroad at High Point January 22, 1907, that it arrived at Durham, a station on that road, January 25, 1907, but was not delivered to the Seaboard Air Line Railroad Company at that point till February 7, 1907, which the court held an unreasonable delay of nine days, and rendered judgment accordingly. The Southern Railroad Company, the sole defendant in the superior court, moved to dismiss for want of jurisdiction, because the Seaboard Air Line Railroad was not a resident of Warren county, the court having held that it had its principal office in Raleigh, Wake county, and that the Southern was a nonresident corporation, without any part of its track, or any local agent, in Warren county, and that the justice could not issue this summons to another county. It made a motion to dismiss on above ground, and asked to enter a special appearance. The court refused the motion to dismiss, and entered judgment for \$32.50.

The sole point presented is that the justice did not acquire jurisdiction by service of summons upon the defendant, the Southern Railroad Company, in another county.

The defendant relies upon Revisal 1905, § 1447: "No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county." But this does not apply to foreign corporations. The next section (1448) is entitled, "Service on foreign corporations," and provides: "Wherever any action, of which a justice of the peace has jurisdiction, shall be brought against a foreign corporation, which corporation is required to maintain a process agent in this state, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof"; and there is a further provision that, in such cases, the summons must be served 20 days before return day. This section governs this case. The justice had jurisdiction of the

cause of action, the certificate was made by the clerk as required, service was made upon an agent of Southern Railroad Company, a foreign corporation, at Henderson, upon whom process against it could be served, and service was made more than 20 days before the return day of the summons. Section 1448 is specially provided for service of justice's summons upon a foreign corporation beyond the limits of the justice's county. Service of summons upon the Seaboard Air Line Railroad Company was properly made on its local agent (Revisal 1905, § 440), and there is no provision for removal to another county in an action before a justice of the peace. Besides, it made no objection; neither does the venue of an action against it concern the Southern Railroad Company.

In the superior court it is true that an action for a penalty must ordinarily be tried in a county where some part of the cause of action arose. Revisal 1905, § 420. But, as to foreign corporations, the action can be brought either in such county, or in any county in which it does business or has property or where plaintiff resides. Revisal 1905, § 423. The penalty if an action is brought in the wrong county is not dismissal, but removal to the proper county if asked in apt time. Revisal 1905, § 425. And there is this express proviso in section 424 that, "In all actions against railroads, the action may be tried either in the county where the cause of action arose, or in an adjoining county, or where plaintiff then resided." Whether joining the Seaboard Air Line Railroad Company made it merely a superfluous party, of which the Southern Railroad Company could not complain, or was ground for a demurrer requiring, if made, a division of the action, or was a proper joinder, making it a matter of proof as to which defendant was liable for the delay, is a matter not before us, as there was no demurrer, and, besides, the Seaboard Air Line Railroad Company was eliminated from the action by the justice's judgment. Certainly the Southern Railway being the initial railroad, the burden is upon it to show delivery without unreasonable delay to the next company. *Meredith v. Railroad*, 137 N. C. 478, 50 S. E. 1. As to the Southern Railroad Company, a justice of the peace in Warren could issue summons against it in favor of a plaintiff in that county (it being a foreign corporation) to be served in another county, under the express terms of section 1448, whose requirements were strictly complied with.

The appellant could have appeared specially before the justice and have moved to dismiss, and, if that were denied, it could have preserved its point by an exception filed and proceeded to trial. But, after being duly served with process, it entered no special appearance in that court. Its special appearance before the commissioner in taking the deposition merely saved a point which it could have made, but did not, at the trial before the jus-

tice. It could not appeal by a special appearance. This has been fully discussed and distinctly held. *Clark v. Mfg. Co.*, 110 N. C. 111, 14 S. E. 518; *Finlayson v. Accident Ass'n*, 109 N. C. 198, 13 S. E. 739; *Gulford Co. v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861; *Plemmons v. Improvement Co.*, 108 N. C. 614, 13 S. E. 188; and, more recently, *Scott v. Life Ass'n*, 137 N. C. 515, 50 S. E. 221. The defendant, not having taken the exception in the justice's court, could not, after judgment there, enter a special appearance by his appeal nor in the superior court. In deference to the request of defendant's counsel, however, we have passed upon the exception to service of summons, as if made in apt time.

Affirmed.

(145 N. C. 85)

MIDYETTE v. GRUBBS et al.

(Supreme Court of North Carolina. Sept. 25, 1907.)

1. PROPERTY—REALTY—STANDING TIMBER.

Standing timber is realty, and a contract for the sale thereof affects realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 4.]

2. LOGS AND LOGGING—SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

A conveyance of standing timber to be removed within a definite time creates a qualified fee in such timber, with the condition that the title to the timber not cut within the time shall revert to the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 6-11.]

3. DESCENT AND DISTRIBUTION—REAL PROPERTY—STANDING TIMBER.

A conveyance of standing timber to be removed within a specified time creates a determinable fee in realty which passes on the death of the grantee to his heirs, subject to the dower interest of the widow; both being determinable as to timber not removed within the time specified.

Appeal from Superior Court, Northampton County; Lyon, Judge.

Action by one Midyette, administrator of W. F. Grubbs, deceased, against one Grubbs and another. From a judgment for plaintiff, defendants appeal. Reversed.

It appears: That W. F. Grubbs died on or about June, 1907, intestate, and domiciled in said county of Northampton. The plaintiff is the duly qualified and acting administrator of his estate, and the defendants are his widow and child and only heir at law. That at the time of his death said W. F. Grubbs was the owner of certain standing timber, in said county, under and by virtue of three deeds, bearing date in the year 1905, which conveyed to said intestate all the timber, except the oak, standing and growing upon certain lands, properly described and bounded, which would measure 10 inches across the stump at the time of cutting, etc., to him and his heirs and assigns forever, with the right to enter on said lands, build tram roads, etc., and cut and remove said timber at any time, as to the first deed, within eight

years from the date, with privilege of two more on certain specified conditions; and, as to the second and third deeds, "at any time within five years from the date with the privilege of five more, on certain specified conditions." That the intestate having died holding the interest conveyed to him by said instruments and before the time limited for the removal of the timber had expired, the plaintiff, his duly qualified administrator, brought this action against his widow and heir at law, claiming that the timber standing and growing on said land embraced in the deeds was personal property, and his claim was resisted by the widow and heir at law, claiming that same was realty and as such belonged to defendants. The court being of the opinion that, under and by virtue of the terms of the three deeds, the timber then standing and growing upon the lands therein described was personalty, gave judgment for plaintiff, and defendants excepted and appealed.

Winborne & Lawrence and S. J. Calvert, for appellants. Peebles & Harris and W. C. Bowen, for appellee.

HOKE, J. (after stating the facts as above). There are courts which hold that in deeds and contracts for the sale of standing timber which evidently contemplate an immediate severance of the timber, or severance within a reasonable time, but conferring no beneficial interest in the soil for the purpose of further growth, such timber shall be considered as personalty, and the validity and effect of contracts concerning it shall be construed and treated in most respects as affecting that kind of property. 2 Page on Contracts, p. 992; Ewell on Fixtures (2d Ed.) 45; Id. 12; McClintock's Appeal, 71 Pa. 365; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Marshall v. Green, 1 C. P. Div. 39. In Page on Contracts, pp. 991, 992, the author, after saying that growing trees other than trees in a nursery are held in most jurisdictions to be realty, and that a contract for the sale of growing timber as such to be removed by the vendee is within the clause of the statute of frauds, requiring contracts concerning land to be in writing, states the doctrine maintained by the courts above referred to as follows: "Some American courts follow the rule which, after much vacillation, was finally adopted by the English courts, that if the parties in contracting contemplate the sale of growing trees solely as chattels, and do not intend that they shall remain attached to the realty for an indefinite or unreasonable time, and do not intend that they shall derive a benefit from allowing them to remain attached to the realty, the contract is not within this clause of the statute. Some jurisdictions hold that, if the contract for the sale of growing trees contemplates an immediate severance of them from the soil, they are to be treated as personalty, and hence not within this clause of the statute;

while, if they are to be removed at the discretion of the vendee, they are realty, and within the statute." And the English rule to which reference is made is thus stated by Lord Coleridge, in the case of Marshall v. Green, 1 C. P. Div. 39, and, quoting from Sergeant Williams in Saunders' Reports of the case of Duppa v. Mayo: "The principle of these decisions appears to be this: That, wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but, where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods." Some of the decisions have gone so far as to hold that, although the time limited for the removal of the timber may have expired, if the vendee afterwards enters and cuts and removes the timber, the vendor might sue him and recover damages for breaking the close by action in the nature of trespass quare clausum fregit, but he could not recover the value of the timber.

The views announced in these decisions have not prevailed with us. On the contrary, this court has uniformly held that standing or growing timber is realty, and that deeds and contracts concerning it are governed by the laws applicable to that kind of property. Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; Whitted v. Smith, 47 N. C. 39; Ward v. Gay, 137 N. C. 397, 49 S. E. 884. In some of our former decisions there was intimation given that in contracts of this kind, where the growing timber was absolutely conveyed and the time of removal was limited to a definite number of years, that the effect of such a contract was to create a lease, but in Bunch's Case, 134 N. C. 116, 46 S. E. 24, decided intimation was given that such a construction of the contract was not the correct one, and in Hawkins' Case, 139 N. C. 160, 51 S. E. 852, the court decided that such an instrument was not a lease, but "conveyed a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed." Hawkins' Case, 139 N. C. 162, 51 S. E. 853. This case has been approved in several recent decisions of the court. Mining Co. v. Cotton Mills, 143 N. C. 307, 55 S. E. 700; Ives v. Railroad, 142 N. C. 131, 55 S. E. 74; Lumber Co. v. Corey, 140 N. C. 466, 53 S. E. 300. As said by Walker, J., in Ives' Case: "It may now be taken as settled that growing trees are a part of the realty; and a contract to sell and convey them or any interest in or concerning them must be reduced to writing." These authorities also clearly establish that, on the expiration of the time

stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor, and both positions are upheld in numerous and well-considered cases in other jurisdictions. *MacComber v. Railroad*, 108 Mich. 491, 66 N. W. 376; *Williams v. Flood*, 63 Mich. 493, 30 N. W. 93; *Lumber Co. v. Hines*, 93 Minn. 505, 101 N. W. 959; *Strasson v. Montgomery*, 32 Wis. 52. Our decisions then having established the principle that standing timber is realty, "as much a part of the realty as the soil itself" (*Douglas, J., in Lumber Co. v. Hines, supra*); second, that deeds and contracts concerning it must be construed as effecting realty; and, further, that in instruments conveying the growing timber, to be removed within a definite time, the title to all timber not severed within the time shall revert to the vendor—we hold that the deeds now under consideration, which conveyed to the intestate, to him and his heirs and assigns, all the standing timber on certain described tracts of land which should measure 10 inches when cut, and to be removed within 10 years, created an estate in such timber in fee, not pure and simple, but qualified and debased by the provision that in case the trees should not be severed within the time the title to same should revert, and rendered the estate a qualified or base or determinable fee. Some anomaly may be suggested as a result of this position, more apparent, however, than real, and arising chiefly from the fact that the property changed its nature by the act of final and complete appropriation. But these difficulties are inherent from the nature of the property, and would exist in any construction that would be placed on such a contract, and we think that the instrument should be construed as of the time when it takes effect and the interest is created, and in reference to the property in its then condition, and so construing these deeds, they convey a determinable fee in realty.

It is objected that the estate could in no event be a fee, in that it lacks one of the essential requirements of such estates that it might by possibility endure forever, whereas this estate must at any event terminate within 10 years. Such a possibility is generally held to be an essential feature of an estate in fee, and, if applied in strictness to these instruments, the requirement might be met by the fact that the interest conveyed includes the right of absolute appropriation by severance. But such a requirement, by authority, has not been universally held to be essential. Thus my Lord Coke in *Liford's Case*, 2 Coke's Report, p. 91, says: "A man may have an estate in lands as long as a tree shall grow, because a man may have an inheritance in the tree itself." Dr. Minor, speaking of this and like estates, makes this comment: "By parity of reason,

leaving authority out of view, it would seem that an estate limited to A. and his heirs, until Z. should return from abroad, was of like character with that just described, and that both might be properly denominated descendible freeholds; the estate, in the case last stated, passing to the heirs of A., if he dies before Z. returns, and, upon Z.'s death without returning, ceasing altogether. So, in like manner, a limitation to A. and his heirs, as long as a tree shall grow, would seem to be not properly an estate of inheritance, not even a base fee (since it cannot by possibility continue forever), but only a descendible freehold, inuring after A.'s death to his heirs, by the effect of the special limitation, until the tree falls, and then coming to its appointed end. Adverse authorities, however, are too numerous and strong to admit of this construction, and both the cases supposed are to be deemed estates of inheritance; that is, according to the ordinary nomenclature, bare or qualified fees, and according to the more rigorous analysis of Plowden and Preston, determinable fees. *Walsingham's Case*, 2 Plowd. 557; 1 Prest. Est. 432, 441"; 2 Minor's Institutes, pp. 98, 99. The estate, then, conveyed by these deeds, being in the nature of determinable fee in realty, is subject to the laws of devolution and transfer applicable to such estates, and, on the death of the intestate, it follows that the estate passed to his heirs, subject to the dower interest of his widow; the dower, however, partaking of the same infirmity which attaches to the estate from which it is derived. Pearson's Lectures, p. 130; 2 Minor's Institutes, p. 87-129; Hopkins on Real Property, p. 88. In reference to such estates this last author says: "Dower attaches to determinable estates, but is defeated by the happenings of the event which terminates the estate. If this occurs before the husband's death, dower never becomes consummate; if after his death, the enjoyment of the land assigned as dower is out off."

This statement of the doctrine must be taken with the limitation in this state that it only applies when the estate of the first taker is determined by an event entirely collateral, and does not apply to a fee determinable on the death of the first taker, and passing a substitute estate by way of executory devise. 4 Kent, Commentaries, p. 49, where the author says: "So dower will be defeated by the operation of collateral limitations as in the case of an estate to a man and his heirs so long as a tree shall stand, and in case of a grant of land to A. and his heirs till the building of St. Paul's Church is finished and the contingency happens. Whether dower will be defeated by a collateral limitation by way of shifting use or executory devise is hitherto an unsettled and vexed question, largely discussed in the book." The query here suggested by the learned author has been resolved with us in

favor of the widow's dower in a decision of much learning by Ashe, J., in the case of Pollard v. Slaughter, 92 N. C. 72, 53 Am. Rep. 402, and other courts of the highest authority have taken the same view. Northcutt v. Whipp, 51 Ky. 65-73. We are referred to Ewell on Fixtures (2d Ed.) p. 45, note 12, where a large number of cases are cited as tending to show that these deeds present a case of constructive severance and the interest created should be considered as personalty. The author here classes growing trees with fixtures, and lays down the doctrine as claimed. A reference to these authorities, however, will show that they refer chiefly to fixtures proper, or to growing crops, about which there has been great diversity in the decisions arising in many instances from different statutory regulations, or they were cases in jurisdiction which hold, as those referred to in the outset, that contracts for sale of standing timber, when an immediate severance is contemplated, create an interest in personalty, a principle which we have endeavored to show has not obtained with us. Even in jurisdictions where this doctrine prevails, it is held not to obtain when a beneficial interest in the soil is conferred for the purpose of future growth; and in the present case the contract passes the trees to be taken off in 10 years and measuring 10 inches when cut, thus passing a beneficial use of the soil for the purposes of growth, so that, in any event, the estate created by these deeds would be held to be realty.

We are of opinion, therefore, and so hold, that on the death of the intestate the estate created by the deeds devolved upon his heir subject to the right of dower in his widow, both interests determinable as to all timber not removed within the time specified in the deeds. There is error.

Judgment reversed.

(145 N. C. 95)

DAVIS v. ATLANTIC COAST LINE R. CO.  
(Supreme Court of North Carolina. Sept. 25, 1907.)

#### 1. DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action by a fireman for personal injuries sustained in being compelled to jump from his engine because of an impending collision, defendant's negligence was admitted, and the only issue was as to the quantum of damages. *Held*, that plaintiff could show the speed of the engine at the time of jumping, to prove the violence of his fall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 479.]

#### 2. SAME.

In an action by a fireman for personal injuries sustained in being compelled to jump from his engine because of an impending collision, defendant's negligence was admitted, and the only issue was as to the damages. *Held*, that plaintiff could show the badly wrecked condition of the engine, that a number of cars were derailed, and the general effect of the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 479.]

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by James Davis against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Day, Bell & Dunn and Murray Allen, for appellant. Daniel, Travis & Kitchin, for appellee.

BROWN, J. The defendant admitted the negligence and its liability for damages, and excepted to the introduction of certain evidence admitted by the court upon that issue.

It appears that the plaintiff was a fireman on defendant's engine and sustained personal injuries, claimed to be of a severe character, in being compelled to jump from his engine immediately preceding a collision with another train on defendant's track. The court permitted plaintiff to prove the speed at which the engine was running when the plaintiff jumped, to which defendant excepted. We can see no error in this, as it tends to prove that the plaintiff was compelled to jump under circumstances calculated to cause injury. It tended to corroborate the testimony of the plaintiff that he had in reality suffered an injury, and was not feigning one. The defendant offered evidence of two physicians, to the effect that they had examined the plaintiff, and that in their opinion he had sustained no substantial injury, and was feigning. The exact question was decided in New York by the City Court of Brooklyn before Clement, C. J., and Osborne, J., in 1891. *Gillespie v. Railroad* (City Ct.) 16 N. Y. Supp. 850. The court says: "We think that the plaintiff had the right to prove the speed of the car. Such proof would have a tendency to show the violence of the fall of the plaintiff." His honor permitted evidence to be given over defendant's objection as to the effect of and circumstances attending the collision. It is contended by defendant's counsel that as this happened after plaintiff jumped, and after his alleged injury was sustained, the evidence should have been rejected as immaterial, and as calculated to unduly excite and prejudice the jury against the defendant. It is unnecessary for us to attempt to lay down here any rule governing trial judges as to how far it is proper to go into the circumstances attending an injury when the issue of damage is solely before the court. We agree with the learned counsel for the defendant that it would be highly improper to admit immaterial and unnecessary evidence, which can throw no possible light upon the issue before the jury, and which is calculated only to prejudice and inflame their minds.

We find no evidence in the record, and none has been pointed out to us in brief or argument, calculated to prejudice a jury, or to make them swerve from the path of impartial duty. No one was killed, maimed,



or hurt, so far as we can discover, except the plaintiff. The objectionable evidence offered related solely to the condition of the engine from which plaintiff had jumped after the collision had taken place, and also tended to prove that 17 cars were derailed, and that 1 box car was on top of the engine as it lay in the ditch. The collision occurred because plaintiff's engine ran into and telescoped a freight train which was preceding it on the track. The conditions given in evidence were such as any one would be likely to suppose would naturally result from such a collision, and had no tendency to unduly inflame the jury or divert their minds from the only issue they were called upon to decide. In this particular case the badly wrecked engine tended to prove that it was running at a rapid speed, and, as we have said before, that tended to corroborate the plaintiff as to the bona fides of his injury by proving that he was compelled, in order to save his life, to jump under circumstances calculated to produce great bodily harm. As the exceptions to the charge are not presented in the brief and were not pressed on the argument, we will not discuss them, except to say that they cannot be sustained.

No error.

(145 N. C. 98)

#### SMITH v. NORFOLK & S. R. CO.

(Supreme Court of North Carolina. Sept. 25, 1907.)

#### 1. APPEAL—REVIEW—IMMATERIAL QUESTIONS.

Where a nonsuit should have been entered, exceptions to the instructions and to the refusal to give requested instructions will not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035-4036.]

#### 2. COLLISION—ACTIONS AT LAW—RULES OF ADMIRALTY COURTS—APPLICABILITY.

The rules of the courts of admiralty do not apply to an action at law in the state courts for negligence causing injury to a vessel in a collision with another, but the rights of the parties are ascertained by the rules controlling actions for negligence wherein contributory negligence is available as a defense.

#### 3. NEGLIGENCE—PROXIMATE CAUSE.

Where both parties were negligent, the liability is placed on the one whose negligence was the proximate cause of the injury, and, when fixed on one, it is because of his negligence and the absence of any intervening negligence on the part of the other contributing to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 74, 75.]

#### 4. SAME.

Where an injury is the result of a sequence of negligent acts, and the original wrong becomes injurious only in consequence of the intervention of some distinct wrongful act, the injury is imputed to the last wrong as the proximate cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 76-79.]

#### 5. COLLISION—ACTIONS AT LAW—NEGLIGENCE—EVIDENCE.

In an action at law for injuries to one steamer in a collision with another in a fog, held, that the proximate cause of the injury was the act of the officer of plaintiff's vessel in changing

her course, though defendant's vessel was going faster than the rules allowed, under the act of Congress providing that every vessel shall in a fog go at a moderate speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 170-174.]

#### 6. SAME—"MODERATE SPEED."

The phrase "moderate speed," in the act of Congress providing that every vessel shall in a fog go at a "moderate speed," having careful regard to the existing circumstances, means that a vessel should, when in a fog, so reduce her speed that other vessels free from blame may not be injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 170.]

Appeal from Superior Court, Craven County; Neal, Judge.

Action by M. B. Smith against the Norfolk & Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to enter judgment of dismissal.

Eliminating nautical terms and irrelevant matter, the plaintiff's evidence makes the following case: The steamer Neuse, belonging to, and controlled by, the defendant company, on the morning of August 25, 1905, while making her regular run up the Neuse river to New Bern, encountered a fog near Otter Creek buoy. Her course was N. N. W. She was in shoal water. Her regular speed was from 12 to 13 miles an hour. Shoal water speed, at which she was running at the time she entered the fog, was 8 miles an hour. She was properly equipped, and in charge of a competent officer, who had been her first officer 14 years. When the steamer entered the fog, he was, and at all times remained, in his proper position, in charge of the watch in the pilot house, at the window on the port side of the wheel, blowing fog signals. He began blowing before he entered the fog. The steamer *Blanche*, belonging to plaintiff, on the same morning, at about 6:10 o'clock, left New Bern, going down the Neuse river to points on Bay river. Her course was S. S. E.  $\frac{1}{4}$ . She was properly equipped and in charge of a competent officer. She encountered the fog, and began to blow her fog signal. Her regular speed was seven miles an hour, which she maintained after entering the fog, until she reached Johnson's Point, when she took a southeast course. The officers in charge of the two steamers each heard the fog signals of the other. The officer of the *Blanche* says that his usual course is to pass Johnson's Point and keep on down to Hampton Shoal Buoy; the course being S. S. E.  $\frac{1}{4}$ . On the day of the collision, before passing Johnson's Point, he "starboarded and went to the port"—thought it would put her out of the way of the Neuse and get off shoal water. The change had the effect to put the *Blanche* across the course of the Neuse. The plaintiff introduced the officer of the Neuse, who testified: That he heard the fog signals of the *Blanche* on his port bow. That he was going N. N. W. That the signals of the *Blanche* were always on the

port bow. "The first glimpse of her I could not understand. Her position ranged across our bow, and I blew four short whistles, and struck four bells to back, blowing the whistles with the right and striking the bells with the left hand. \* \* \* Q. Up to the time she appeared her whistles always sounded on your port bow? A. Yes, sir. Q. If she had been proceeding on a proper course, down the channel, what would that course have been? A. Going down the main channel about S. S. E." There was plenty of water and plenty of room "for the *Blanche* to have proceeded port to port. \* \* \* Q. If the *Blanche* had fulfilled her duty, will you state whether or not there would have been a collision? A. I don't think there would. There was room for her to have passed on her starboard side. \* \* \* The boat which has the other on her own starboard hand shall keep out of the way, and of the other vessel, to navigate with caution, if necessary, if she thought there was danger of collision. \* \* \* Q. State whether, up to the time you saw the *Blanche* appearing out of the fog and crossing your bow, there was anything in the situation which showed that she was going to attempt to cross your bow. A. No. The whistle sounded on the port bow all the time. Q. Up to the time the *Blanche* appeared in the fog, will you state whether or not there was anything from the sound of the whistle, or the location, which would indicate that there would be any danger in passing, if each vessel was properly navigated? A. No, sir. Q. When was it you first ascertained that there was danger of collision? A. When I sighted her. Q. Was there anything at that time which you could have done to avoid the collision? A. Nothing in my judgment more than I did." After testifying that he was running at 8 miles an hour, being shoal water speed, he was asked: "Had you reduced the speed at all on account of fog? A. No, sir; we never reduce speed. It is done from the engine room." He says that he could not rightly tell how fast he was moving when he struck the *Blanche*; that he should judge about 3 or 3½ miles—reduced speed by backing. "Q. Suppose you had been going up at three miles an hour, and had backed, your boat would have been stopped without sinking the *Blanche*, wouldn't it? A. It is a mathematical calculation." It was in evidence that, when the officer of the *Neuse* first saw the *Blanche*, she was about 50 yards distant from him, about the length of his boat. The defendant introduced no evidence, but moved for judgment of nonsuit. Motion denied, and defendant excepted. The following issues were submitted to the jury: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) If so, did plaintiff by his own negligence contribute to the injury. (3) Notwithstanding the plaintiff's contributory negligence, could the defendant, by the ex-

ercise of the rule of the prudent person, have avoided the injury? The defendant excepted to the third issue. The jury, under the instructions of the court, answered the first issue "Yes." By consent the second issue was answered "Yes." The jury answered the third issue "Yes." There was judgment upon the verdict for \$2,000. Defendant excepted and appealed.

Simmons, Ward & Allen and H. H. Little, for appellant. W. W. Clark, for appellee.

CONNOR, J. (after stating the facts as above). As, in our opinion, the defendant was entitled to judgment of nonsuit upon the motion made at the close of the testimony, it is unnecessary to discuss or pass upon the exceptions to the instructions given, and the refusal to give others requested by defendant. The action being prosecuted in the state courts for alleged negligence, the rules obtaining in courts of admiralty in such cases do not apply. The rights and liabilities of the parties are to be ascertained by resorting to the principles, which control in actions for alleged negligence, wherein contributory negligence is set up as a defense. Fuller, C. J., in *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218, says: "At common law the general rule is that, if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages so caused. In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant was negligent, if it appeared that his own negligence directly contributed to the result complained of." 25 Am. & Eng. Enc. 1025. The motion for judgment of nonsuit involved two propositions: First, that there was no evidence of negligence on the part of the *Neuse*; second, that, if there was negligence, the admitted contributory negligence on the part of the *Blanche* intervened and became the proximate cause of the injury, thus preventing a recovery. This is undoubtedly true, unless the plaintiff can maintain a third proposition—that defendant, having knowledge of plaintiff's negligence, failed to use ordinary care to prevent the injury. Barrows on Neg. 35. "It is sometimes said to be the rule that a plaintiff may recover notwithstanding the fact that his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him." Beach, Cont. Neg. § 54. It being established that defendant was negligent—that is, guilty of a breach of duty—and that plaintiff was also negligent, the law fixed the liability upon the one whose negligence was the proximate cause of the injury. If fixed upon the defendant, it is because of his negligence and the absence of any intervening negli-

gence, on the part of plaintiff, contributing to the injury. Where the injury is the result of a sequence of negligent acts, or omissions, the rule is thus stated by Judge Cooley: "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission of another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was remote." Cooley on Torts, 70, cited with approval in *Clark v. Railroad*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; *Pickett's Case*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am St. Rep. 611.

In *Farmer v. Railroad*, 88 N. C. 564, it is said: "Where an injury results from negligence, and the act of the plaintiff is directly connected and concurrent with that of the defendant, the plaintiff's negligence is the proximate cause of the injury, and will bar his recovery in an action for damages; but, where the negligent act of the plaintiff precedes that of the defendant, it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care." These and other decisions, holding this doctrine, are based upon the case of *Davies v. Mann*, 10 M. & W. (Exch.) 546. In all of the cases the liability is put upon the party whose negligence is the proximate cause of the injury. Upon the undisputed evidence in this case, we think it very doubtful whether there is any evidence of negligence on the part of the officer of the Neuse; but, passing that question, it is clear that the admitted negligence of the *Blanche* was last in order of sequence, and, as the learned counsel properly conceded, contributed to the injury. The answer to the second issue put an end to the controversy. The officer of the Neuse, introduced by plaintiff, says that, before entering into the fog, he blew fog signals and continued to do so until he saw the *Blanche*; that he was on the watch in the pilot house; that his course was N. N. W.; that he heard the fog signals of the *Blanche*; that they were always on the port bow, clearly showing her position; that nothing occurred to indicate that she would change her course or her position, her course being S. S. E.  $\frac{1}{2}$ ; that she had plenty of room to pass, and that the first intimation he had of danger was when, 50 yards distant, he saw her cross his course; that he immediately blew the proper signals, rang the bells, reversed his engine, backed his boat; that he did everything in his power to avoid the collision. Conceding that, at the moment he saw the *Blanche*, he was going faster than the rules allowed, is it not apparent that, but for the erratic course of the *Blanche*, he could and would have proceeded with perfect safety to both boats? The case comes clearly within the principle of *Pickett's Case* and numerous other authorities.

But the learned counsel for plaintiff calls attention to the rules established by Congress to prevent collisions. "Every vessel shall in

a fog go at a moderate speed, having careful regard to the existing circumstances and conditions." He insists that the term "moderate speed" has been defined to be such a speed as will enable the boat to stop within a distance at which he could see another boat. In *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, Judge Brown, after a very exhaustive discussion of the authorities on the subject, says: "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precaution as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." In other words, the steamer should so reduce her speed, when in a fog, that steamers which are free from blame or negligence may not be injured. The learned justice proceeds to say that in a dense fog this rule might require both vessels to come to a standstill. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerage way; the true principle being that they must use due diligence, the standard of which, in the light of the rules, being measured by "existing circumstances and conditions." The distinction between the measure of duty to avoid injury imposed upon a locomotive engineer, passing a public crossing and running on the track where there is no such crossing, is pointed out by Smith, C. J., in *Parker v. Railroad*, 86 N. C. 221. In the former the public have an equal right with the train. The engineer must anticipate that persons will be using the crossing and lower his speed, so that he may have his engine under such control that he can stop before coming in contact with a person on the crossing. Persons using the crossing must, however, use ordinary care to avoid injury. This speed in towns is usually fixed by ordinance, and in many cases its violation is declared to be as matter of law the proximate cause of the injury. It is unnecessary to discuss the distinction made in that class of cases and the one before us. There was nothing in the conditions by which the *Blanche* was surrounded to cause her to change her course. The undisputed evidence is that "she had plenty of room and water" to pass the Neuse in safety. Her officer elected to change the course, the effect of which change was to throw her across the course of the Neuse at a point which rendered it impossible to prevent collision. The Neuse, with a regular speed of 12 miles, was running at the shoal water speed of 8 miles. There is nothing in the evidence showing that her surroundings required any further reduction to prevent injury to a steamer herself free from negligence, or to indicate that the only steamer of whose presence in the river she had any notice was off her course until too late to prevent the injury. Whatever may have been said by this court in regard to "continuing

negligence," the facts in this record do not come within the doctrine of any case wherein that expression is used. Measured by the well-settled principles of the common law, we find no evidence upon which to base the third issue. We are of the opinion that, by a shorter route, the same result would have been reached by granting the motion for judgment of nonsuit. In refusing the motion there was error. Let this be certified to the superior court of Craven, to the end that judgment be entered dismissing the action.

Error.

(145 N. C. 128)

**WILLIAMS v. MUTUAL RESERVE FUND LIFE ASS'N.**

(Supreme Court of North Carolina. Oct. 3, 1907.)

**1. INSURANCE—CONTRACTS—WHAT LAW GOVERNS.**

A policy of a New York corporation on the life of a citizen of North Carolina, which was signed in 1884 in New York, and which stipulates that the place of the contract is New York, is a New York contract, prior to Act 1893, p. 302, c. 2999, § 8 (Revisal 1905, § 4806), providing that contracts of insurance taken within the state shall be subject to the laws thereof.

**2. SAME—FOREIGN CORPORATIONS—REGULATIONS.**

Neither a resident of Virginia who is an assignee of a policy issued by a New York corporation to a citizen of North Carolina, which stipulates that it is a New York contract, nor his cause of action thereon, is within Revisal 1905, § 4747, providing that the appointment by a foreign insurance corporation of the insurance commissioner as attorney shall be irrevocable as long as any liability of the corporation remains outstanding in the state, notwithstanding the right secured to every citizen of any of the states to sue in the courts of another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, § 1573.]

**3. CORPORATIONS—FOREIGN CORPORATIONS—CARRYING ON BUSINESS WITHIN STATE.**

The Legislature has the power to prescribe the terms on which foreign corporations may come into the state, and may pass statutes for the protection of its own citizens doing business with them, as against the objection that such statutes discriminate against nonresidents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2505-2527.]

Appeal from Superior Court, Martin County; Long, Judge.

Action by H. G. Williams, administrator, against the Mutual Reserve Fund Life Association. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss.

On April 19, 1884, defendant, a New York corporation, issued to A. W. Satterthwaite, of Yatesville, Beaufort county, in this state, a policy of insurance upon his life for \$6,000, payable to insured or his legal representatives. The policy contained the usual stipulations in regard to payment of assessments. There is nothing in the policy to indicate at what place the application was made, or where the policy was delivered, other than

the statement of insured's residence. The policy was signed in New York. The tenth clause is as follows: "The entire contract contained in this certificate and said application, taken together, shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulation of said association and the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." On November 27, 1895, the said A. W. Satterthwaite, having paid the assessments to that date, assigned the policy to the plaintiff, a citizen and resident of the state of Virginia, who thereafter paid such assessments as were made on said policy until June 1, 1901, when the defendant company declared the contract of insurance forfeited on account of plaintiff's refusal to pay increased assessments demanded of him. The assessments paid by plaintiff amount to some \$4,000. Plaintiff, on the 7th day of June, 1906, instituted this action in the superior court of Martin county for the purpose of recovering the assessments paid by him, remitting and forgiving all sums in excess of \$1,999.99, etc. Summons was served on James R. Young, Esq., Commissioner of Insurance for the state of North Carolina. Defendant, by its counsel, at June term, 1906, of said court, made a special appearance, and lodged a motion to set aside and vacate the service of summons on the Commissioner of Insurance. The court, upon this motion, found the following facts: On May 19, 1899, defendant company revoked the power of attorney theretofore made to the Commissioner of Insurance. At the date of the policy, at the date of the assignment, and at all times since the plaintiff was and is now a citizen and resident of the state of Virginia. Defendant is a corporation, chartered, organized, and having its principal place of business in New York City. The court denied the motion, and defendant duly excepted. Defendant, thereupon, demurred to the complaint. Demurrer was overruled. Defendant excepted and appealed.

J. W. Hinsdale and Gilliam & Gilliam, for appellant. R. O. Everett, for appellee.

CONNOR, J. (after stating the facts as above). The record presents a number of interesting questions, some of which are difficult of solution. In the view which we take of the appeal, it is unnecessary to discuss or decide them. The appeal must be disposed of upon the defendant's exception to the refusal of his honor, Judge Ward, to set aside the service of summons on the Insurance Commissioner and dismiss the action. It will be noted that, prior to Act 1893, p. 302, c. 299, § 8 (Revisal 1905, § 4806), there was no statute in this state preventing a foreign insurance company and the insured from fixing, by agreement, the place of the contract. By that statute it is provided that "all contracts

of insurance, application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof." That, in the absence of such a statute, the parties may agree upon the place of the contract, is well settled. 22 Am. & Eng. Enc. 1325. Therefore the policy, by its express terms, is made a New York contract. This brings us to the consideration of the effect upon plaintiff's right to bring the defendant into court by serving summons on the Commissioner of Insurance after the revocation of the power of attorney. Act 1899, p. 176, c. 54, § 62, subsec. 3 (Revisal 1905, § 4747), requires every foreign insurance company before it shall be admitted to do business in this state to file in the office of the Insurance Commissioner "an instrument appointing him and his successor its true and lawful attorney, upon whom all lawful process in any action against it may be served," and further providing that "the authority thereof shall continue in force irrevocable as long as any liability of the company remains outstanding in this state."

The defendant, conceding the full force of this provision in the statute, as construed by this court in *Biggs v. Insurance Co.*, 128 N. C. 5, 37 S. E. 955, and *Moore v. Ins. Co.*, 129 N. C. 33, 39 S. E. 637, insists that, as against the plaintiff, a resident and citizen of the state of Virginia, suing upon a New York contract, the limitation upon the power of the company to revoke the power of attorney does not apply. The point has been ruled in accordance with defendant's contention in *Hunter v. Ins. Co.*, 184 N. Y. 136, 76 N. E. 1072. Mr. Justice Hiscock, discussing the language of our statute, says: "Statutes requiring the execution of some such agreement by foreign corporations as is invoked against the defendant here have always been regarded as primarily designed for the protection of the citizens of the state enacting the legislation and who might acquire rights under contracts executed with them, or for their benefit, while they were such citizens." The learned justice, speaking of citizens of other states, says: "They are not of the class for whose protection it was originally executed. They have not acquired any rights upon the faith of it." The contract of insurance being a New York contract, the plaintiff a resident of Virginia, we do not think that he, or his cause of action, comes within either the language or spirit of the portion of the statute which limits the power of the company to revoke its power of attorney. This view is not in conflict with the right secured to every citizen of any of the states to sue in the courts of this state upon any cause of action he may have against defendant, whether a resident of this state or not, provided he finds the defendant in the state and has valid service of process. The Legislature of this state has the undoubted power to prescribe the terms upon which foreign corporations may come

into the state and to pass statutes for the protection of its own citizens doing business with it. This is no discrimination against residents of other states. It is a question of procedure always subject to legislative control, provided it does not violate any constitutional rights of the citizen. Except for the purpose stated in the statute, the defendant had a right, at any time, to withdraw from the state and cancel its power of attorney to the commissioner. Plaintiff is not within the restrictive language of the statute in that respect. The court erred in refusing the motion. This will be certified to the superior court of Martin, to the end that the defendant may have judgment in accordance with its motion, and the action be dismissed.

Reversed.

(78 S. C. 296)

STATE ex rel. LYON, Atty. Gen., v. RIDDOCK et al.

(Supreme Court of South Carolina. Sept. 28, 1907.)

COURTS — SUPREME COURT — ORIGINAL JURISDICTION — SUBJECT-MATTER.

The Supreme Court has original jurisdiction of the subject-matter of a suit by the state on the relation of the Attorney General to restrain persons from using premises as a place for the sale of intoxicating liquors not tested and found pure as provided by law.

Suit by the state, on the relation of J. Fraser Lyon, Attorney General, against E. J. Riddock and another, partners doing business as Riddock & Byrnes, and others. Decree entered as prayed for.

Lyon, Atty. Gen., and De Bruhl, Asst. Atty. Gen., for petitioner. T. Moultrie Mordecai, for respondents.

GARY, A. J. On hearing the complaint and affidavits in the above-stated case, it is ordered that the respondents, E. J. Riddock, William Byrnes, E. W. Blitch, and Charleston Consolidated Railway, Gas & Electric Company, show cause before the Supreme Court at Columbia, S. C., on the 28th day of September, 1907, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not be issued restraining you and each of you from selling or dispensing in any manner alcoholic liquors and beverages not having been tested and found pure and free from poisonous and deleterious matters, as provided by law, upon the property belonging to the Charleston Consolidated Railway, Gas & Electric Company, located on the Isle of Palms, in the county of Charleston, and used as a hotel, pavilion, and general pleasure resort, and commonly known as the "Isle of Palms"; that you also show cause why an injunction should not be issued restraining you from permitting persons to resort to the premises herein described for the purpose of drinking alcoholic liquors or beverages. And it is

further ordered that the said respondents, their agents, and servants be in the meantime restrained and are hereby forbidden to suffer or commit any of said acts until the further order of this court. It is further ordered that the respondents shall in the meantime have the right to apply to me upon giving the Attorney General four days' notice to set aside the restraining portion of this order. It is further ordered that this original order be exhibited to the respondents, and that copies of the petition, affidavits, and of this order be served upon them.

**PER CURIAM.** This cause coming on to be heard, the respondents made a special appearance and motion to dismiss. After hearing argument, it is ordered, adjudged, and decreed by the court that this court has jurisdiction of the subject-matter and parties hereto, and the motion of the respondents is overruled. It having been ordered by the court that the respondents should answer to the rule on the merits, counsel for respondents having stated to the court that under advice of counsel respondents would not answer, the Attorney General then moving for a writ of perpetual injunction against the respondents, now, on motion of the Attorney General, it is ordered that the respondents, E. J. Riddock, Wm. Byrnes, E. W. Blitch, and Charleston Consolidated Railway, Gas & Electric Company, and their officers, agents, servants, successors, and assigns, be, and they are hereby, perpetually restrained and enjoined from using, or permitting to be used, the said premises described in the petition herein, being certain property on the Isle of Palms, in the county of Charleston, in this state, commonly known as the "Isle of Palms," being a hotel and general pleasure resort, and having therein a pavilion and an apartment designated "clubroom," as a place where alcoholic liquors and beverages, not having been tested and found to be pure and free from poisonous and deleterious matters are sold, or dispensed in any manner, and from keeping, using, and maintaining, or permitting to be used, kept or maintained, the said premises above described as a place where persons are permitted to resort for the purpose of drinking alcoholic liquors and beverages. It is further ordered that this original order be exhibited to each of the respondents, and that certified copies thereof be served upon respondents. It is further ordered that a certified copy of this order be filed with the clerk of court of Charleston county.

178 S. C. 178)

**FRANCIS et al. v. FRANCIS et al.**

(Supreme Court of South Carolina. Sept. 17, 1907.)

**1. MORTGAGES—ABSOLUTE CONVEYANCES.**

Whether a conveyance of land with an agreement to reconvey on payment of a debt constitutes a mortgage or a conditional sale

depends largely on whether the debt continued or was discharged by the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 5.]

**2. SAME—CONSTRUCTION.**

An agreement to reconvey land on condition that, if the grantor or his heirs should pay the grantee \$140, with interest at 7 per cent. per annum, with any amount that the grantor might be indebted to the grantee, on or before January 1, 1875, etc., showed the continued existence of a debt to be paid as the condition of reconveyance, and warranted the inference that the deed and agreement to reconvey constituted a mortgage as between the original parties from the time they were executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 108.]

**3. SAME—RECORD—NOTICE.**

Whether a deed, with a contract to reconvey on payment of a debt, constituted a mortgage or was of the nature of a mortgage, it was an instrument required to be recorded, so as to affect rights of subsequent creditors or purchasers, by Civ. Code 1902, § 2456; and, having been duly recorded, subsequent purchasers were charged with notice of the equities of the grantor and his heirs to redeem or compel performance of the contract to reconvey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 393.]

**4. SUBROGATION—MORTGAGEES IN POSSESSION—CONVEYANCE OF LAND.**

Grantees of a mortgage in possession, though affected with record notice of the rights of the mortgagor's heirs to redeem, are subrogated to all the rights of their grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 38.]

**5. SAME—MORTGAGEE IN POSSESSION—RIGHT TO REDEEM.**

Act 1791 provided that no mortgagee should maintain any possessory action for the real estate mortgaged, even after default, provided that nothing therein contained should extend to any suit or action pending, nor when the mortgagor should be out of possession, etc. Held that, where mortgagees took possession after the repeal of the proviso of such act by Act Dec. 18, 1879 (17 St. at Large, p. 19), the fact that the mortgage was executed before such repeal did not affect the right, if any, of the heirs of the mortgagor to redeem.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Clarendon County; D. E. Hydrick, Judge.

Suit by Aaron Francis and others against John Francis and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Wilson & Du Rant, for appellants. Lee & Moise, for respondents.

**JONES, J.** The plaintiffs, as part of the heirs at law of Anthony Francis, deceased, brought this action against the other heirs at law and C. O. Witte, Arthur Lynah, and Edward H. Sparkman for the partition of a certain tract of land, which they allege said Anthony Francis owned at the time of his death, a portion of which is in the possession of the said C. O. Witte, Arthur Lynah, and Edward H. Sparkman, in which they claim some interest as trustees. The defendants C. O. Witte, Arthur Lynah, and Edward H. Sparkman, as trustees, answered, denying the allegations of the complaint, except that they were in

possession, alleged ownership of the premises described in fee simple, pleaded the statute of limitations, and, further answering, set up the defense of purchasers from C. E. Salinas and others for value without notice of any existing equities in favor of the late Anthony Francis, or of his heirs at law, in or to said premises, and that their grantors, C. E. Salinas and others, were likewise purchasers for value without notice of the said existing equities. The pleadings having raised the issue of title, trial was begun before a jury. It appears that the tract of land in question was conveyed to Anthony Francis by deed dated December 5, 1872, and it was conveyed by Francis to Louis Loyns by deed absolute in form, dated December 30, 1873; that the said Francis was in possession until his death in 1876, and his heirs at law until 1883 or 1884, when Louis Loyns went into possession. The land in question was mortgaged by Louis Loyns to A. J. Salinas & Sons January 29, 1891, was sold under foreclosure proceedings to C. Edward Salinas March 7, 1892, and was conveyed by deed of trust dated January 15, 1906, to C. O. Witte, Arthur Lynah, and Edward H. Sparkman, trustees. Plaintiff offered in evidence bond for title by Loyns to Francis, bearing same date as conveyance to Loyns, and sought to show that these papers were intended as a mortgage, and also offered testimony to show admissions by Loyns of payment before he took possession and during the lifetime of Francis. This testimony was received subject to objection, and was afterwards ruled out as incompetent under the pleadings, and this ruling is the basis of the second, third, and fourth exceptions. At the close of plaintiff's testimony defendant's attorney moved for a direction of verdict "on the ground that, the heirs of Anthony Francis having shown title out of their ancestor and traced title into the defendants Witte, Sparkman, and Lynah, they occupied the position of mortgagees in possession and cannot be disturbed, unless it could be shown that the mortgage was paid before the original mortgagee went into possession of the land." The court having held that the declarations of Louis Loyns, said to have been made in 1875, as to payment of the debt due Loyns before possession was taken by him, are not competent or admissible against defendants C. O. Witte, Arthur Lynah, and Edward Sparkman, under the pleadings in this action, concluded there was no competent evidence to submit to the jury, and dismissed the complaint, from which plaintiffs appeal.

The first exception makes the point that the court erred in deciding that defendants Witte, Lynah, and Sparkman occupied the position of mortgagees in possession. The ruling is correct, if the deed of Francis to Loyns and the collateral agreement to reconvey by Loyns to Francis constitute a mortgage, and if Witte, Lynah, and Sparkman are subject to the equities existing between

the original parties. Whether such a transaction is a mortgage or a conditional sale must be determined by the intent of the parties, as clearly established by the attending facts and circumstances. The most general test is whether the debt continued or was discharged by the conveyance. *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388; *Keithly v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; 1 *Jones on Mortgages*, § 267; *Pom. Eq. Jur* § 1195. The agreement to reconvey in this case was upon condition that "if the said Anthony Francis, or his heirs, shall well and truly pay me the above sum of \$140, with interest at 7 per cent. per annum, with any amount that the said Anthony Francis may be indebted to me by open account or otherwise on or before the 1st day of January, 1875, then and in that case to reconvey to him the said tract of land described above." This recital shows the continued existence of a debt to be paid as a condition of reconveyance, and, independent of the parol testimony submitted, warranted the view that the deed and agreement to reconvey constituted a mortgage as between the original parties at the time for their execution. Being a mortgage or in the nature of a mortgage, the instruments were such as are required to be recorded, so as to affect the rights of subsequent creditors or purchasers, under section 2456, vol. 1, Civ. Code 1902; and having been duly recorded, the respondents in a proper case made might be held affected with notice of whatever equity Francis and his heirs at law may have to redeem or compel performance of contract to reconvey, subject, of course, to any proper defense.

Assuming, then, that respondents are in possession affected with notice, they would be subrogated to all the rights of their grantor, Loyns, as mortgagees in possession. Loyns took possession of the land in 1884 or 1885, after the repeal of the proviso of the act of 1791 by statute of December 18, 1879 (17 St. at Large, p. 19), and the fact that the mortgage was executed before said repeal would not operate to prevent the right, if any, of the heirs of Francis to redeem. *Sims v. Steadman*, 62 S. C. 304, 40 S. E. 677. A mortgagee in lawful possession is entitled to retain possession against the mortgagor until it is shown under proper pleadings and proof that the debt has been paid. *Cooke, Adm'r, v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709, and cases cited in note at page 276 of 7 L. R. A.; *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308. The complaint, however, contains no allegations that the papers in question constitute a mortgage, nor that said mortgage had been paid, nor that the conditions of the contract to reconvey had been performed, nor that respondents are in possession with notice of appellants' equity; and the court was not called upon to consider whether any amendment to the complaint could or should be made to this end. The action being for

partition, and under the issue of paramount title in respondents, the appellants having shown lawful possession in respondents, it was not error to dismiss the complaint. *Shiver v. Arthur*, 54 S. C. 194, 32 S. E. 310; *Miller v. Price*, 66 S. C. 85, 44 S. E. 584.

In view of the character of the action as disclosed by the pleadings, it must also follow that no error was committed in excluding the testimony sought to be introduced, and in holding that there was no competent testimony to sustain the action.

The judgment of the circuit court is affirmed.

WOODS, J. (dissenting). I am unable to resist the conclusion that in the opinion of the court too much importance is attached to the form of the action. The deed from Francis to Loyns and the obligation of Loyns to reconvey, taken together, constituted a mortgage, or at least a contract in the nature of a mortgage. These papers having been duly recorded, all subsequent purchasers from Loyns were charged with notice of them and their legal effect. If the debt was paid before Loyns, the original mortgagee, took possession, then there was no debt and no mortgage when Salinas and his grantees, Witte, Lynah, and Sparkman, took possession, and they could not hold as mortgagees in possession against the plaintiffs. Evidence of payment in full of the mortgage debt to Loyns was therefore competent to show there was no mortgage, and hence no mortgagees in possession. One of the witnesses testified Francis, the mortgagor, and Loyns, the mortgagee, had made a full settlement; Loyns saying to Francis: "That is all right. Come back Monday and get your papers." If the mortgage was paid, then the plaintiffs as heirs of the mortgagor out of possession were entitled to recover the possession from the defendants unlawfully holding possession under a mortgage no longer having any existence. The fact that the mortgage consisted of two papers, the deed to the mortgage absolute in form and the separate agreement of the mortgagee to reconvey, instead of the usual single paper in form an absolute conveyance with the condition of becoming a nullity on payment, should make no difference. *McCreary v. Coggeshall*, 74 S. C. 55, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For these reasons, I think the evidence as to the payment of the debt to Loyns was competent, and the circuit judge was in error in directing a verdict for the defendants.

(78 S. C. 200)

BROOKE v. LAURENS MILLING CO.  
(Supreme Court of South Carolina. Sept. 18, 1907.)

1. SALES—QUALITY—INSPECTION—DECISION OF INSPECTOR.

Where a contract for the sale of No. 2 white corn provided that a certain public elevator grade should be accepted as final, the

buyer was absolutely bound to accept corn tendered under the contract which had been inspected and passed as "standard No. 2 white" by the public elevator, when the grading was done in the exercise of an honest judgment.

2. SAME—ACCEPTANCE—INFERIORITY OF QUALITY—WAIVER.

Where defendant accepted certain corn delivered under a contract of sale, he thereby waived the right to claim that the corn was inferior in quality; the inferiority, if any, being obvious, and not latent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 460.]

3. SAME—BREACH OF CONTRACT—RESALE.

Where a contract for the sale of corn provided that in case of the buyer's breach the seller might sell the corn for the buyer's account, the seller, on the buyer's breach, though entitled to sell the corn without waiting for the time agreed on for delivery of all the installments under the contract to arrive, could not recover the difference between the contract price and the market price on the day or days appointed for performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 924.]

4. SAME—PRIOR SALE—MARKET PRICE.

Where, on defendant's breach of a contract to purchase certain corn from plaintiff, plaintiff immediately sold the corn before the time fixed for acceptance under the contract, neither the amount realized at such resale nor the market price on the day of the sale was material in an action by plaintiff for defendant's breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 924.]

5. SAME—GUARANTY OF PRICE.

Where a contract for the sale of corn provided that, in case of the buyer's breach, the seller should sell the corn for the buyer's account, such contract, if construed to authorize a sale on the buyer's breach before the delivery date, did not operate as an implied guaranty by the seller of the market price on the day of such resale.

Appeal from Common Pleas Circuit Court of Laurens County; R. O. Purdy, Judge.

Action by George W. Brooke against the Laurens Milling Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Dial & Todd and F. P. McGowan, for appellant. Simpson, Cooper & Babb, for respondent.

WOODS, J. The plaintiff and defendant in January, 1904, made a contract in writing, by which it was agreed plaintiff should sell and deliver to defendant, at specified times, "9,600 bushels bulk No. 2 white corn." and defendant should pay for the corn in specific installments. The contract was in these words: "This witnesseth that George W. Brooke, of Atlanta, Ga., has this day sold to Laurens Milling Co., of Laurens, S. C., 9,600 bushels bulk No. 2 white corn, at — per bushel delivered at Laurens, S. C. Said corn to be stored with the Steel Elevator and Storage Co., of West Nashville, Tenn., and carrying charges of 1 cent per bushel per month, or fraction of a month, are to be paid by said Laurens Milling Co. In addition to the above price, beginning April 1st, 1904. Delivery is to be made



within 15 days after receipt by said Brooke of order therefor by said Laurens Milling Co., provided, however, that if failure to deliver within the usual time is occasioned by failure of the railroads to furnish cars therefor, or transport same, shall not be chargeable to said Brooke. Title to said corn shall pass on delivery hereunder. West Nashville Public Elevator weights and grades to be accepted as final. Said Laurens Milling Co. has paid to said Brooke a margin of 10 cents per bushel on said corn by notes of \$960.00, June 1st, 1904; July 1st, 1904, payable at the ——— of ———, which amount of said notes is to be deducted from the last invoice when the grain is shipped, or to such amount as will balance the account, and it is agreed if said Laurens Milling Company does not order out said corn as per these terms of contract, said Brooke may at his option sell said grain for account of said Laurens Milling Co. Shipments to be made as per memorandum on back of this sheet." Indorsed on it was the following memorandum:

2,400 bus. No. 2 white corn to be shipped March...	.68%
1 car March 1st.	
1 " " 15th .....	.68%
1 " " 20th.	
2,400 bus. No. 2 white corn to be shipped April...	.69%
1 car April 1st.	
1 " " 15th .....	.69%
1 " " 20th.	
2,400 bus. No. 2 white corn to be shipped May....	.70%
1 car May 1st.	
1 " " 15th .....	.70%
1 " " 20th.	
2,400 bus. No. 2 white corn to be shipped June...	.71%
1 car June 1st.	
1 " " 15th .....	.71%
1 " " 20th.	

The defendant accepted and paid for two car loads of the corn, but refused to accept two other car loads which reached Laurens, the designated place of delivery, on the ground that it was not up to grade; and notified the plaintiff not to ship the remainder. Thereupon the plaintiff sold the corn, and brought this action for the difference between the contract price and the price realized on the resale. The substance of the defense is contained in this sentence of the answer: "That, instead of shipping the corn of the quality stipulated in the contract, the plaintiff fraudulently shipped corn to the defendant that was damaged, musty, and mildewed and very inferior in all respects to No. 2 white corn, and was unfit for use, and this defendant could not use the same in its business, and upon the arrival of this corn at Laurens the defendant declined to receive the same, and immediately so notified the plaintiff on the ——— day of ———, 1904, and demanded of the plaintiff the return of the notes given by the defendant to the plaintiff under the said contract, which demand has never been complied with." Evidence was adduced tending to prove the rejected corn was heated and inferior to No. 2 grade when it reached Laurens, and there was also evidence of its liability to become heated and damaged in transportation from Nashville, the place of shipment.

The provision of the contract on which an

important question made by the appeal hinges is this: "West Nashville public elevator weights and grades to be accepted as final." There is no ambiguity or obscurity in this language. The grade No. 2 white corn provided for in the contract is a grade of universal trade recognition. It seems perfectly clear the West Nashville public elevator was not empowered to make a new standard of corn grading. The general trade grading was to be the standard, but the West Nashville public elevator was to inspect the corn tendered for the parties, and decide whether it was up to date trade standard of No. 2 white. The plaintiff produced certificates from M. L. Coggins, grain inspector at the West Nashville public elevator, that he had inspected each of the car loads of corn, and that all of them contained "corn grade No. 2 white"; and Coggins confirmed these certificates by his testimony as a witness. The circuit judge submitted in his charge as one of the issues decisive of the case, whether in the opinion of the jury, as formed from the evidence, the corn was or was not in fact of No. 2 grade when loaded at Nashville. This we think was error, because the parties themselves had agreed in the contract that the grading of the elevator company should be final. In such case the true rule as fixed by authority, from which we can find no dissent, is that the decision of the arbitrator whom the parties have agreed is conclusive when reached in the exercise of his honest judgment. This rule was applied to the decision of arbitrators appointed by the parties in *Rounds v. Aiken Mfg. Co.*, 58 S. C. 290, 36 S. E. 714, and earlier cases in this state; to the decision of an engineer under a contract to dig a well in *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70; to that of a meat inspector under contract to deliver meat of a certain grade in *Nofsinger v. Ring*, 71 Mo. 149, 36 Am. Rep. 456; to that of architects and engineers under contracts for the construction of buildings or railroads in *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344, 290, 27 L. Ed. 1053; *Chicago, etc., R. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Kennedy v. Poor*, 151 Pa. 472, 25 Atl. 119; *McAlpine v. Trustees*, 101 Wis. 468, 78 N. W. 173; *Kilgore v. N. W. T. Baptist Ass'n*, 89 Tex. 465, 35 S. W. 145; *Selm v. Krause*, 13 S. D. 530, 63 N. W. 583; *East Tenn., etc., Ry. Co. v. Central L. & M. Mfg. Co.*, 95 Tenn. 538, 32 S. W. 635; *Thompson v. Bradbury*, 5 Idaho, 760, 51 Pac. 758; *Hot Springs Co. v. Maher*, 48 Ark. 522, 8 S. W. 639. The reason for holding the award of the arbitrator selected by the parties final, when reached in the exercise of his honest judgment, seems to be at least as strong as the reason for giving such effect to the return of commissioners in partition. In stating the principle applicable to the returns of commissioners the court says in *Aldrich v. Aldrich*, 75 S. C. 374, 55 S. E. 888: "Even if it should be conceded that a preponderance of

the evidence outside the report of the commissioners on the lands given Mrs. Richardson and Mrs. Duncan was too high, it was proper to sustain the valuation made by the commissioners, unless the court was satisfied the valuation was so grossly incorrect and unequal as to warrant an inference that the commissioners acted from unfair and improper motive. It is a matter of common knowledge that men of experience may differ as to the value of lands. So long, therefore, as the valuation by commissioners may be accounted for on this ground, it should be sustained; and it is not sufficient to overthrow a valuation by commissioners merely to show that in the opinion of other honest and experienced men the true value is higher or lower than that made by commissioners under oath." There is no doubt under the authorities proof may be made of gross inferiority of the work done, or material used, or goods delivered, or of gross over or under valuation, because such proof tends to show that the arbiter agreed on did not exercise his honest judgment, or must have come to a different conclusion. Nevertheless the issue always remains the same—did the arbiter exercise his honest judgment, not whether the jury or the witnesses would have come to a different conclusion in the exercise of their judgment. To give the finding of the arbiter selected by the parties less force would be to deny the right of the parties to contract. If, therefore, the inspector at the West Nashville public elevator inspected the corn, and in the exercise of his honest judgment graded it No. 2 white, the plaintiff was entitled to recover, and it was immaterial that the jury might have been of the opinion that the judgment of the inspector was not sound and the corn was not, in fact, up to the grade No. 2 white.

The plaintiff demurred to the two counterclaims set up in the answer, on the ground that the allegations were not sufficient to constitute counterclaims, and the demurrer was overruled. The first counterclaim is as follows: "That the defendant received and used part of the corn shipped to it by the plaintiff, and paid the plaintiff therefor the price stipulated in the contract, but the same was found to be of a very inferior quality, and not No. 2 corn, and was worth much less than the corn the plaintiff contracted to deliver to the defendant, to wit, the sum of \$297.50." By acceptance of the goods, the defendant waived the right to allege inferiority of quality which was obvious to him. *Woods v. Cramer*, 34 S. C. 516, 13 S. E. 660; *Vanderhorst v. McTaggart*, 2 Bay (S. C.) 498; *Mitchell v. McBee*, 1 McM. (S. C.) 267, 36 Am. Dec. 264. And there is no allegation that the inferiority was latent. In *Ellison v. Johnson*, 74 S. C. 202, 54 S. E. 202, 5 L. R. A. (N. S.) 1151, the question here made was not discussed nor involved. The point there was the measure of damages for breach of warranty in the sale of a quality of flour.

Nothing was decided as to the effect of the acceptance of defective goods when the defects were not latent, and the goods open to examination as the corn was in this case. The demurrer to this counterclaim should have been sustained. On the same point there was error in the charge as set out in the twelfth exception.

In the complaint plaintiff alleges that when defendant notified him that it would not accept the remainder of the purchase, 6,286 bushels, he resold it as authorized by the contract at a net loss of  $3\frac{1}{4}$  cents a bushel, aggregating \$204.29. By the second counterclaim, the defendant alleges this sale was made at three cents a bushel less than the market price at Laurens on the day of the sale, and asks judgment for \$188.58 on this ground. To determine whether this counterclaim was subject to demurrer, it is necessary to state the rights of the plaintiff under this clause of the contract: "And it is agreed if said Laurens Milling Company does not order out said corn as per these terms of contract, said Brooke may at his option, resell said grain for account of said Laurens Milling Co." If the defendant, without such legal excuse as would release him from the contract, notified plaintiff the remainder of the corn would not be accepted, this gave plaintiff the right to consider the contract breached and to sue for damages immediately, without waiting for the time agreed on for the delivery of all the installments to arrive. *Payne v. Melton*, 67 S. C. 235, 45 S. E. 154; *Ellison v. Johnson*, supra; *Hochster v. De La Tour*, 22 L. J. Q. B. 455, 6 Eng. Rul. Cases, 576; *Roper v. Johnson*, 23 Eng. Rul. Cases, 545, and note; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; 24 Cyc. 1124; 94 Am. St. Rep. 120, note.

The damages in such case are to be estimated as of the date when the contract was to be performed, not the date of the repudiation. The rule is thus stated in *Roper v. Johnson*, supra: "The general rule as to damages for the breach of a contract is that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by *Cockburn, C. J.*, in *Frost v. Knight*, in the *Exchequer Chamber*, L. R. 7 Ex. 111, involves the very distinction which I am endeavoring to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not

to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach." After full discussion the Supreme Court of the United States adopted this view in *Roehm v. Horst*, supra, and it is now generally accepted in this country. Evidently, if the trial takes place before the time for performance has arrived, there is difficulty in estimating with precision the loss of the plaintiff on the day of performance yet in the future. The difference in the market price on the day of performance and the price fixed in the contract is not available as a measure, because it is impossible to know the future market price. In the case last cited Chief Justice Fuller thus states the principle on which the damages in such circumstances are to be estimated: "As to the question of damages, if the question is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought to have availed himself." This difficulty, however, is not present here, because the time fixed by the contract for delivery had arrived before the trial. If the time of delivery arrives before the trial, the general rule that the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been accepted by the purchaser is applicable. This is the rule here. The plaintiff, it is true, had the option to resell the corn for defendant's account; but, according to the principle laid down in the numerous cases above cited, he could not charge the defendant with a loss on a resale made before the time specified in the contract for delivery. The contract only gave the plaintiff the option to substitute for the market price on the day appointed for performance the price realized by a resale on that day. Therefore, while the plaintiff under his option could hold the corn and resell it at the time fixed for acceptance or not, as he saw fit, the defendant was in no wise bound by the result of a resale made before the day fixed for performance. The resale by the plaintiff was of no effect, and his option to resell on the arrival of the day fixed for performance of the contract by defendant remains unexercised. The measure of the damages, therefore, would be the difference between the market price of the corn on the day the contract contemplated the acceptance of the corn by the defendant and the price which the defendant contracted to pay.

The second counterclaim is for the difference between the price of 6,286 bushels of corn realized by the resale, made before the time for delivery, and the market value on the

day of the resale. If the defendant breached the contract and threw the corn on the plaintiff's hands, then, as we have seen, he is liable for the contract price less the market value of the corn on the day it was to be delivered. The plaintiff having sold the 6,286 bushels before the time fixed for acceptance, neither the amount realized at this resale nor the market price on the day of resale enter into the case. For these reasons, the demurrer to the second counterclaim also should have been sustained.

The complaint alleges in effect a breach of the contract by defendant in refusing to pay for so much of the corn as was shipped and accepted, in refusing to accept and pay for so much of the corn as was shipped to defendant and refused after it reached Laurens, and in notifying plaintiff by letter it would refuse to receive or pay for the 6,286 bushels unshipped. As to the alleged breach in refusing to take the 6,286 bushels unshipped corn, the complaint incorrectly alleges the defendant's liability to be the difference between the contract price and the amount realized on resale made before the time for delivery had arrived, instead of the true measure of liability, namely, the difference between the contract price and the market value on the day the corn was to be accepted. But, as there was no objection made to the complaint by demurrer or otherwise, this mistake has not been considered. It is proper to say, if defendant meant by his second counterclaim to admit that the agreement contemplated an option to the plaintiff to resell the 6,286 bushels at once on its notice that it would refuse to accept, the counterclaim would still be demurrable; for, if the resale is to be considered to have been made according to the contract, then under the contract it was "for account of Laurens Milling Company," and this altogether negated the idea that the plaintiff was to guarantee the market price.

Of course, these conclusions as to the complaint and the counterclaims are announced without prejudice to the parties to move to amend the complaint or counterclaims as they may be advised in accordance with the principles we have stated. No specific reference to the exceptions to the charge are deemed necessary, as in the discussion we have endeavored to cover them all. Under the principles we have announced, the exceptions as to the exclusion and admission of testimony are overruled.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

(78 S. C. 323)

ELMS v. SOUTHERN POWER CO.

(Supreme Court of South Carolina. Oct. 5, 1907.)

CORPORATIONS—FOREIGN—VENUE OF ACTIONS.  
Though, under Civ. Code 1902, § 1793, a foreign corporation may become domesticated,

and a domestic corporation is resident in any county where it maintains an agent and conducts business, and under Code Civ. Proc. 1902, § 146, must be sued where it resides, under Code Civ. Proc. § 423, plaintiff may elect in which county to sue a foreign corporation, and where plaintiff sued defendant in a county where it does not appear to have an agent or conduct business, alleging defendant to be a foreign corporation, and it appeared and, answering, admitted it was a foreign corporation, the court acquired jurisdiction, which could not be overthrown by showing defendant had become domesticated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2801.]

Appeal from Circuit Court, Lancaster County; C. G. Dantzler, Judge.

Action by John W. Elms against the Southern Power Company. From an order transferring the cause to another county, plaintiff appeals. Reversed.

J. Harry Foster, for appellant. Morrison & Whitlock, Russell G. Lucas, and W. O. Hough, for respondent.

JONES, J. This appeal is from an order of Judge Dantzler transferring the cause for trial to Chester county on the ground that the court of common pleas for Lancaster county had no jurisdiction to try the same. The action was commenced in the common pleas for Lancaster county to recover damages for personal injuries alleged to have resulted to plaintiff in Chester county from the concurrent negligence of the defendant Southern Power Company and James P. Rosemon. Service was made on defendants in Chester county, and defendants appeared and made joint answer to the merits. The case was docketed for trial in Lancaster county and continued for one term. At next term the defendant made a motion that the action be transferred for trial to Chester county, and, if that request be refused, to transfer to Greenville county, upon showing by affidavit that defendant Rosemon was a resident of Greenville county and that defendant Southern Power Company was a domestic corporation, having complied with chapter 44 of the Civil Code of 1902.

There is no evidence that the defendant company maintains an agent and conducts its corporate business in Lancaster, but, on the contrary, it appears that it maintains an agent and conducts its business in Chester county where the injury occurred and the service was made. Section 1793, Civ. Code 1902, provides: "When a foreign corporation complies with the provisions of this chapter, it shall ipso facto become a domestic corporation. It may sue and be sued in the courts of this state, and shall be subjected to the jurisdiction of this state as fully as if it were originally created under the laws of the state of South Carolina." If, for the purposes of this action, the defendant Southern Power Company must be treated as a domestic corporation, then upon the showing made Chester county is the proper place for trial as to

that defendant. In the absence of a statute confining residence to a particular county, a domestic corporation is resident in any county in the state where it maintains an agent and conducts its corporate business, and under section 146, Code Proc. 1902, must be sued in the county where it resides. *McGrath v. Insurance Co.*, 74 S. C. 70, 54 S. E. 218; *Nixon & Danforth v. Insurance Co.*, 74 S. C. 439, 54 S. E. 657. On the other hand, if the defendant company must be treated as a foreign corporation in this action, the plaintiff, under section 423 of the Code of Civil Procedure of 1902, may elect in which county to sue, and the appearance and answer of defendant in the court of common pleas for Lancaster county, where the suit was brought, would give that court complete jurisdiction. We are of the opinion that, for purposes of jurisdiction in this suit, the defendant company must be treated as a foreign corporation.

The complaint alleges "that the Southern Power Company now is and was at the times hereinafter stated a corporation duly created and existing under the laws of the state of New Jersey, and as such entitled to sue and be sued in the courts of this state; that said defendant has real estate and other property situated in Lancaster county, said state." The answer expressly admits the truth of this allegation. It thus appears as a verity by the record that plaintiff has elected to sue the defendant company as a foreign corporation, and the defendant has elected to defend in that capacity. Thus, upon the record made, the common pleas for Lancaster county had full jurisdiction, which could not be overthrown by merely showing that such foreign corporation had become domesticated by compliance with the statute. By such domestication the foreign corporation is subject to the jurisdiction of the courts of this state in local matters not affecting federal jurisdiction, as if originally a domestic corporation; but nevertheless it still and also has distinct entity as a foreign corporation and liable to be sued as such, and with right to defend as such, in the courts of this state. *Calvert v. Southern Ry. Co.*, 64 S. C. 139, 36 S. E. 750, 41 S. E. 963; *Wilson v. Southern Ry. Co.*, 64 S. C. 162, 36 S. E. 701, 41 S. E. 971. The common pleas for Lancaster county, having acquired jurisdiction over defendant as a foreign corporation, has jurisdiction to hear and determine the controversy, and it was error to remove the cause to Chester county for want of jurisdiction.

There being no exception in behalf of defendant Rosemon alleging error in not removing the cause to Greenville county because of his residence in that county, we do not consider that phase of the question.

The judgment of the circuit court is reversed.

GARY, J. I concur in the result, as this question of jurisdiction related to the person and was waived by answering to the merits.

(78 S. C. 211)

**WARE SHOALS MFG. CO. v. JONES,**  
Comptroller General.

(Supreme Court of South Carolina. Sept. 21, 1907.)

**1. COURTS—SUPREME COURT—ORIGINAL JURISDICTION—INJUNCTION—LICENSE TAXES.**

Under Const. 1895, art. 5, § 4, conferring jurisdiction on the Supreme Court to issue writs of injunction, such court has power to restrain the collection of an illegal tax, notwithstanding Civ. Code 1902, § 412, providing that the collection of taxes shall not be stayed or prevented by injunction, etc., where the Legislature has not provided another adequate remedy for protection of the taxpayer.

**2. TAXATION—INJUNCTION—LICENSE TAXES—CONTEST—REMEDY.**

Civ. Code 1902, § 413, giving a taxpayer the right to pay taxes under protest and sue a county treasurer for taxes supposed to have been illegally paid, does not provide an adequate remedy against alleged illegal license taxes imposed on a corporation by the license tax act of 1904 (24 St. at Large, p. 462), as amended by the act of 1905 (24 St. at Large, p. 827), which taxes are not under the control of any county treasurer, but are assessed on the books of the state Comptroller General and are payable directly into the state treasury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1231.]

**3. STATES—SUITS AGAINST STATE—SUITS AGAINST STATE OFFICERS.**

A suit to restrain the Comptroller General from proceeding to collect a license tax provided by the license tax act of 1904 (24 St. at Large, p. 462), as amended by the act of 1905 (24 St. at Large, p. 827), against petitioner, a corporation, because of the alleged unconstitutionality of such statute was not a suit against the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, § 181.]

**4. CORPORATIONS—CHARTERS—ALTERATION—IMPLIED POWER.**

Where the state issues a charter to a corporation under general laws expressly reserving to the state the power to alter the charter at pleasure, no contract on the part of the state not to alter such charter by the imposition of license taxes can be implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 119-121.]

**5. CONSTITUTIONAL LAW—CORPORATIONS—CHARTER POWERS—OBLIGATION OF CONTRACT.**

Const. art. 9, § 2, provides that no corporate charter shall be granted, changed, or amended by special law, except in cases of certain charitable, etc., corporations; but that the General Assembly shall provide by general laws for amending existing charters and for organizing all subsequent corporations, and any such law so passed, as well as all charters existing or subsequently created, shall be subject to future repeal or alteration. *Held*, that the Legislature had unlimited power to alter corporate charters, so that the imposition of a license tax on a corporation organized under the general law subsequent to such constitution by the license tax act of 1904 (24 St. at Large, p. 462), as amended by the act of 1905 (24 St. at Large, p. 827), did not constitute an impairment of the state's contract obligation to the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 406.]

**6. LICENSES—CORPORATIONS—LICENSE TAXES—PUBLIC POLICY.**

The issuance or denial of corporate charters being entirely within the discretion of the state, the imposition of a license tax on corporations as a condition to their right to do busi-

ness within the state is not contrary to public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 47.]

**7. SAME—NONUNIFORMITY—CLASSIFICATION.**

The license tax act of 1904 (24 St. at Large, p. 462), as amended by the act of 1905 (24 St. at Large, p. 827), imposing a license tax on corporations, is not void for inequality, because it does not apply to individuals in the same line of business; the Legislature being entitled to classify corporations and individuals differently in the imposition of taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 8.]

**8. SAME—CORPORATION TAX—GRADUATION—VALIDITY.**

The license tax act of 1904 (24 St. at Large, p. 462), as amended by the act of 1905 (24 St. at Large, p. 827), imposing an annual license tax on corporations of one-half of one mill on each dollar of their capital stock paid in and outstanding, was not void because the tax was uniform, and not graduated under Const. art. 8, § 6, authorizing the corporate authorities of cities and towns to collect license or privilege taxes so graduated as to secure a just imposition of the tax on the classes subject thereto; such provision being applicable only to licenses imposed by municipal corporations, and not to franchises granted by the state.

**9. TAXATION—TAXING POWER—PRESUMPTION.**

The supreme taxing power of the state is vested in the Legislature, and the presumption is that the attempted exercise of such right is valid and constitutional.

Original application by the Ware Shoals Manufacturing Company for an injunction restraining A. W. Jones, as Comptroller General of the state of South Carolina, from proceeding to assess and collect a license tax against petitioner. Writ denied. Petition dismissed.

Dial & Todd, for petitioner. J. Fraser Lyon, Atty. Gen., for the State.

POPE, C. J. This is an application by the petitioner to this court in its original jurisdiction for a writ of injunction against the respondent, as Comptroller General, whereby he shall be perpetually enjoined from proceeding under an act of the General Assembly, the license act of 1904 (24 St. at Large, p. 462), amended in 1905 (24 St. at Large, p. 827), to assess and charge against petitioner a tax of one-half of one mill upon each dollar of its capital stock paid in and outstanding, amounting to the sum of \$500, and, upon the refusal of the petitioner to pay said tax within the times stated in the act, to proceed to collect the same as directed therein. A rule to show cause why the injunction prayed for should not be granted was issued on March 29, 1907, directed to the respondent, and in the meantime restraining him from all further proceedings against the petitioner under said license act. The petition alleges, in brief, that the act in question is unconstitutional, null, and void, and that the respondent is proceeding entirely without authority of law.

In considering the cause made, we are met at the outset with preliminary questions of grave importance. The first of these is as

to whether or not this court has jurisdiction to hear the matter, and, in case it find the act unconstitutional, as alleged, it can then go forward and grant the injunction prayed for. Section 412 of the Civil Code of 1902 provides: "The collection of taxes shall not be stayed or prevented by an injunction, writ or order issued by a court or a judge thereof." The Constitution of 1895 (article 5, § 4) gives the Supreme Court power to issue writs or orders of injunction, mandamus, etc. A provision practically identical with this was contained in article 4, § 4, of the Constitution of 1868. The inquiry, then, is: Can the Legislature, in the light of this constitutional grant of power, prevent the court from issuing an injunction restraining the collection of taxes. The question has been exhaustively considered in the three cases of *State v. Treasurer*, 4 S. C. 520, *State v. Gaillard*, 11 S. C. 310, and *Chamblee v. Tribble*, 23 S. C. 70; the court holding that such action on the part of the Legislature was valid. In the recent case of *Western Union Tel. Co. v. Winnisboro*, 71 S. C. 234, 50 S. E. 870, the holding in these cases was affirmed. In all of the above-named litigations, however, the petitioner had an adequate remedy at law; section 413 of the Code of 1902 giving the taxpayer the right to pay under protest and bring suit against the county treasurer for the recovery of taxes supposed to have been illegally paid. It can readily be seen, however, that the remedy provided by this section would not in all cases be adequate. Suppose, for example, a municipal corporation should exact a license tax of fruit venders or barbers so exorbitant as to be absolutely prohibitive of such pursuits, will it be contended that this court has no power to enjoin its collection? The remedy proposed of paying under protest and bringing a suit to recover would in such conceivable cases be absolutely no remedy at all. Or take the present case, where it is alleged that the suit cannot be maintained because it would in effect be a suit against the state, if this fact be found to be as alleged, then there is no remedy if the power to enjoin be denied, for once the taxes are paid they are beyond the reach of the party paying. In conferring the power upon the court to issue the writs in question, the only reasonable conception is that the constitutional convention intended to grant it jurisdiction to issue the writ in such cases as it had previously exercised the power. It was well established prior to the adoption of the Constitution of 1868 that the court by the writ of prohibition could enjoin the collection of taxes. *Carter v. Burger*, 1 McM. 418; *Hibernian Society v. Addison*, 2 S. C. 499. Therefore, when the act of the Legislature above quoted was sought to be put into effect, a diversity of judicial opinion appears. A consideration of the three leading opinions on the subject will show that, even where there is an adequate remedy provided at law, the judges are exactly divided as to

whether or not the Legislature had the power to prevent the issuance of the writs in question; such justices as *McIver*, *Moses*, and *McGowan* being of the view that such action was illegal. The power of the court when there is no adequate remedy seems not to have occurred to the minds of the learned judges who wrote the opinions above referred to. Therefore, whatever might be the law in cases where there is an adequate remedy, we shall endeavor to show that, where there is no adequate remedy, the court may stay the collection of taxes by prohibition or injunction. We propose to pursue the inquiry untrammelled by any implication seemingly arising from the discussions above referred to.

It is one of the fundamental principles of law that for every wrong or injury there must be an adequate remedy. At the common law the remedies obtainable were in many cases far from adequate. In order to supply this need the system of equity, with its great adaptability, came into existence, and where the common law was inadequate the litigant had his remedy in that court. This, of course, took place only when the law by its generality and hardness, so to speak, was unable to give justice. Among the powers thus acquired was the right in certain cases to issue the preventative writ of injunction. In our state, with the development of the equity system, the number of instances in which the writ was applicable and would issue as a remedy increased, so that at the time of the adoption of our Constitution of 1868 its usefulness in South Carolina was even more extended than in England. As was said above, one purpose for which its power was exercised was the restraining of the collection of illegal taxes. This power the Constitution left remaining in the equity court. Looking then to the principle, at least one of the great principles, upon which our government is founded, namely, that each of the three departments must remain forever separate and distinct, we are of the opinion that, where there is no legal adequate remedy, it is beyond the power of the Legislature to say that the collection of taxes shall not be enjoined by any writ or other order of any court or judge thereof. When the Legislature does provide an adequate remedy, a court of equity, upon one of its own fundamental principles, namely, that where there is an adequate remedy at law equity will not interfere, loses jurisdiction. This is no new scheme or principle. It is the very mode by which our modern law court has become so imbedded with many of the beneficial remedies formerly cognizable only by a court of equity. In holding section 412, above quoted, constitutional, we think the act was regarded as practically reiterating the maxim that where there is a legal remedy resort cannot be had to a court of equity. In this view the opinions above referred to are sound.

This being our view of the law, the next step is to ascertain whether or not the peti-

tioner here has an adequate legal remedy. Section 413 of the Civil Code of 1902 provides, in substance, that, where a tax is charged upon the books of the county treasurer, if the person against whom they are charged deem them illegal, he shall nevertheless pay them under protest, and within 30 days may bring an action against the county treasurer for recovery of the same, and, if it be decided that the taxes so paid should be returned, then the Comptroller General shall issue his warrant for the refunding of the taxes so paid. It will be noticed that this act refers only to taxes charged upon the county treasurer's books, and permits suit to be brought only against the county treasurer. In the case here under consideration, the taxes are charged upon the Comptroller General's books, and never come under the control of any county treasurer. They are payable to the state Treasurer. It is evident, then, if we strictly construe the language of the act above referred to, that the present case is not embraced therein. Shall we so construe it? Of course, it is understood that the Legislature in passing the act could not foresee all the possible contingencies, and hence could not use language broad enough to cover all cases that might arise. When the act was passed, the Legislature doubtless had in contemplation only the ordinary county and state taxes. The license tax here under consideration was not in existence. Therefore it could not have been the intention to make provision for such a case. Then, too, this court has formerly declared that this statute from its nature must be strictly construed. *Bank v. Cromer*, 35 S. C. 227, 14 S. E. 493. It in effect takes away, in the sense above indicated, a power previously exercised by a court of equity and by the Constitution conferred upon that court. Therefore it will be taken for granted that the Legislature meant only what it said, namely, that the act was to apply only to taxes collected by county treasurers. Then, too, there is the fact that the state Treasurer is an officer of the state, and the act does not give permission to sue state officers as would be necessary to a suit in case it be held that suing the Treasurer would in effect be suing the state. An extended discussion of this question is not, we think, necessary to the determination of the case. It seems to be well settled that such a suit would in effect be against the state. *Lowry v. Thompson*, 25 S. C. 417, 1 S. E. 141, and cases cited. Under this holding, however, the present case, being against the Comptroller General, would not it be a suit against the state? We think not. The doctrine is well established by a line of cases beginning with *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204, that a court will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate rights and privileges of the complainant which had been guaranteed by

the Constitution and would work irreparable damage and injury to him. The principle is discussed at length and reaffirmed in the comparatively recent case of *Pennoyer v. McCannagh*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363. The distinction seems to be based on the fact that an officer, while attempting to execute an unconstitutional law, is not acting by any authority of the state, and therefore in that identical act is not to be regarded as a state officer. For example, if the tax in question is unlawful, then the Comptroller General in collecting it is not acting for the state, for it would be a contradiction to say that the acts for the state in exacting a tax were not authorized by state law. On the other hand, if even an illegal tax, or an illegal deed, as in *Lowry v. Thompson*, supra, be in the hands of a state officer, holding it for the benefit of the state, the officer's custody of the money or paper is the state's custody, and the liability for it the state's liability. As we have endeavored to show above, the remedy before the act in question was by prohibition or injunction, and, until that remedy is specifically taken away by the establishment of an adequate legal remedy, this court may issue these writs. Under the common law, no other remedy was regarded as adequate, and in this case, one not having been provided by statute, we are forced to the conclusion that the petitioner has no adequate remedy at law if the act requiring the tax is null and void.

This brings us then to the question of the constitutionality of the act. The statute, after requiring corporations to make certain annual reports to the Comptroller General, provides: "Every corporation organized under the laws of this state to do business for profit, other than railroad companies, express companies, street railway companies, navigation companies, water works companies, power companies, light companies, telephone companies, telegraph companies, parlor, dining and sleeping car companies, shall upon filing the report required of them in section one, pay to the state treasurer on or before the first day of April in each year, an annual license fee of one half of one mill upon each dollar paid in the capital stock of said corporations, said license fee shall not be less than five dollars in any case." Petitioner contends that, as its charter was issued under the laws of 1893, the act of 1904 was in effect a violation of the contract existing between itself and the state. This contention we think cannot be sustained. There is no express language in the charter held by the petitioner by which the state contracts not to alter any of the provisions therein contained. Even if we concede the proposition that the state may so contract, yet, where it does not do so, but, on the contrary, issues the charter under general laws expressly reserving to the state the power to alter the charter at pleasure, it seems clear that such a contract

cannot be implied. The charter here in question was issued subsequent to the Constitution of 1895, and was therefore issued in contemplation of any provision contained therein. Article 9, § 2, of that instrument provides: "That no charter shall be granted, changed or amended by special law, except in case of such charitable, educational, penal or reformatory corporations as may be under the control of the state, or may be provided for in this constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration. \* \* \*" This language, it would seem, gives the Legislature almost unlimited power in this respect. And it cannot be said that the power so conferred is repugnant to the Constitution of the United States, as violative of the obligation of a contract, for the reason that every contract made between the state and a corporation has in view this section of the Constitution. Nor can this provision be said to be against public policy, for the issuing of such charters is entirely within the discretion of the state. It has a right to refuse them altogether, should it seem necessary and proper. Unlimited franchises and special privileges are not always beneficial to a commonwealth. Therefore, if it says to persons wishing to incorporate themselves and to enjoy the benefits of such incorporation that the incorporation is upon condition that whenever the public welfare demands it such change may be made in the contract as to it seems proper, the organization has no right to complain if such change is made. Yet we must not lose sight of the fact that when incorporated the organization becomes in a certain sense individualistic, and is therefore entitled to all of the protective laws of the commonwealth. Its property cannot arbitrarily be taken from it, nor can it be unjustly discriminated against. This is one of the grounds upon which the petitioner would have the act of 1904 declared null and void. He seeks to show that, while the tax here in question applies to corporations, it does not apply to individuals who are in the same line of business. Granting the contention to be true, we do not think it necessarily follows that such a classification is arbitrary or unjust. No one will deny that there are many advantages incident to corporate bodies which are enjoyed by individual dealers. Assured duration of life, the centralization and combination of large capital stocks, usually far surpassing that invested by individuals, and numerous other benefits conferred by the incorporation, all serve logically to place corporations in a class to themselves. Now, were the Legislature to undertake to say that certain corporations should pay the license tax here in question, while others of the same

class were excepted, we think this would be justly termed a discrimination. Where, however, all corporations of like kind are put in one class and subjected to common burdens, we think it cannot be said that such action is discriminatory or arbitrary. A similar question was considered at length in the case of *Simmons v. Telegraph Co.*, 63 S. C. 430, 41 S. E. 522<sup>1</sup>, where the court said: "Legislation is not unequal nor discriminatory in the sense of the equality clause of the Constitution, merely because it is special or limited to a particular class. The decisions of the United States Supreme Court establish that the Legislature has power to make a classification of persons or property for public purposes, provided such classification is not arbitrary and bears reasonable relation to the purpose to be accomplished, and that the equality clause is not violated, when all within the designated class are treated alike."

Petitioner, relying on article 8, § 6, of the Constitution, alleges that the tax levied by the act in question is uniform, and not graduated, and is therefore void. A consideration of that section will show that it was intended to apply to licenses imposed by municipal corporations and refers in no way whatever to franchises granted by the state. We do not think, however, that, even were the section applicable, it would be any ground upon which to hold the act void. The object of the graduation is to make such taxes as far as possible uniform. A just imposition is the end in view. Now, it will readily be conceded that, had the Legislature seen fit, instead of imposing a tax of one-half of a mill on the capital stock of its corporations, to impose a definite amount, say \$500, or a like amount, as a privilege of doing business in the state, its power would not have been questioned. The former plan, we presume, seemed more equitable and just. Instead of making an arbitrary classification of corporations having various amounts of capital stock, the Legislature saw fit to require each to pay a certain amount upon its stock. This method causes a corporation to pay for the privilege it enjoys as measured by its capital stock. As compared with other corporations it pays no more nor no less than it is entitled to pay. In this view, capital stock is merely a measure by which the amount to be charged for the franchise is to be ascertained. The imposition made by the act cannot in a true sense be said to be a tax on the capital invested. The amount so directed to be paid is for the privilege of carrying on business in the state. Apart from this privilege tax, of course, property in the state is subject to the regular levies for county and state purposes. It seems so evident that a state has a right to make such exactions from its domestic corporations, its own creatures, that no one would question its exercise. Certainly such an exercise involves no double taxation, for the privilege is clearly one thing, and the property is another. That



the state has a right to tax such privileges has been held in a line of cases beginning almost with the foundation of our republic. The general rule, as laid down by Judge Cooley in his work on Taxation, is as follows: "Every person within the state owing temporary or permanent allegiance to it, all property of every description within the state and entitled to the protection of its laws, every private franchise, privilege, business, or occupation, is subject to be taxed by the state, in return for benefits received and anticipated from state government and protection."

The supreme taxing power of the state is vested in the Legislature. The presumption is that it will always exercise that power with due regard to the Constitution of the state and of the United States, and it is only where its acts are clearly unconstitutional that this court will set them aside. Again, any doubt must always be resolved in favor of the constitutionality of its action. With these principles in mind, we do not hesitate to say that the act here before the court is constitutional, and the petition must be dismissed.

The judgment of this court is that the motion be denied, and the petition dismissed.

(78 S. C. 264)

#### STATE v. POPE.

(Supreme Court of South Carolina. April Term, 1907. On Rehearing, Sept. 27, 1907.)

#### 1. CRIMINAL LAW—RULINGS ON MOTIONS FOR CONTINUANCES—REVIEW.

Motions for continuance in a criminal case for the absence of witnesses are addressed to the discretion of the trial court, and its rulings will not be disturbed, unless the discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3045.]

#### 2. SAME—ABSENCE OF WITNESSES—MATERIALITY OF TESTIMONY.

Circuit court rule 27 declares that no motion for a continuance for the absence of witnesses shall be granted without the oath of a party or his counsel that the witness is material. On a motion for a continuance, accused in his affidavit averred that it was impossible for him to state what an absent witness would testify to and his counsel made no affidavit. *Held*, that the court properly denied the application, on the ground that the materiality of the testimony was not shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1355.]

#### 3. WITNESSES—RIGHT OF ACCUSED TO COMPULSORY PROCESS FOR WITNESSES—CONSTITUTIONAL PROVISIONS.

Const. art. 1, § 18, giving to accused compulsory process for witnesses in his favor, is sufficiently complied with where accused was awarded compulsory process, under which a witness was bound over under recognizance to appear, and where a bench warrant was subsequently issued for the arrest of the witness.

#### 4. SAME.

Const. art. 1, § 18, giving to accused compulsory process for witnesses "in his favor," does not require the court to issue compulsory process for any one the accused may designate as a witness, but there must be a showing that

the person wanted is a witness in favor of accused, and that his testimony will be material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 5.]

Pope, C. J., and Gary, A. J., dissenting.

Appeal from General Sessions Circuit Court of Hampton County; Geo. W. Gage, Judge.

J. Henry Pope, Jr., was convicted of manslaughter, and he appeals. Affirmed.

John S. Reynolds and W. S. Smith, for appellant. Solicitor James E. Davis and W. S. Tillinghast, for the State.

JONES, J. At the October term, 1906, of the court of general sessions for Hampton county, the appellant was adjudged guilty of manslaughter and sentenced. At the call of the case, a motion for continuance of the term was made in behalf of the defendant, upon the ground that a material witness, Dr. M. L. Peeples, was absent after having been duly bound over according to law. The witness was bound over on the 22d of October, the day on which the term began, and was in attendance on the court for some time, but left after having been warned not to leave by defendant's attorney. It does not appear precisely when the witness left, or when defendant's attorneys were informed that he intended to leave or had left, but on October 25th Judge Gage, on the application of defendant's attorneys, issued a bench warrant directing the sheriff to arrest the witness and bring him to the bar of the court. The record fails to disclose the cause of the absence of the witness, or the reason why the sheriff failed to arrest him. After issuing the bench warrant, Judge Gage ordered the trial of the case to proceed over the protest of defendant's counsel; but it does not appear whether the trial was had on the 25th, 26th, or 27th of October. It appears that the court ruled that the solicitor having agreed to accept what the witness would swear to the trial must proceed. The appellant urges two exceptions for reversal: (1) error in refusing a continuance when it appeared that the witness had been regularly bound over as an expert witness; it being impossible for the defendant to put in the shape of an affidavit what the witness would testify to if present. (2) Error in forcing defendant to trial in the absence of said witness who was duly bound over and for whom bench warrant had been issued, but had not been served or return made thereon by the sheriff, thereby depriving defendant of his constitutional right to have compulsory process for obtaining witnesses in his favor. Motions for continuance on account of the absence of witnesses are addressed to the discretion of the trial court, and the court will not interfere unless a clear case of abuse of discretion is shown. *State v. Murphy*, 48 S. C. 5, 25 S. E. 43; *State v. Smith*, 56 S. C. 378, 34 S. E. 657. The discretion of the court in this case was not abused nor was it controlled by any

erroneous view of the law. In fact, the court acted in conformity with rule 27 of the circuit court, declaring that no motion for continuance beyond the term on account of the absence of a witness shall be granted without the oath of the party, his counsel, or agent, to the effect (1) that the witness is material; (2) that the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; (3) that he has used due diligence to procure the testimony of the witness, or such other circumstances as will satisfy the court that his motion is not intended for delay; and (4), in addition to the foregoing, the affidavit must set forth what facts he believes the witness, if present, would testify to and the grounds of such belief.

No such affidavit was presented to the court notwithstanding the offer of the solicitor to accept what the witness would swear to. It is stated in the exception that it was impossible for defendant to state what the expert witness would testify to if present. Matters of fact stated only in an exception cannot be considered by the court; but, if this statement were properly in the record, it would not avail, for it is to be presumed that, if the defendant could not make the statement required by the rule of court, his counsel surely could have done so. Under the circumstances, it may fairly be assumed that the circuit court was not satisfied that the testimony of the absent witness was material. In the case of *State v. Way*, 88 S. C. 833, 17 S. E. 39, it was held not reversible error to refuse to continue a case on the ground of the absence of witnesses subpoenaed to appear, even though the prosecuting attorney refused to admit that they would testify what was expected of them. In *State v. Box*, 66 S. C. 402, 44 S. E. 969, a bench warrant had been issued for the arrest of the absent witnesses. Three of the witnesses were brought into court the next morning, but the warrant had not been executed as to the others. One of the exceptions alleged error in forcing defendant to trial when sufficient time had not been allowed the sheriff to execute the bench warrant. This court held there was no abuse of discretion, and the court emphasized the fact that rule 27, referred to above, sets down what course the accused should pursue to obtain a continuance.

Under article 1, § 13, of the Constitution, and section 45 of the Criminal Code of 1902, it is true that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses "in his favor." This right was so far accorded the appellant as that compulsory process was awarded him under which a witness was bound over under recognizance to appear, and on his application a bench warrant was afterwards issued for the arrest of the witness, so that the real

point of the complaint is not that compulsory process was denied the accused, but that, such process having been granted whenever sought, the court declined to continue the case for the term on the showing made, which we have shown was not such as justice and the rule of the court required, it not appearing that the witness was material.

The judgment of the circuit court is affirmed by an equal division of the court.

**WOODS, J.** I concur in affirming the judgment on the ground that there was nothing before the court to show the materiality of the absent witness. The Constitution gives the accused the right "to have compulsory process for obtaining witnesses in his favor." Obviously this does not mean the court is bound to issue compulsory process for anybody the defendant may designate as a witness. Much less does it mean that the cause must be continued for the absence of any one who may be designated as a witness for defendant. There must be a showing that the person wanted is really a witness "in favor" of the defendant, and that his testimony would be material to the defendant's cause.

**POPE, C. J.** I dissent. The Constitution provides that compulsory process shall be made to obtain witnesses. This was not given. Rule of court must yield to the Constitution.

**GARY, A. J. (dissenting).** Section 18, art. 1, of the Constitution, provides that the accused shall have compulsory process for obtaining witnesses in his favor, and this provision is mandatory. This right is not exhausted because a witness at one time was arrested and bound over to attend court, but continues until the accused is placed upon his trial, unless waived or forfeited by his conduct, of which there is no evidence whatever in this case, nor does the record show that the ruling of his honor the presiding judge was based upon such ground. As long as this right continues, the accused cannot be forced to trial, even though the Solicitor may be willing to accept as testimony what the witness would swear if present.

For these reasons, I dissent.

#### On Rehearing.

**PER CURIAM.** Judgment of the circuit court affirmed, for reasons stated in the opinions of Associate Justices JONES and WOODS, heretofore filed.

JONES and WOODS, JJ., and GARY, KLUGH, DANTZLER, PRINCE, MEMMINGER, HYDRICK, and WILSON, Circuit Judges, concur. POPE, J., and GARY, A. J., dissent.

(129 Ga. 302)

**EDWARDS v. HALE**

(Supreme Court of Georgia. Aug. 15, 1907.)

**PARTNERSHIP—EVIDENCE TO ESTABLISH.**

The evidence, though conflicting, amply authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38; Partnership, § 76.]

(Syllabus by the Court.)

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by Hugh Edwards against J. P. Hale. Judgment for defendant, and plaintiff brings error. Affirmed.

Edwards filed his petition against Hale, alleging that the defendant was indebted to him in the sum of \$250 on account of the breach of a partnership agreement; that they entered into an oral agreement to form a partnership under the name of "John P. Hale, Proprietor"; that Hale was to furnish the capital to start the business; that both were to rent a house, and Edwards was to conduct the business and take out a reasonable amount for his support, and the profits and losses were to be borne equally; that the plaintiff went to work in good faith and built up a good business, which was increasing daily; that there was no time especially agreed on as to how long the partnership should continue, but it was understood that it was not to be terminated without three months' notice; and that, notwithstanding such agreement, the defendant, without any notice to petitioner, took charge of the business and refused to allow him to participate therein, and deprived him of all his rights as a partner. The petition concludes in the following language: "Your petitioner further shows that, being turned out of the business without any notice, he was out of employment and lost his time and profits for three months, which he was entitled to, all to the value of said \$250, which the said defendant is justly indebted to petitioner." The defendant filed an answer in which he denied all liability. At the trial the plaintiff testified that the agreement was as set forth in the petition. The testimony of the defendant was to the effect that there was no partnership whatever; that the plaintiff was simply employed to conduct the business, and was to be paid for his services one-half of the profits; that he had no interest in the business, and was not liable in any way for the losses; that for a sufficient cause he was discharged; and that all that was due him, under the terms of the agreement, had been tendered to him, which he had refused to receive. The trial resulted in a verdict for the defendant, and the plaintiff assigns error upon the refusal of the judge to grant a new trial.

W. W. Stark, for plaintiff in error. H. H. Perry, for defendant in error.

58 S.E.—52

COBB, P. J. (after stating the facts as above). The controlling issue was partnership or no partnership. The evidence upon this subject was conflicting. It is contended by counsel for plaintiff in error, in his brief, that the evidence was sufficient to authorize a finding either way. It is therefore only necessary to determine whether any error of law had been committed which would authorize a reversal of the judgment. Error is assigned upon the following charge of the court: "If there be no agreement as to the time of the continuance, the partnership is at will, and may be dissolved at any time by any partner giving the other three months' notice; and if this be the truth of the case, if the defendant dissolved it without this notice, then the plaintiff can recover what the profits would amount to for said three months, and no more, and the burden is upon the plaintiff to show what these profits would amount to." Error is assigned upon this charge, for the reason that it limited the plaintiff's recovery to the profits that might have been made during the three months following the wrongful dissolution of the partnership, and placed the burden upon the plaintiff of showing what his damages would be. As will be seen from the statement of facts, the plaintiff distinctly alleges that his damages were the loss of profits during the three months, and hence there was no error in the judge limiting the plaintiff's recovery in the manner in which it had been limited in his petition. Neither was there any error in instructing the jury that the burden was upon the plaintiff to prove his damages. He must furnish some basis upon which the jury could estimate the damages resulting to him from the breach of the partnership agreement. It may be that under the petition the plaintiff would have been entitled to recover nominal damages for the breach of the contract, even though there was no evidence as to any actual damages sustained; but it is well settled that in an action upon a contract a new trial will not be ordered merely for the purpose of allowing a plaintiff to recover nominal damages. *Roberts v. Glass*, 112 Ga. 459, 37 S. E. 704; *Bloom v. Americus Grocery Co.*, 116 Ga. 784, 43 S. E. 54.

Error is also assigned upon the following charge: "In order to constitute a partnership by joint interest in the profits and losses, the partners must share in all losses sustained by the partnership. The word 'loss' in this section [section 2629] means something more than the mere failure to realize profits." The error assigned upon this charge is that it precludes the jury from finding for the plaintiff profits which had been added to the business, and that the court did not define the term "losses." So far as the latter assignment of error is concerned, it is sufficient to say that, if any definition of this term used in the Code section had been desired, it should have been the subject of a proper written request. The

first criticism is not well taken, for the reason that the court, in the charge referred to, was not undertaking to determine how an accounting should be had to determine the profits and losses of the business, but simply defining what was a partnership under the law.

The only other assignment of error is an objection to the testimony of a certain witness as to the statement of the father of the defendant in the absence of both the plaintiff and defendant. The judge, in a note to the motion for a new trial, says that this evidence was admitted for the purposes of impeachment. Even if this evidence was improperly admitted, for the reason that it sought to impeach the witness upon a matter which was immaterial, the error was, under all the circumstances, not of such grave nature as to require a reversal of the judgment.

Judgment affirmed. All the Justices concur.

(129 Ga. 292.)

#### FORD v. CLARK.

(Supreme Court of Georgia. Aug. 14, 1907.)

##### 1. JUDGMENT—MOTION TO VACATE—FRAUD.

A judgment, founded on a verdict obtained by fraud practiced on the defendant and the court, may be set aside, and the original case reinstated, in a court of law, with proper pleadings, and with all the parties at interest as parties to the motion; the motion being made at the term of the court at which the verdict and judgment were entered, and the movant showing that he was not in laches, had a meritorious defense, and announcing ready for an instant trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 712, 713.]

##### 2. SAME—EVIDENCE.

The motion to vacate the verdict and judgment and to reinstate the case met the requirements of the foregoing rule, and was supported by the evidence, and the discretion of the trial judge in vacating the verdict and judgment and reinstating the case was not abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 712, 713.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by J. J. Ford, administrator, against W. S. Clark. Judgment for defendant, and plaintiff brings error. Affirmed.

Ford, as administrator of Graves, instituted his action of ejectment against W. S. Clark, returnable to the April term, 1906, of Colquitt superior court. At the next term a verdict was rendered in favor of plaintiff, and a judgment entered thereon. During the same term, the defendant filed his motion to vacate and set aside the verdict and judgment, alleging that previously to the institution of the suit he had deposited his title deed to the premises in dispute with the counsel for the plaintiff in the ejectment suit. As soon as he was served with a copy of the petition, he applied to plaintiff's counsel for

his deeds, for the purpose of preparing his answer to the action of ejectment, when counsel for plaintiff informed him that it was unnecessary to file any answer to the case; that he, as attorney for the plaintiff, would withdraw the suit; and that the same would never go to trial. Relying upon this statement, movant did not file an answer to the suit. He avers that he had a meritorious defense to the ejectment suit, and sets out facts showing a good prescriptive title to the land embraced in the suit. He alleges that he had no knowledge that counsel for the plaintiff had violated his promise to dismiss the suit until the term of court at which judgment was taken, and after the plaintiff's counsel, without notice to him, had taken a verdict and judgment against him. He offered to file his answer instant and announced ready for trial on the merits of the ejectment suit. When this petition was presented to the judge, he granted a rule nisi directed to Ford, as administrator, requiring him to show cause instant why the verdict and judgment should not be set aside and the defendant allowed to file his answer as prayed. Due and legal service of the order and petition were acknowledged by counsel for plaintiff in the ejectment suit. The plaintiff moved to dismiss the proceeding, on the ground that it was a motion to set aside a verdict and judgment, not predicated upon a defect appearing upon the face of the record. The court overruled this motion to dismiss, and the plaintiff excepted. After hearing the evidence, the court granted the motion to set aside the verdict and judgment, and this judgment also is assigned as error.

W. C. McCall, for plaintiff in error. Edwin L. Bryan, for defendant in error.

EVANS, J. (after stating the facts as above). 1. There is no doubt that the judgment of a court of competent jurisdiction may be set aside, by the court which rendered it, for fraud and irregularity. *Mobley v. Mobley*, 9 Ga. 247. An examination of previous adjudications of this court discloses some apparent conflict as to the proper procedure. In *Dugan v. McGlann*, 60 Ga. 353, it was said that a judgment may be vacated for fraud, accident, or mistake, unmixed with the negligence or fraud of the complaining party, by decree in chancery, or in a court of law with appropriate pleadings, but cannot be set aside on either of those grounds on motion. It has been repeatedly held by this court that a motion to set aside a judgment must be based on some defect which appears on the face of the record. *Regopoulos v. State*, 116 Ga. 596, 42 S. E. 1014, and citations. But not all motions to set aside judgments are necessarily based on matter appearing on the face of the record. For example, any judgment or verdict entered up in consequence of perjury may be set aside "upon motion and notice to the adverse par-

ty." Civ. Code 1895, § 5366. Here we find clear recognition of the right to set aside a judgment, on motion, for a defect not apparent on the record. In *Mobley v. Mobley*, 9 Ga. 247, there was a motion made in the court of ordinary to set aside a judgment granting letters of dismission to an administrator, on the ground of fraud. Objection was made to the evidence offered to prove the fraud alleged, on the ground "that fraudulent acts, however flagrant, could not be given in evidence" in a motion to set aside a judgment. In the course of the discussion of this point, Nisbet, J., said: "Fraud in procuring a judgment is ground for its reversal, both in law and equity. It is an irregularity which vacates it. It may be inquired into by the court which rendered the judgment." At common law a motion to set aside a judgment could be predicated upon any irregularity in the judgment, whether appearing in the face of the record or not. Judge McCay said, in *Fannin v. Durdin*, 54 Ga. 479, that the provisions of our Code were merely declaratory of the common law; but his remarks were said to be obiter dicta in the *Case of Regopoulos*, supra. Be that as it may, we find that, as early as the case of *Mobley v. Mobley*, cited from 9 Ga. 247, it was considered proper procedure to vacate a judgment procured by fraud to file a petition addressed to the court wherein the judgment was rendered, distinctly alleging the specific fraud and praying a rule against all the parties interested, to show cause why the judgment should not be set aside. When the rule was served, the court, on the day therein appointed, would proceed to hear evidence relating to the alleged fraud. This practice was approved in *Turner v. Jordan*, 67 Ga. 604. In the late case of *Union Compress Co. v. Leffler*, 122 Ga. 640, 50 S. E. 483, it was held: "In a proper proceeding by petition, with rule nisi or process, and service upon the necessary parties, the courts of this state may exercise the jurisdiction, which obtained at common law, to set aside judgments for irregularities not appearing on the face of the record." See, also, *Ayer v. James*, 120 Ga. 578, 48 S. E. 154. Whether such proceeding be technically a motion to set aside a judgment, or denominated by other appropriate name, it is certainly a proceeding in a court of law, and it would be immaterial to the parties haled into court whether they were cited to appear by a rule issued by the judge, or process in the name of the judge, issued by the clerk.

2. The movant submitted evidence to sustain the truth of the grounds of his motion. He proved that he had a meritorious defense to the ejectment suit, viz., a good prescriptive title. His motion was made at the trial term of the ejectment suit, and he offered instantly to plead and announced ready for trial. The plaintiff in ejectment would not have been delayed, for he could not have had a trial at an earlier term of

the court. The movant was diligent, in that he moved instantly upon knowledge that the plaintiff had taken judgment against him in violation of his promise to dismiss the suit. An application to vacate a verdict and judgment is addressed to the sound discretion of the judge, and the court did not err under the evidence submitted in setting aside the verdict and judgment, and reinstating the case.

Judgment affirmed. All the Justices concur.

(129 Ga. 319)

### SORRELLS v. MATTHEWS.

(Supreme Court of Georgia. Aug. 15, 1907.)

#### PARENT AND CHILD—WRONG TO CHILD—ACTION BY PARENT.

A father cannot maintain a suit for a wrong done to his minor child, unless he has incurred a direct pecuniary injury therefrom, by reason of loss of service or expenses necessarily consequent thereon. It follows that, if a teacher of a public school is liable to any one for expelling a pupil therefrom, an action therefor will not lie in favor of the father of the pupil, when he has thereby suffered no direct pecuniary loss.

(Syllabus by the Court.)

Error from Superior Court, Randolph County; Moses Wright, Judge.

Action by J. M. Sorrells against C. R. Matthews. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Sorrells brought an action against C. R. Matthews, teacher of a public school, for damages in the sum of \$300, for expelling the plaintiff's children from the school. The petition was dismissed at the trial term, on a motion in the nature of a general demurrer, and the plaintiff excepted. The substance of the petition was: The defendant contracted with the board of education of Randolph county to teach a public school at Benevolence in that county, for six months, beginning December 1, 1905. He also agreed with the trustees of the Benevolence Academy "to carry on, in conjunction with said public school, a school in said Benevolence Academy extending two months longer than said public school term, and in which other branches were taught than those taught in the public school; and under an arrangement of some sort between the trustees, or between him and said trustees, it was arranged to pay his salary for this extra time by levying an assessment on every pupil who entered said school, regardless of whether entered for the whole or only the public term, at the rate of from five to seven dollars." The plaintiff had three children of school age entitled to enter said public school. The school was opened by the defendant in October or November, 1905, and at the beginning of the public term thereof, when the plaintiff had the right to enter his children, he entered them in said public school, notifying the defendant, at the time, that they were being entered for the public depart-

ment, and for the public term only, and for the purpose of receiving such advantages alone as the public school afforded. Soon after the children were thus entered, the chairman of the board of trustees of said academy demanded of plaintiff \$16, for the assessment levied by said board of trustees on each pupil. The plaintiff "declined to pay the same, and the demand was several times afterwards made on [him] by some member of said local board of trustees, which [he] as often refused to pay." The chairman of the board of trustees then notified the plaintiff that, unless said sum was paid, his children would be sent home. The plaintiff not having paid the amount so illegally exacted, the defendant, about December 18, 1905, "publicly and in the presence of said school, for no other cause or reason than petitioner had refused to yield to said illegal exaction, dismissed, expelled, and sent petitioner's said children home, and afterwards refused to receive them or to teach them in said public school, unless he would pay the assessment imposed upon him by the board of trustees of said academy." The defendant, in expelling plaintiff's children, acted with full knowledge that neither the trustees nor he had any right to make such assessments and to refuse to receive them back in school, and "the acts of said Matthews in said matter were arbitrary, wilful, and malicious." In order to have his children restored to the school, it was necessary for the plaintiff to mandamus the county board of education, and by this means the children were put back in the school on January 18, 1906. The plaintiff, "by reason of the loss of time from said school by his said children and the expense of having to pay attorney's fees, \* \* \* was injured, and by the wrong and humiliation put upon his unoffending children [he] was humiliated and his feelings greatly wounded. Besides this the action of said Matthews put him in the attitude of one who refused to pay his obligations, and the acts of said Matthews were willfully and maliciously designed to put him in that false light before the public, and by such acts petitioner says that he has been injured and damaged in the sum aforesaid."

W. C. Worrell and M. O. Edwards, for plaintiff in error. Powell & Pottle, for defendant in error.

FISH, C. J. (after stating the facts as above). One ground of the motion to dismiss the petition was that it set forth no right of action in the plaintiff. In our opinion this ground was well taken, and therefore the necessity of dealing with any other question raised by the record is obviated. In no case can a father maintain an action for a wrong done to his minor child, unless the father has incurred some direct pecuniary injury therefrom, in consequence of loss

of service, or expense necessarily consequent thereon. *Bell v. Wooten*, 53 Ga. 684; *Central Railroad Co. v. Brinson*, 64 Ga. 475; *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684; *Hurst v. Goodwin*, 114 Ga. 586, 40 S. E. 764, 88 Am. St. Rep. 43. Civ. Code 1895, § 8816, providing that "every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant," is merely declaratory of the common law. *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684. At common law the parent's right to recover for a tort to his minor child is, by legal fiction, predicated upon the relation of master and servant. *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684, and cases cited. In *Spear v. Cummings*, 23 Pick. (Mass.) 224, 34 Am. Dec. 53, it was held that "the teacher of a town school is not liable to any action by a parent, for refusing to instruct his children." This ruling was put upon the ground that there is no privity of contract between the parent and the teacher; the latter being responsible on his contract only to the town by which he is employed and paid. In *Sherman v. Charlestown*, 8 Cush. (Mass.) 161, Shaw, C. J., referring to the case just cited, in which he also delivered the opinion, said that the court were of opinion, among other reasons, that the action was misconceived, "because the father is not the person injured and entitled to recover damages in his own right." In *Stephenson v. Hall*, 14 Barb. (N. Y.) 222, it was held that an action will not lie in behalf of a parent, against the town superintendents of public schools, for expelling and excluding the plaintiff's minor child from the common schools, nor for damages sustained by the parent in bringing an appeal to the state superintendent of common schools, to get such child reinstated in the schools. In the opinion in that case, Allen, J., used this language: "Can it be said that the plaintiff has an interest as well as a right to have his daughter in the school, that by reason of the education she was receiving she was being prepared to render herself more useful, and that her services during her minority would thus become more valuable to her parent? This would be carrying the doctrine much too far, in my opinion, in order to sustain an action of this kind, an action clearly not to be favored, unless in support of an undoubted principle of law." In *Donahoe v. Richards*, 38 Me. 376, it was held that the parent of a child expelled from a public school by order of the superintending school committee can maintain no action against the members of the committee for such expulsion. In delivering the opinion, Appleton, J., said: "In this case, there is no act done by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her; and, if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong

committed, the injury done, is done to her alone, and, if her rights have been violated, she alone is entitled to compensation." So, in *Boyd v. Blaisdell*, 15 Ind. 73, where the plaintiff sued the school trustees of a township for refusing admission to his children into a district school in such township, it was held that the plaintiff could not maintain the action, as the parent can only sue for such injuries to his child as occasion loss of service. For all other injuries the child must sue.

All the cases cited, holding that a parent cannot recover for the expulsion of his child from a public school, were not put upon the common-law doctrine (*Hall v. Hollander*, 4 Barn. & Cress. 660, 5 East, 45; *Flemington v. Smithers*, 2 Carr. & Payne, 292-578; *Frazier v. Georgia Railroad Co.*, 101 Ga. 70, 28 S. E. 684, and citations) that a parent cannot maintain an action for an injury to his child which does not result in loss of service, or cause expense to the parent. We have been able to find only one reported case out of harmony with this rule, viz., *Roe v. Deming*, 21 Ohio St. 666, where it was held: "The father of a child entitled to the benefits of the public school of the subdistrict of his residence may maintain an action against the teacher of the school and the local directors of the subdistrict for damages for wrongfully expelling the child from the school." There was no further opinion rendered, and no authority cited. We do not agree to the soundness of this dictum. Counsel for plaintiff in error cites the case of *Board of Education of Cartersville v. Purse*, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593, 65 Am. St. Rep. 312, admitting, however, that "the Purse Case did not decide the question involved here, but [contending] the analogous line of reasoning would establish the soundness of our contention." In that case it was held that a board of education having the charge and control of a system of free schools established by law and supported by taxation has the right to suspend from attendance upon school children whose parent, in undertaking to interfere with the discipline of a teacher over one of the children, enters the schoolroom of such teacher, during school hours, and, in the presence of the assembled pupils, is guilty of conduct toward such teacher which is subversive of the discipline of the school. The line of reasoning in the opinion in that case, delivered by Mr. Justice Cobb, led to the conclusion that "it would be contrary to the policy of our law, based as it is upon the common law, to bestow upon the child in the matter of its education any right independent of the parent." From this, counsel argues that it follows that, when a child is wrongfully expelled from a public school, the right of action for such expulsion is in the parent, and not in the child. But the very opinion upon which counsel relies recognizes that there is a right of action in a child for his wanton and malicious expul-

sion or exclusion from a public school, in which he has been lawfully entered by his parent, and authorities to this effect are there cited. On page 444 of 101 Ga., page 904 of 28 S. E. (41 L. R. A. 593, 65 Am. St. Rep. 312), the learned justice said: "While it is the act of the parent or guardian which places the child in the school and puts him in a position where he can obtain the benefits of the system, this does not prevent a duty from arising on the part of the school authorities towards the child to abstain from unlawful conduct which would deprive the child of the benefit which the act of the parent has secured to him. The moment the child is placed in school this duty arises. A breach of this duty will be a tort for which the child can recover in a proper action against the person wantonly and maliciously depriving him of the benefits which he would receive from the school. \* \* \* Out of this breach of duty damage arises to the parent, as well as to the child. The parent therefore has the right to appeal to the courts to compel the child to be admitted or reinstated, as the case may be, and also to appeal to the courts by his action for damages for the amount which he would be required to expend in the education of his child. This child would also have a right against the individual thus wantonly and maliciously depriving him of the benefit which is secured to him by the law in the event the parent sees proper to enter him in the school." The same learned justice, in the opinion rendered in *Hurst v. Goodwin*, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43, said: "It does not, however, follow that the right of action for injuries of every character to a minor child is in the father alone. If the injury is one from which the father does not sustain any damage—that is, which does not destroy or impair the ability of the child to render services to the father—there is no right of action in the father for the wrong done the child." In the case with which we are dealing, if, under the facts alleged, a right of action existed, it was in the children, not in the father, and it is their right, not his, which he is seeking to exercise in his own behalf. He makes no claim for money expended in the education of his children, in consequence of their expulsion from the public school. Indeed, his petition indicates that he spent no money for this purpose, as it shows that they were only out of the school about a month, during which time he was trying to get them reinstated therein. There is no allegation that he was put to any other expense by reason of their being expelled from the school. It is true that it is alleged that by reason of his having to pay attorney's fees he was injured, but what he paid such fees for is not alleged, nor the amount which he paid, nor that they were reasonable, nor whether the fees referred to were in the present case or in some other. Of course, in no event could he recover any attorney's fees for

which he became liable in a case in which he sets out no cause of action.

The petition was properly dismissed upon the demurrer.

Judgment affirmed. All the Justices concur.

(129 Ga. 248)

**ADAMS et al. v. STATE.**

(Supreme Court of Georgia. Aug. 13, 1907.)

**CRIMINAL LAW — CONFESSIONS — ADMISSIONS BEFORE CORONER'S JURY.**

Where the body of a man apparently murdered was found by the roadside, and two persons were arrested and placed in jail charged with the murder, and were subsequently taken thence in custody before the coroner's jury summoned to hold an inquest on the body, and, without being informed that they were not compelled to testify, were sworn and examined as witnesses, not on their motion, but on that of the coroner or the jury, in regard to the homicide and their connection with it, on a subsequent trial under an indictment charging them with murder, confessions or inculpatory statements elicited on their examination before the coroner's jury were not admissible against them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1185.]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; Price Edwards, Judge.

B. G. Adams and Hillard Lee were convicted of murder, and bring error. Reversed.

Griffith & Matthews, for plaintiffs in error. W. K. Fielder, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. B. G. Adams and Hillard Lee were jointly indicted for the murder of Reece Jones. They were found guilty and sentenced to life imprisonment. They made a motion for a new trial, which was overruled, and they excepted. The motion contained, besides the general grounds, numerous others which were added by amendment. Most of these require no discussion further than to say that they are without merit. As to others, if there were some slight inaccuracies of expression in detached portions of the charge, when taken in connection with the entire charge, they will scarcely require a new trial. In one part of the charge the presiding judge used the expression: "Yet if the evidence was not strong enough to exclude every reasonable hypothesis of murder or the claim of murder," etc. In a case depending upon circumstantial evidence it is every other reasonable hypothesis save that of the guilt of the accused which must be excluded, not "every reasonable hypothesis of murder or the claim of murder." Such an inadvertence in expression will doubtless not occur again.

One ground of the motion for a new trial requires a reversal. It appears that the body of the deceased was found beside the public road, and evidence of a circumstantial character was introduced to show that he was killed by the defendant. After the body was

found, an inquest was held. The defendants had been arrested and placed in jail, charged with the murder of the deceased. They were taken from jail in custody of the sheriff and sworn and examined as witnesses before the coroner's jury. They were not informed that they were not compelled to testify, and were examined after all parties had been excluded from the room where the inquest was being held. On their trial in the superior court under the indictment, two members of the coroner's jury were allowed, over objection, to testify to what the defendants had sworn as witnesses at the inquest, including certain inculpatory statements. The ruling just stated was erroneous. Pen. Code 1895, § 1006, declares that: "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury." Among the powers of a coroner's jury is that of declaring whether the person upon whose body the inquest is held came to his death by murder; and, if so, who were the principals and who were the accessories. Pen. Code 1895, § 1262. If the inquest discloses facts which lead or may lead to the prosecution of any person for the homicide, the coroner shall issue a warrant for the arrest of the person suspected of the homicide, returnable as other warrants. Pen. Code 1895, § 1264. "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it." Pen. Code 1895, § 1010. In a court of inquiry the defendant is permitted to make his own statement of the transaction, not under oath, if he desires so to do. Pen. Code 1895, § 910. The spirit of the law is that one accused of crime shall not be required to be put under oath, and thus to be placed in the dilemma of either being required to testify as a witness against himself, or being subject to the penalties of false swearing. His right to speak, not under oath, is a statutory privilege, and it is not lawful to require him to be sworn as a witness against himself. Where a coroner's jury has been summoned to hold an inquest over the body of a deceased person who appears to have been murdered, and another has been arrested and is held in custody, accused of the crime, he is not formally upon trial, but substantially he is so, and the crime for which he has been arrested, as well as his connection with it, is the subject of investigation. For the coroner, or other officer representing the state to bring him forward as a witness under such circumstances, require him to be sworn, and demand of him under oath to testify as to his own guilt or innocence, is in violation of the spirit, if not the letter, of the statute. If he should decline to be sworn at all, or to answer questions, he must know that the



effect would be disastrous to him. It is not a case where one may lawfully be called as a witness generally, but where, if certain questions are put to him, he may claim his privilege. It is a case where the accused ought not to be sworn at all. It may be that there is nothing in the fact of an arrest alone which will make a voluntary confession of a party under arrest inadmissible; or, if one voluntarily makes a confession or inculpatory statement before a magistrate, this alone may not render it inadmissible; or, as suggested above, where it is lawful to swear a person as a witness, so that the general examination of him is proper, but if the witness is asked certain questions he may claim his privilege, the administration of an oath may not alone render a confession voluntarily made inadmissible on a subsequent trial. But we think there can be no doubt that, where it is unlawful to require the accused to be sworn as a witness, to do so, and to draw out of him, by questions, confessions, or inculpatory statements under oath is improper, and such statements are not admissible against him, if he is subsequently tried for the offense involved.

In *Cicero v. State*, 54 Ga. 156, it was said: "A magistrate has no right to examine a defendant for the purpose of obtaining from him contradictory statements." Before a confession is admissible in evidence, it must appear *prima facie* that it was freely and voluntarily made. If the contrary appears, it is inadmissible. If the evidence for the state makes out a *prima facie* case for the admission of such a confession, the court is not bound, before admitting it, to hear evidence on behalf of the accused, tending to show coercion or improper inducement in its procurement. If the evidence for the state shows the confession to be admissible, it will be admitted. If the defendant desires to introduce evidence to show that there was improper inducement which caused the confession to be made, he can do so, and it will then be for the jury to determine, under all the evidence, whether or not the confession was free and voluntary. *Irby v. State*, 95 Ga. 467, 20 S. E. 218; *Dawson v. State*, 59 Ga. 333; *Smith v. State*, 88 Ga. 627, 15 S. E. 675. As to inculpatory statements, or even statements seeking to place the crime upon another, see *Fuller v. State*, 109 Ga. 809, 35 S. E. 298. In *Inman v. State*, 72 Ga. 269, no question was raised as to the admissibility of evidence, but exception was taken to the charge of the court as to the credit to be given to sworn statements of a person as a witness before a coroner's jury, when subsequently introduced in evidence (apparently without objection) on his trial for murder. Counsel for the state in the present case relied on the case of *Woolfolk v. State*, 81 Ga. 551 (6), 562, 8 S. E. 724. It will be observed that there the court dealt with two matters together: First, that testimony was allowed in relation to the coroner's requiring the de-

fendant, during the progress of the inquest, to remove his clothing, whereby certain blood stains were disclosed on his person; and, second, certain statements of the defendant which were made during the investigation. The first point was the one principally considered. In regard to the second point, it was stated, in the opinion (page 562 of 81 Ga. and page 728 of 8 S. E.) that: "So far as this record discloses, the statements made by the defendant were perfectly voluntary and not under oath." This distinguishes the *Woolfolk* Case from that now under consideration. In *Green v. State*, 124 Ga. 344, 52 S. E. 431, it was held that the objection to showing the statement which the defendant had made at the coroner's inquest was without merit, where the record did not disclose any evidence of compulsion, or that the statement proved by such testimony was not freely and voluntarily made. In the opinion (page 346 of 124 Ga., and page 432 of 52 S. E.) it was stated that: "There was no error in admitting the testimony complained of in the first ground of the amendment to the motion for a new trial; it not appearing from the record that the accused was under oath when she made her statement during the coroner's inquest." A sentence in the opinion should perhaps be mentioned, lest it might be subject to be misunderstood hereafter. It was said that: "As it does not appear from the record in the case at bar that the incriminating statement of the accused was not voluntarily made, and the burden being upon her to show such fact, if it was a fact (*Eberhart v. State*, 47 Ga. 599), her failure so to do renders her objection to the testimony without merit." It was not intended by this to conflict with the rulings in *Irby v. State* and *Dawson v. State*, *supra*. In the *Eberhart* Case, one ground of the motion for a new trial was because the court erred in allowing the confessions of the defendant and of one Spann to go to the jury without a preliminary examination, and without proof that they were freely and voluntarily made. In a note to this ground, the court stated that during the examination of the same witness on the trial of Spann, on the preceding day, in regard to the same confessions, he had thoroughly examined the witnesses as to the character of such confessions, and had fully satisfied himself that they were freely and voluntarily made, without the slightest hope of benefit or the remotest fear of injury; that during the trial of the prisoner no objection was made by counsel on this ground, and the attention of the court was not called to the fact. In the opinion the failure to object was emphasized. It was said that: "We incline to think that, if objected to, it would have been the duty of the state to show the circumstances under which they were made, that the court might see if they were voluntary. \* \* \* If they are given in and not objected to, it is too late after verdict to say that there was not a sufficient inquiry into

the circumstances." The language of the seventh headnote is too broad, standing alone. It must be construed in the light of the question before the court.

In many cases it has been held, where a person, under arrest accused of a crime connected with the death of the person on whose body the inquest is held, is called as a witness before the jury, not of his own motion or volition, that sworn confessions so obtained are not considered voluntary, and cannot be used against the witness in a subsequent prosecution of him. Different courts have assigned different reasons for this exclusion, and have advanced different theories on the subject. Some have based it upon the letter or spirit of statutes. Others, without regard to statutes, have declared that confessions so obtained are not voluntary. In *Wharton's Crim. Ev.* (9th Ed.) § 664, after stating that a confession, though made under oath, if not procured or induced by compulsion or undue influence, is admissible, it is added: "And, as we will presently see, when the defendant is in custody under charge of crime, and is then sworn and questioned by the examining magistrate, his answers thus compelled cannot afterwards be put in evidence against him." In section 668, it is said: "But the testimony of the accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn, and examined, not on his own motion, but on the motion of the prosecution. This rule is founded upon the unreliable as well as the inquisitorial character of such statements; and therefore where a man, having been arrested by a constable, without a warrant, upon suspicion of having committed murder, was compelled to answer under oath as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate." See, also, 1 *Greenleaf on Ev.* § 225. An elaborate discussion of the subject and of leading cases on both sides will be found in 1 *Wigmore on Ev.* §§ 842-852, and note to section 852. See, also, 1 *Bish. Crim. Proc.* (4th Ed.) §§ 1255, 1256. In *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, it was held that, on a trial for murder, statements made by a person as a witness at a coroner's inquest upon the body of the deceased, before the witness had been charged with the murder, and before it was ascertained that a murder had been committed, were admissible in evidence against him. *Selden and Allen, JJ.*, dissented. In the opinion numerous decisions were discussed. In *People v. McMahon*, 15 N. Y. 384, the prisoner had been arrested by a constable, without a warrant, on suspicion of being the murderer of his wife. The constable took him before the coroner, who was holding an inquest on the body of the murdered woman.

The coroner swore him and examined him as a witness. It was held that his evidence thus given before the coroner was not admissible on the prisoner's trial for the murder. The opinion was prepared by *Selden, J.*, who had formerly filed a dissenting opinion in the *Hendrickson Case*. It was learned and interesting, but much that was said extended beyond the ruling actually made, and it has given rise to no little discussion since. In *Teachout v. People*, 41 N. Y. 7, the two preceding cases were considered, and it was held that: "Statements made by the prisoner, under oath, at a coroner's inquest upon the body, are admissible against him upon his trial for the murder, although he knew, at the time he was sworn, that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him, and that he had a right to refuse to testify." A distinction was made between one who was merely suspected of the crime, and one who had been arrested and stood before the coroner's jury as substantially a party charged with the crime, and who was subjected to examination on oath. In *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709, this distinction was again recognized. In *People v. Chapleau*, 121 N. Y. 286, 24 N. E. 469, the person who had been arrested, charged with the crime of murder, desired to go before the coroner's jury and make a statement, and, after being duly informed that his depositions might be used against him, elected to be sworn, and asked to be allowed to testify. It was held that, under the then existing statute, his statement was admissible in evidence against him on a subsequent trial for murder. In that case the preceding rulings were treated as harmonious, which has called forth from *Prof. Wigmore* a somewhat satirical comment. 1 *Wig. Ev.* § 852, note 1, *supra*. See, also, *Wilson v. State*, 110 Ala. 1, 20 South. 415, 55 Am. St. Rep. 17; *State v. Clifford*, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518 and note; *Farkas v. State*, 60 Miss. 347; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State v. Broughton*, 7 Ired. (N. C.) 96, 45 Am. Dec. 507.

The case of *Davis v. State*, 122 Ga. 564, 50 S. E. 376, is readily distinguishable from the one at bar. There, on an investigation before a grand jury, founded on an indictment against certain parties, another person was examined as a witness. Apparently there was some suspicion of his being connected with the crime, but in the report it does not appear that he was under arrest. He was warned of his privilege not to testify to anything tending to criminate him. He nevertheless voluntarily answered a question. It was held admissible, when he was afterwards indicted and tried, to prove what he said and his manner while testifying.

If there were any irregularities in regard to one of the jurors, or in regard to certain

expressions in the charge, as claimed, they will probably not occur again.

Judgment reversed. All the Justices concur.

(129 Ga. 246)

### BROWN v. BROWN.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. DIVORCE—CRUEL TREATMENT.

Cruel treatment, as a ground for divorce, is "the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb or health. \* \* \* The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 62.]

#### 2. SAME.

Where acts of cruelty have been condoned by subsequent cohabitation, such acts will not be revived as a ground for divorce, except by fresh acts of cruelty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 185, 188.]

(Syllabus by the Court.)

Error from Superior Court, Turner County; W. N. Spence, Judge.

Action by Sarah Brown against W. O. Brown. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Sarah Brown filed her libel for divorce against her husband, W. O. Brown, on the ground of cruel treatment. In support of her allegations, the libellant testified: "I and the defendant, W. O. Brown, have both been residents of Wilcox county three years before the filing of suit. I married W. O. Brown on the 16th day of July, 1908, and lived with him until the 19th day of May, 1905, at which time we separated. During the time that we lived together I performed, on my part, all the duties incident to the marital relation. During the time that we lived together W. O. Brown was strong and healthy and able to work, and could have secured remunerative work, but he worked very little, and failed to provide reasonable food and clothing and other necessities of life for me during the continuance of marital relation. He cursed at me several times, and on two occasions prior to our separation he threatened to strike and whip me. The first time was a year or more before our separation. I was in the house, and he was on the outside, when he, while in the yard, said he would whip me, and he then came into the room, but did not strike me, and said nothing more. He said while out in the yard he was going to whip me and leave the country. By reason of his threat towards me I was apprehensive that he would strike me, but he didn't do so. I continued to live with W. O. Brown as his wife, notwithstanding his treatment of me, believing that he would reform his conduct; but, becoming convinced that there would be no reformation, I separated from him on May 19, 1905, and have not since lived with him as his

wife. W. O. Brown had no property when the libel for divorce was filed, nor did I." At the conclusion of her testimony, the court granted a nonsuit, and she sued out a bill of exceptions complaining of the judgment of nonsuit.

Hal Lawson, for plaintiff in error. T. O. Wells, for defendant in error.

EVANS, J. (after stating the facts as above). In the case of Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, Candler, J., after a very lucid discussion and analysis of the prior adjudications of this court, defined cruel treatment, within the meaning of Civ. Code 1896, § 2427, which provides that such treatment, to be a ground for divorce, shall be "the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb or health. \* \* \* The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed." The majority of the court concurred in this exposition of the meaning of the term "cruel treatment," as used in our divorce statute. While the writer was upon the superior court bench, he observed a tendency to extend and apply this ground for divorce to many trivial circumstances happening in the domestic relation as sufficient to dissolve the marital tie. Slight disagreements, and words inspired by transitory temper, were never intended by the statute as cause for setting aside a marriage contract. The testimony of the plaintiff shows her husband was not a very industrious man, and he may not have provided her with what she considered a reasonable support. About a year before the separation he cursed libellant, and threatened to whip her. That she considered this threat to be a mere exhibition of temper, and that no bodily harm was apprehended, is shown by her remaining with him for a year thereafter. No immediate provocation was given for the separation, and when the libellant formulated her grounds for divorce she seized upon a sally of temper, which had been condoned by a year's cohabitation. Condonation is a conditional forgiveness of all antecedent acts of cruelty, and such acts as may have been condoned will not be revived except by fresh acts of cruelty. Odom v. Odom, 36 Ga. 286. What constitutes cruel treatment in the meaning of the law is a question of law for the court. Gholston v. Gholston, 81 Ga. 628. So important to society and the moral tone of a community is the preservation of the relation voluntarily entered into by husband and wife that judges should not permit a severance of that relation where the testimony fails to show that the complaining party is not entitled to a divorce under any ground recognized by law. Indeed, the statute makes it the duty of the judge to see that the grounds are legal, and

sustained by proof. Civ. Code 1895, § 2455. In this case the testimony did not make a case of cruel treatment, as defined in Ring v. Ring, and a nonsuit was properly granted.

Judgment affirmed. All the Justices concur.

(129 Ga. 314)

**J. A. FAY & EAGAN CO. v. T. J. DUDLEY & SONS.**

(Supreme Court of Georgia. Aug. 15, 1907.)

**1. SALE—WARRANTY.**

When a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser that it is required for a particular purpose, yet if a known, described, and definite thing, which is of the kind and quality called for by the order, be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 773.]

**2. SAME—RETENTION OF ARTICLE SOLD.**

When the written contract for the sale of an article provides that the retention of the article for a given time after the date of shipment shall constitute a trial and acceptance, and be a conclusive admission of the truth of all warranties, the mere fact that within the time stipulated notice of dissatisfaction has been given to the seller, but notwithstanding the article has been retained, will not have the effect to relieve the buyer from the force of the terms of the written contract.

**3. SAME—NEW CONTRACT—CONSIDERATION.**

The alleged new agreement between the plaintiff and defendant in reference to the machine was entirely lacking in consideration, and could not be the basis of any liability on the part of the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 259.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Action by J. A. Fay & Eagan Company against T. J. Dudley & Sons. Judgment for defendants, and plaintiff brings error. Reversed.

J. A. Fay & Eagan Company, a corporation, brought suit against Dudley & Sons, a partnership, upon an account. The bill of particulars was as follows: "T. J. Dudley & Sons, to J. A. Fay & Eagan Co., Dr. June 28, 1901. Shop No. 58,289. One No. 6 latest improved tenoner, with double upper and lower tenoning heads and bits, upper and lower cope heads and bits, left off but with copy spindles, T X L pulleys 16" diameter, net \$300.00 f. o. b. Columbus. 1901, August 28th. By cash, \$400.00. Bal. due Oct. 28th, 1901, \$400.00."

An amendment to the petition alleged that the machine referred to in the bill of particulars was sold and delivered under the terms of a written contract, a copy of which is exhibited. The contract is as follows: "Columbus, Ga., March 16, 1901. J. A. Fay & Eagan Co., Wood Working Machinery, Cincinnati, Ohio. Subject to strikes, accidents, or other delays beyond your control, deliver f. o. b.

Columbus, Ga., April 7th, 1901, one latest improved double end tenoner—No. 6 double upper and lower tenoning head bits, upper and lower cope heads and bits left off, but with cope spindles. One second-hand Buck blind stile mortise and borer, with bits to mortise and bore 5/16" mortise and hole, and to be suitable for small stationary slats, if necessary, as small as 3/8"x3/32" mortise. One Fay No. 3 saw mandrel, pulley between bearings and mandrel turned to 1" where saw goes. (No extension device necessary.) One second-hand Fay sash sticker with boring attachment (second-hand list No. 920) with boring but and set of knives, mandrel 1" to suit head you have; you to send a wire to confirm this diameter. For which agree to pay nine hundred and seventy-eight dollars with exchange. The purchaser agrees to make settlement within thirty days after date of shipment, and to then evidence all payments due at a later date, by notes bearing date of shipment and interest. In case payment is divided to be made as follows: \$490 cash on arrival. \$488 in four months with 6 per cent. interest. Title to machine to remain with us till paid for; you to sign agreement to this effect. It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash; and that this contract is not modified or added to by any agreement not expressly stated herein; and that a retention of the property forwarded, after thirty days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the J. A. Fay & Eagan Company"—signed by the parties.

The defendants filed an answer in which they denied all liability. The answer also alleged that the defendants were in need of a machine of the character described in the contract, and the plaintiff sold the machine and warranted it to be the latest improved double-headed tenoner and suited for the purposes intended, such purpose being the manufacture of doors, sash, blinds, and furniture, and this was known to the plaintiff. Plaintiff guaranteed that the machine would do the work required, that it was properly constructed, and that it would last for many years. The price agreed on was \$800; one-half to be paid on arrival, and the balance in four months, with interest, and the title to remain in the plaintiff until paid for. On June 28, 1901, the machine was shipped to the defendants, and upon its arrival \$400 was paid to the plaintiff, and the machine installed in the shops of the defendants. In doing so, they relied upon the warranty and representations of plaintiff that the machine was as represented. After a thorough trial and test it was discovered that it was not as

represented, was not properly constructed, and would not do the work, nor was it suitable for the purposes intended. Plaintiff was at once notified of the defects, and defendants offered to return the same upon repayment of the amounts that had been paid. Relying upon the representations, the defendants installed the machine and intended to use it, and in consequence thereof have been compelled to pay out various sums of money for freight and other expenses, amounting, in the aggregate, to more than \$500. Defendants have repeatedly offered to return the machine, and still offer to do so. It is alleged that the defendants have been damaged in the sum set forth in the pleadings, and it is prayed that this amount be recouped and judgment in their favor be rendered. In an amendment to the answer it is alleged that the machine was received about July 20, 1901, and as soon as it was placed in position it was discovered that the heads of the tenon machine were cracked, and notice in writing was given to the plaintiff to this effect, and after this defect was repaired, the machine was put in operation, and it failed to do the work for which it was intended. Defendants made every effort to induce plaintiff to repair the machine, the defects of which were specifically pointed out, and repeatedly offered to return the machine upon the repayment of the money which had been advanced, and plaintiff promised that it would make the necessary changes. Finally, in December, 1902, plaintiff and defendants agreed that the defendants should return the machine to plaintiff, who would put it in perfect order, supply such new parts as were necessary, the plaintiff to pay the freight both ways, and that on the return of the machine the defendants were to set it up and operate it, and after a test of 30 days, if the machine was all right, the defendants were to pay the plaintiff the balance of \$400; otherwise, the defendants would not accept the machine. In pursuance of this agreement on or about January 10, 1903, the machine was shipped to plaintiff, who, after keeping it about three months, returned it to the defendants. The defendants installed it and attempted to operate it, when it was ascertained that it would not do the work for which it was intended. The defects in the machine are pointed out in the answer, and it is alleged that the plaintiff was notified that the machine was not satisfactory and did not comply with the terms of the agreement, and that the defendants would neither accept it nor pay for it. The trial resulted in a verdict for the defendants. The plaintiff made a motion for a new trial, which being overruled, it excepted.

Goethius & Chappell, for plaintiff in error. J. H. Martin and A. W. Cozart, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. The contract was in writing.

There is no claim that the contract, as it appears in the writing, was the result of any fraud, accident, or mistake. It was free from ambiguity. The parties must therefore stand or fall by the terms of that instrument. It was an agreement to sell a machine of a certain description and a certain character. In a contract for the sale of goods, words of description of the subject-matter of the sale are ordinarily to be regarded as simply a warranty that the goods delivered shall be of the character described in the contract. *Henderson Elevator Co. v. North Ga. Mill. Co.*, 126 Ga. 279, 55 S. E. 50. Hence there was a warranty, on the part of the sellers, that the machine delivered would be of the kind and character described in the contract. There was nothing in the contract warranting that the machine would do a particular work, or work of a given character. The mere silence of the contract on this question would not be sufficient to open the door to parol evidence. In *Seltz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, it was held that where a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular purpose, yet, if the known, described, and definite thing be actually supplied, there is no warranty that it will answer the particular purpose intended by the buyer. In that case the contract was an agreement to sell "a No. 2 size refrigerating machine, as constructed by the said party of the first part." The defendant attempted to set up, as a defense, that prior to the execution of the contract the agent of the plaintiff had represented that the machine would cool 150,000 cubic feet to 40 degrees Fahrenheit, and it was held that this could not be considered, for the reason that it violated the terms of the written contract, that the contract described the machine, that there was nothing in the description in reference to the work it would do, and that that which was attempted to be proved as a representation of the plaintiff was itself a new description of the machine and in conflict with the terms of the instrument. In the present case, the contract being for the sale and delivery of a machine manufactured by the plaintiff and described in the contract, if a machine of that character was delivered, the plaintiff complied with its part of the contract, and the defendants would be compelled to perform their part. It was therefore error to admit in evidence the representations as to the work that would be done by the machine, made by the agent at the time that negotiations were pending and before the written contract was entered into.

2. The contract provided that the retention of the property, "after thirty days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all contracts of

warranty, express or implied." There was no provision in the contract that notice from the defendants to the plaintiffs that they were dissatisfied with the machine, and that the machine did not comply with the terms of the contract, should interfere with the distinct agreement above referred to, resulting from the mere retention of the machine. It may be that this was a very unreasonable stipulation, but the parties have made their own contract, and they must abide by its terms. If the defendant retained the machine during the time referred to in the above stipulation in the contract, such retention amounted to an admission that the representations made by or for the plaintiff were true and avoided all warranties. Unreasonable stipulations of a similar character to the one now under consideration appear in numerous contracts; but it has been uniformly held that the parties must abide by the terms of their contract in the absence of fraud, accident, or mistake. See, in this connection, *International Harvester Co. v. Dillon*, 128 Ga. 872, 55 S. E. 1034; *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445, 42 S. E. 778.

3. But it is said that, even though the defendants would not be allowed to enter any of their defenses to the original contract, there has been a new agreement, and that the plaintiff has not complied with the terms of the new agreement, and that the damages resulting to the defendants from its failure so to comply are subject to be set off against the plaintiff's demand for the balance due on the purchase money of the machine. Under this alleged new agreement, the defendants were to return the machine to the plaintiff, who was to make certain changes therein, and then ship the same back to the defendants, the plaintiff to pay the freight each way, and then, if the machine was satisfactory, the balance of the purchase money was to be paid. The plaintiff was not to receive one cent in addition to the original purchase price of the machine, but was to go to the expense of making repairs and pay the freight both ways. There was no consideration for this agreement. It was purely a voluntary undertaking on the part of the plaintiff. At the time when it was made, the plaintiff was in a position where it could have demanded the balance due on the purchase money, and the defendants, under the new agreement, were under obligation to do no more than what they would be already compelled to do; that is, to pay the balance of the purchase money.

We will not undertake to deal with all the assignments of error on the different instructions of the judge, as it will sufficiently appear, from what has been said, in what particulars we deem the instructions appropriate as well as those we deem erroneous.

A new trial should have been granted.

Judgment reversed. All the Justices concur.

(129 Ga. 309)

### STERLING v. PARK.

(Supreme Court of Georgia. Aug. 15, 1907.)

#### DEED—DELIVERY—PARTIES.

One who signs, seals, and delivers a deed, though not named therein as a grantor, is still bound as a grantor, and the deed is operative as a conveyance of his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 61.]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by R. E. Park against M. L. Sterling. Judgment for plaintiff. Defendant brings error. Affirmed.

F. M. Longley, for plaintiff in error. Hatton Lovejoy and Frank Harwell, for defendant in error.

EVANS, J. The various assignments of error raise but one question: Is it essential that a person who signs, seals, and delivers a deed should be mentioned in the body of the deed, to be bound by it, and to make it an operative conveyance of his estate in the land? The case in hand was a complaint for land, and one of the plaintiff's muniments of title was a deed in which M. C. Huntley was named as grantor, and R. E. Park as grantee, and which purported to convey, for a valuable consideration, a described lot of land in fee simple. The deed was signed and sealed by M. C. Huntley, W. H. Huntley, and the defendant. Neither W. H. Huntley nor the defendant was named in it as grantor. At the time the deed was executed, the title to the land was in M. C. Huntley for life, with remainder to the others who signed the deed. The plaintiff's contention is that the deed is operative and effective as a conveyance of the estate which each maker, signer, had in the land; while, on the other hand, the defendant contends that, as she was not named in the deed as grantor, it is not an operative conveyance of her estate in remainder.

The point in the case has been before many courts of last resort; and there is much contrariety of opinion on the subject. We believe the rule to be that one who signs, seals, and delivers a deed, in which he is not named as grantor, is nevertheless bound by these acts as a grantor. We think an examination into the origin and reason of the contrary doctrine will demonstrate the correctness of our conclusion. At common law a deed is defined to be a writing, sealed and delivered by the parties. Coke's Lit. 171; 2 Bl. Com. 295. Lord Coke said: "There have been eight formall or orderly parts of a deed of feofment, viz.: (1) The premises of the deed implied by Littleton; (2) the habendum, whereof Littleton here speaketh; (3) the tenendum, mentioned by Littleton; (4) the reddendum; (5) the clause of warrantie; (6) the in cuius rei testimonium, comprehending the sealing; (7) the

date of the deed, containing the day, the month, the yeare and stile of the King, or the yeare of our Lord; lastly, the clause of his testibus. \* \* \* The office of the premises of the deed is twofold. First, rightly to name the feofor and the feoffee; and, secondly, to comprehend the certaintie of the lands or tenements to be conveyed by the feofment either by expresse words or which may by reference be reduced to a certaintie." 1 Coke's Inst. 6a. Signing was not necessary to make a deed valid as such, at common law, and Sir William Blackstone says that "it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds 'sealed and delivered' continues to this day notwithstanding St. 29 Car. II, c. 8," which requires deeds to be signed by the maker. 2 Blackstone, Com. 307. Not only could any seal be used, but "a stick or any such like thing which doth make a print." Shep. Touch. 57. "In *Temes de la Leys v. 'Fait'*, reference is made to a charter of Edward III, of which the last two lines run in the English translation thus:

"And in witness that it was sooth  
He bit the wax with his foretooth."

Norton on Deeds, 6.

Thus will be seen, from the conditions prevailing at common law, the prime importance of the grantor's name appearing in the body of the deed was to identify the deed as the act of a particular grantor. Without signature, and executed with a seal indented by the prick of a pin, or imprint of a tooth, the deed could not disclose the identity of the grantor, except by mention of his name in the grant. From the very necessity of the case grew the rule that the name of the grantor should appear in connection with apt words indicating that the deed was his grant. But even at common law a deed could be made in a very informal manner. Says Lord Coke: "I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feofment; for if such a deed be without premises, habendum, tenendum, the clause of in cuius rei testimonium, the date, and the clause of his testibus, yet the deed is good. For if a man by deede gives lands to another, and to his heires, without more saying, this is good, if he put his seale to the deede, deliver it and make livery accordingly." 1 Coke's Inst. 7a. Thus it would seem that the requirement of a deed made before the statute of frauds was, not that the grantor's name should appear in formal context, but, if the writing should identify the grantor, the deed would be considered his grant. Let us also recall the old common-law distinction (obsolete in this state) between deeds poll and indentures. The former are those made by one person only. To the latter two or more persons are parties. The case of *Scudamore v. Vandenstene* (1579) cited in 2 Coke's Inst. 573, is

grounded upon this principle. It was there held that a person could not take any immediate benefit under an indenture, or sue on any covenant contained therein, unless he was named as a party thereto. The statement of Lord Coke, in that case, that no grant can be made to a person not a party to the deed, was never true except of grants of immediate interest. Norton on Deeds, 24. And was never applied to deeds poll, but was limited to deeds inter partes. Norton on Deeds, 24; *Cooker v. Child*, 2 Levinz, 74.

The question first came up in America in the Massachusetts Supreme Court in 1812, in the case of *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56. It was there held that a conveyance by a husband to which the signature and seal of the wife was affixed, but her name not being otherwise mentioned in the deed, did not bar the wife's right of dower. The conclusion of the court was rested on the reason that a deed cannot bind a party sealing it unless it contains words expressive of an intention to be bound. Other courts have followed the Massachusetts court, either upon the authority of *Catlin v. Ware*, or the reason upon which the decision was placed. *Peabody v. Hewett*, 52 Me. 83, 88 Am. Dec. 496; *Purcell v. Goshorn*, 17 Ohio, 105, 49 Am. Dec. 448; *Harrison v. Simons*, 55 Ala. 510; *Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; *Adams v. Medsker*, 25 W. Va. 127; *Cox v. Wells*, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; *Agricultural Bank v. Rice*, 4 How. (U. S.) 225, 11 L. Ed. 949. Most of these decisions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization. As was very pertinently said by Woodbury, J., in *Elliott v. Sleeper*, 2 N. H. 525, decided as early as 1823: "Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for 'know,' says Perkins, section 36, 'that the name of the grantor is not put in the deed to any other intent but to make certainty by the grantor.' Bacon's Ab. 'Grant' C. This certainty is attained whenever the person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention whatever be made of him in the body of it, because he can perform these acts for no other possible purpose than to make the deed his own. In a deed poll, like that under consideration, where only the grantor speaks or

signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound than in deeds indented." In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275, *Ingoldsby v. Juan*, 12 Cal. 564, and *Hrounska v. Janke*, 66 Wis. 252, 28 N. W. 166. Text-writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument. 3 Washburn on Real Prop. 2120; 1 Devlin on Deeds, § 204.

The requisites of a deed, under the Code, are that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or some one for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction. Civ. Code 1895, §§ 3599, 3602. We think that the deed under discussion measures up to these statutory essentials, and is effective as a conveyance of the defendant and her co-remainderman, though their names are not mentioned in the body of the instrument. See, in this connection, *Ball v. Wallace*, 32 Ga. 170.

Judgment affirmed. All the Justices concur.

(129 Ga. 300)

#### CLAXTON v. LOVETT et al.

(Supreme Court of Georgia. Aug. 15, 1907.)

#### 1. BILLS AND NOTES—DEFENSES—COVERTURE—DURESS.

In an action against two defendants on a promissory note, in which one of them pleaded that she was a married woman, and that her undertaking was that of a surety for her husband's debt, and also that the note was signed under duress, brought about by the conduct of her codefendant, it was necessary, to maintain the defense, that evidence should be adduced establishing the marriage relation between the defendants, and also that the acts constituting the duress were committed by the codefendant.

#### 2. SAME.

The evidence in the present case did not disclose, with sufficient certainty, either that the defendants were married, or that the duress was brought about by the codefendant.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. L. Rawlings, Judge.

Action by L. J. Claxton, executor of W. G. Sammons, against Lizzie Lovett and R. T. Lovett. Judgment for defendants, and plaintiff brings error. Reversed.

L. J. Claxton, an executor of the estate of W. G. Sammons, deceased, brought suit against Mrs. Lizzie Lovett, as principal, and R. T. Lovett, as security, on a promissory note, for stated amounts of principal, interest, and attorney's fees. Mrs. Lovett filed an answer, denying the indebtedness, and alleging that she was not the principal on the

note, but that her husband, R. T. Lovett, was the principal, and she was security, and that none of the amount so borrowed was ever received by her or used by her in any way whatever; and also alleging that she signed the note as security under duress. On the trial, Mrs. Lovett testified that she "never got any money from Mr. W. G. Sammons." Hershal Lovett testified that he had heard "papa" tell Mr. Sammons that, if he could get \$1,000, he thought he could pull through, and his papa told him that he had loaned it to him; that he heard papa tell mama he wanted her to come into the room and sign the note he was going to give Mr. Sammons; that he did not see his mother sign the note, and could not swear that the note in evidence was the note his father had reference to. Lou Anna Lovett testified that she did not see this thousand dollar transaction; that she heard her father and mother discussing it; that about two or three days before the signing of the paper her father came home drinking, and came into the room where her mother was, and told her that he wanted her to sign the paper, so that he could get a thousand dollars to help out in the mercantile business; that she did not want to sign it, and he used an oath and told her she would sign it, and about that time he got mad with her mother and drew out his pistol; that he first choked her, and she told him that, if he did not stop, she would call Hershal; and that she did call Hershal, and her father went out of the room. The jury returned a verdict in favor of the defendant. The plaintiff made a motion for a new trial, which was overruled, and the plaintiff excepted.

J. L. Kent, J. K. Jordan, and Jas. K. Hines, for plaintiff in error. Wm. Faircloth and W. R. Daley, for defendants in error.

COBB, P. J. The record discloses a suit on a promissory note, signed by two persons bearing the same surname. It is indicated, by the petition, that the principal is a married woman. From her answer it appears that she is a married woman, and that the apparent surety is her husband. Her defense is that she is not the principal, but really the surety, and that the debt was the obligation of her husband; and, in addition to this, that she signed the paper under duress brought about by the conduct of her husband. At the trial, she testified that she had received none of the money which was the consideration of the note. She did not testify that her codefendant was her husband, or even that she was a married woman. Two witnesses are introduced who bear the same surname as that of the defendant. They each testify to transactions in reference to a note or debt between persons who are described as "papa" and "mama" and "father" and "mother"; but there is absolutely not a word in the testimony of either



of the witnesses which shows that the persons referred to in the testimony in the manner above indicated are the defendants in the case or in any way connected therewith. The only thing to connect the transactions referred to in the testimony with the transactions mentioned in the pleading is the fact that the defendants and the witnesses all bear the same surname. In order for Mrs. Lovett to sustain her defense, it was absolutely necessary that she should establish by evidence that she was a married woman, that R. T. Lovett, her codefendant, was her husband, or that her codefendant, R. T. Lovett, committed the acts which constituted the duress which brought about the signing of the note. The evidence entirely failing to connect the transactions therein referred to with the transactions mentioned in the pleading, we have no alternative but to reverse the judgment refusing to grant a new trial.

Judgment reversed. All the Justices concur.

(129 Ga. 234)

### HARRISON v. HARRISON.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### APPEAL—REVIEW—EVIDENCE—NEW TRIAL—SUCCESSIVE VERDICTS.

No error of law was complained of. While the evidence is not altogether satisfactory, still it has been the basis of two verdicts in favor of the plaintiff, and the second verdict has met with the approval of the trial judge; and, as there is at least some slight evidence upon which the finding may be supported, the judgment refusing to grant a second new trial will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3951.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action by M. L. Harrison against N. D. Harrison, administrator of Emma S. Harrison. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Burwell, for plaintiff in error. R. H. Lewis, for defendant in error.

COBB, P. J. Mrs. M. L. Harrison brought suit against N. D. Harrison, as administrator of Emma S. Harrison, on an account for services rendered the intestate of the defendant in caring for her for four years prior to the date of her death; the amount of the claim being \$576. The defendant filed an answer, in which he denied all liability on the part of the estate. The case was tried, and resulted in a verdict for the plaintiff for \$480 principal and \$50.40 interest. A motion for a new trial was made by the defendant, which was granted, and this judgment was affirmed. *Harrison v. Harrison*, 124 Ga. 783, 52 S. E. 813. The case was tried a second time, and resulted in a verdict in favor of the plaintiff for \$480 principal and \$114.80 interest. The defendant filed a motion for a new trial,

which the court overruled, and the defendant excepted.

The plaintiff was a sister-in-law of the intestate of the defendant, and they, with the other members of the family, lived together. The deceased was afflicted and in feeble health, and required a great deal of attention from the other members of the household. While the evidence is conflicting as to which member of the household rendered the greatest service to the deceased in nursing and caring for her, there was evidence to sustain a finding that the plaintiff was considerate and attentive, and performed, from day to day, those irksome and necessary duties required in providing for the comfort and happiness of an afflicted person. There was no evidence whatever of any express agreement between the plaintiff and the deceased that compensation should be paid for the services thus rendered; and the case, therefore, depends upon whether the circumstances were such that it would necessarily be inferred that it was in contemplation of each party that there should be compensation for the services. The evidence relating to this question is not altogether satisfactory; but, when the character of the services rendered and the time required each day for this service is taken into consideration, the jury might infer that the service was of such an exacting character that it was not rendered on the one hand, or received on the other, purely from motives of natural love and affection. In *Murrell v. Studstill*, 104 Ga. 604, 30 S. E. 750, the character of the service rendered is recognized as a proper subject for consideration in determining whether, under all of the circumstances, compensation was intended. This was more strikingly recognized in the case of *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300. In that case the services were rendered by a daughter to her father, but they were of the most exacting and irksome character. It is true that in that case there was also some evidence of a declaration by the father indicating his intention to compensate. While we are not altogether satisfied with the verdict as rendered, and we might not have rendered such verdict if we had been members of the jury, still, as there was some slight evidence to support the finding, and two verdicts have been rendered in the case, and the verdict now under consideration has met with the approval of the trial judge, we will not reverse his judgment refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(129 Ga. 241)

### HARRIS et al. v. EQUITABLE SECURITIES CO.

(Supreme Court of Georgia. Aug. 12, 1907.)

#### 1. JUDGMENT—RES JUDICATA—MATTERS DETERMINED—EVIDENCE.

Where a judgment is pleaded as an estoppel, the burden is upon the party relying upon

the estoppel to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation; and, if it appear from the record introduced in support of the plea that several issues were involved in such litigation, and the verdict and judgment do not clearly show that this particular issue was then decided, before such plea can be sustained, this uncertainty must be removed by extrinsic evidence showing that such matter was then decided in accordance with the contention of the party relying upon the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1822.]

## 2. SAME.

The case of *Linton v. Harris*, 78 Ga. 265, 3 S. E. 278, distinguished from the present case. (Syllabus by the Court.)

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by the Equitable Securities Company against C. L. Harris and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. W. Stark, for plaintiffs in error. Robt. S. Howard, Jno. L. Lye, and Chas. A. Reid, for defendant in error.

**FISH, C. J.** 1. The Equitable Securities Company sued C. L. Harris, administrator of the estate of J. L. Harris, Sr., deceased, C. L. Harris, and J. L. Harris, Jr., on several promissory notes given by the decedent and the defendants to plaintiff for the purchase price of certain described land, praying for a general judgment with special lien on the land. The defendant filed several pleas. Among them were (1) that plaintiff could not make defendants a good title to the land, in pursuance of its bond so to do, by reason of an outstanding paramount title in a given third person; (2) payment; (3) that the land and notes in question were the assets of the equitable mortgage company, which were in the hands of its receiver, who had no authority to convey them to plaintiff. On the trial there was a general verdict, viz.: "We, the jury, find for the defendants." A general judgment was entered in accordance with the verdict. Subsequently the same plaintiff brought an action against the same defendants and four others to recover the same land for the purchase price of which the notes sued on in the former case were given by defendants in that case to the plaintiff. The defendants filed several pleas, among them being estoppel by judgment in the former case, defendants setting up as a defense that the verdict and judgment in that case were to the effect that the notes in question had been paid. On the trial of the last case, the only evidence introduced by defendants was a copy of the pleadings, verdict, and judgment in the former case. Even without reference to the evidence submitted by plaintiff, which was uncontradicted, and which strongly tended to show that no evidence was submitted on the former trial in support of either the plea of payment or that of para-

mount outstanding title, a verdict against the plea of estoppel by judgment was demanded, and the court did not err in directing such a verdict. *Draper v. Medlock*, 122 Ga. 284, 50 S. E. 113, 69 L. R. A. 483, and citations. See, also, *Callaway v. Irvin*, 123 Ga. 344, 51 S. E. 477; *Irvin v. Spratlin*, 127 Ga. 240, 55 S. E. 1037.

2. The case of *Linton v. Harris*, 78 Ga. 265, 3 S. E. 278, relied on by the plaintiffs in error, is not in conflict with the above ruling. That was also an action of ejectment, which necessarily involved the question of the plaintiff's title to the premises in dispute, and the defendant pleaded estoppel by a former judgment in his favor, rendered in a suit of a different character against him, wherein the real plaintiff, at the time of the trial, was the same person who subsequently brought the ejectment suit. But there was no uncertainty whatever as to the plea upon which the general verdict in the former litigation in favor of the defendant was based, as it clearly appeared that the defense in former suit was placed squarely upon the question whether such plaintiff had title to the very premises which he subsequently sued to recover from the same defendant, that this defense was fully litigated upon the trial, and hence that "the sole question of title arising in the latter action [was] the same as that which was adjudicated in the former."

Judgment affirmed. All the Justices concur.

(129 Ga. 280.)

## CULBREATH v. MARTIN.

(Supreme Court of Georgia. Aug. 14, 1907.)

**VENDOR AND PURCHASER — BONA FIDE PURCHASER.**

In a contest between the donee under a deed of gift, and a bona fide purchaser for value from the executor of the donor, under a power of sale in the will, who takes without notice of the prior voluntary deed, preference is to be given to the latter, and the title acquired by him is superior to the rights of the volunteer under the prior conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 533, 594.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Fannie Culbreath against Robert Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

In 1905 Fannie Culbreath brought an action against Robert Martin to recover possession of a described tract of land. The defendant, in his answer, denied title in the plaintiff. The plaintiff relied upon a deed from Grace Kennedy to Fannie Culbreath, dated April 25, 1892. It appeared that the grantee was the adopted daughter of the grantor, and that she was a minor at the date of the death of her grantor, which occurred in 1899. The consideration of the

deed was \$1 and natural love and affection. The deed had been recorded during the lifetime of the grantor. Further than this fact there was no evidence of delivery. The defendant claimed under a deed from Bryan Cumming, as executor of Grace Porter, formerly Grace Kennedy. This deed was made in pursuance of a power of sale in the will, and upon a valuable consideration. Neither the executor nor Martin, his vendee, had any actual notice of the deed under which the plaintiff claims at the time of the sale by the executor. The plaintiff was never in possession, but Grace Kennedy remained in possession either by herself or by her tenants during her lifetime, and the property was thereafter taken into possession by the executor. The jury returned a verdict in favor of the defendant, and the plaintiff assigns error upon the judgment refusing to grant a new trial.

F. W. Capers, for plaintiff in error. Bryan Cumming, for defendant in error.

COBB, P. J. (after stating the facts as above). It is the settled law of this state that a bona fide purchaser for value is entitled to prevail over the holder of a voluntary conveyance of a previous date, though the same be duly recorded, unless the former took with actual notice of the existence of the previous deed. *Finch v. Woods*, 113 Ga. 996, 39 S. E. 418; *Scott v. Atlas Ass'n*, 114 Ga. 134, 39 S. E. 942. In *Whittington v. Wright*, 9 Ga. 23, it was said that a conflict between the equities of a bona fide purchaser and a volunteer can only arise when both parties claim under the same grantor. In that case one party was a purchaser for value and the other was a volunteer, but they did not derive title from the same source. In *Bell v. McCawley*, 29 Ga. 356, it was said that the rule above referred to applies only to cases where two conflicting titles are derived from the same source. In *Russell v. Kearney*, 27 Ga. 96, it is said that the doctrine applies only where both conveyances are made by the same person. It is to be noted in all of these decisions that the court was dealing with cases where it was held that the doctrine was not applicable, and the judges, speaking for the court, used the different expressions, "from the same grantor," "from the same source," and "from the same person." There is nothing in any of them which constitutes an authoritative ruling that the doctrine is applicable only in those cases where both the plaintiff and defendant claim each under deeds in which the grantor is the same. The use of the expression, "the same source," in one of the opinions, indicates that it was in the mind of the judge that the doctrine might be applicable in cases where the parties claim under a common source of title. Civ. Code 1895, § 3530, declares: "Every voluntary deed or conveyance, made by any person, shall be void as

against a subsequent bona fide purchaser for value without notice of such conveyance." While this section of the Code was evidently taken from the decisions above referred to and other decisions of this court, there is nothing in the section that indicates that the rule there laid down is to be limited to cases where both the plaintiff and defendant each claim under a deed from the same person. In the present case the plaintiff claimed under a deed from Grace Kennedy. The defendant claimed under a deed from the executor of Grace Kennedy. The purchaser from the executor was a bona fide purchaser for value, without notice of the voluntary deed executed by Grace Kennedy.

The controlling question is therefore whether the purchaser for value from the executor, without notice of the prior voluntary deed of the testatrix, is entitled to occupy the same position as if he had bought, under similar circumstances, from Grace Kennedy. This identical question seems never to have been decided by this court. In *Crozier v. Bryant*, 7 Ky. 174, Chief Justice Boyle says: "A gift may be void as to a purchaser, but he must be a purchaser who can derive his title from the donor." This language would indicate that it was not necessary to the application of the doctrine now under discussion that it should appear that both the plaintiff and defendant had each a deed from the same person, but that the doctrine would be applicable in any case where one party claimed under a deed of gift and the other party was a purchaser for value who could derive his title, either directly or indirectly, from the donor in the deed of gift. In that decision, however, the court was dealing with a case where the parties did not each derive title from the donor, and therefore what was said by the judge was merely obiter, as is true in the cases in our own reports above referred to. The reason on which the rule would seem to be founded is that where the owner of property has made a deed of gift, but there is nothing about the possession or otherwise to indicate to a prospective purchaser that there is any other claim to the property other than that of the donor, one who purchases for value should be protected on account of the apparent ownership, notwithstanding the actual legal title had passed under the prior voluntary conveyance. In other words, unless there is something which amounted to actual notice to the prospective purchaser that his vendor had parted with the title to a volunteer, a bona fide purchaser for value would be protected as against such volunteer. If he finds his vendor in possession, with all rights of ownership apparently vested in him, as against a volunteer he is authorized to deal with him as the owner; and this is true notwithstanding the deed of gift may have been at that time actually recorded. *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318. Would not the reason which is at the foundation of the rule apply

with equal force to a case where the purchaser for value is one who buys from the one who stands in the shoes of the donor and who conveys the donor's interest, and that only? That is, ought not a purchaser for value from an executor selling under a power of sale in a will stand upon the same footing in reference to a prior voluntary deed of the testatrix as he would if his title was derived directly from the testatrix during her lifetime? The registry act of 1837 (Acts 1837, p. 91) provided that, "in all cases where two or more deeds shall hereafter be executed by the same person or persons, conveying the same premises to different persons, the one recorded within twelve months from the time of execution (if the feoffee had no notice of a prior deed, unrecorded at the time of the execution of the deed to him or her) shall have preference." Cobb's Digest of Laws, p. 175, § 44. In *Ellis v. Smith*, 10 Ga. 253, it was held that under this act a purchaser at a sheriff's sale, who has his deed first recorded, would gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself. In the opinion Judge Lumpkin says: "The effect of a sale by the law, in this respect, is just the same as if made by the individual whose agent or trustee the officer becomes to make the transfer. All the defendant's estate is sold. The purchaser takes his place. The mischief of an unrecorded deed is the same to him as to a private purchaser." In *Tucker v. Harris*, 18 Ga. 1, 58 Am. Dec. 488, it was held that a purchaser at an administrator's sale who has his deed first recorded will gain the same preference over an unrecorded deed as if he had bought of the intestate in his lifetime. Judge Lumpkin, in the opinion, after referring to the case of *Ellis v. Smith*, says: "The rule and the reasoning in that case apply with full force to a purchaser at an administrator's sale." The registry act, as it now appears in the Code, is, in the particular above referred to, in the following language: "The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." Civ. Code 1895, § 3618. It has been held, since this section became the law, that a deed from the sheriff, duly recorded, is entitled to priority over an unrecorded deed from the defendant in execution, though made before the rendition of the judgment under which the sheriff sold, if the purchaser at his sale had no notice of the older deed. *McCandless v. Inland Acid Co.*, 108 Ga. 618, 84 S. E. 142. See, also, *Ousley v. Bailey*, 111 Ga. 783, 36 S. E. 750; *Maddox v. Arthur*, 122 Ga. 674, 50 S. E. 668 (2). The original registry act uses the expression, "the same person or persons." The Code uses the expression, "the same vendor." Still, in each instance, it was held that a deed made by one authorized by law to sell the property of another, either during his lifetime or after his

death, was entitled to preference, if taken without notice of a prior unrecorded deed. See, in this connection, *Henderson v. Armstrong*, 128 Ga. —, 58 S. E. 624. The very same reasons which would determine a contest between a duly recorded deed subsequent in date to a prior unrecorded deed would be sufficient to determine a contest between a bona fide purchaser for value and a donee under a prior voluntary deed. But it is said that the executor had no authority to sell property which did not belong to his testator. Neither has an administrator authority to sell property that does not belong to his intestate on account of a deed having been made during his lifetime. Nor has a sheriff authority to sell as the property of the defendant in execution that of which he was not the owner on the day of judgment. Still, if any of these officers or persons attempt to sell, and the purchaser is a bona fide purchaser without notice, the law protects the purchaser, even at the expense of the real owner, who, in the one case, has been negligent in reference to the duty imposed upon him under the registry law, and, in the other instance, negligent in so conducting himself as that those who dealt with his donor would be misled by those circumstances which made the donor the apparent owner. There was no error in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(129 Ga. 271)

#### THOMAS v. HERRINGTON.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### INJUNCTION—CONFLICTING EVIDENCE—PRESERVATION OF STATUS.

When, on the hearing of an application for injunction, it appears from the evidence that there has been an agreement between the parties by which the plaintiff was given the privilege of using the timber, for turpentine purposes, upon certain lands of the defendant, but there is a conflict of the evidence as to the quantity of land covered by the contract, and the evidence is conflicting on other material questions, and the judge has granted an injunction at the instance of the plaintiff, and has refused an injunction at the instance of the defendant, the judgment will be affirmed, with direction that the order of the judge be so modified as to grant an injunction to the defendant upon the same terms on which the injunction was granted to the plaintiff, so that the status may be preserved until the final hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305-306.]

(Syllabus by the Court.)

Error from Superior Court, Jeff Davis County; L. A. Parker, Judge.

Action by J. L. Herrington against Mike Thomas. Judgment for plaintiff. Defendant brings error. Affirmed with directions.

Herrington brought an equitable petition against Thomas, alleging that the plaintiff bought from the defendant the right to box the timber suitable for turpentine purposes,

for a period of 4 years, upon a tract of land containing 340 acres, and paid therefor the sum of \$100; that he failed to take a lease, but attempted to do so; that, neither of the parties knowing how to draw a lease, the writing which they signed failed to accomplish the purpose; that he afterwards demanded a lease from the defendant, and that the defendant refused to give it; that he commenced to exercise the privilege claimed, and boxed and otherwise used the timber upon the land, and, in order to protect the timber from forest fires and preserve the same from destruction, he placed several employes in the woods to weed and rake the grass and straw; that, unless this precaution is taken, the timber is liable to be destroyed and irreparable damage result to one interested in using the same for turpentine purposes; and that the defendant intimidated and threatened his employes and drove them from the land. The prayer is for an injunction to restrain the defendant from interfering with the laborers of plaintiff, and that the defendant be required, by decree, to execute the lease in accordance with the agreement of the parties. Upon this petition, the judge granted a rule nisi and a restraining order. The defendant answered that he had never agreed to execute a lease to all of the timber on all of the tract of land, but he did agree to permit the defendant to work the boxes then cut, and also to cut and use all the timber suitable for turpentine purposes in an old field, consisting of 30 acres, lying on the north side of the tract, the sum to be paid for this privilege being \$100; that the plaintiff asked for the turpentine privileges only to the extent just referred to, and the defendant agreed to nothing more; that it was distinctly understood that the plaintiff was not to touch a tree outside of the 30 acres, except to work the old boxes then in existence; that the defendant is a Greek, and could neither read nor write the English language, and is entirely ignorant in reference to transactions of the character of the one entered into; that the plaintiff presented him with a paper, which he represented contained the agreement in the terms as understood by the defendant, and the defendant agreed that his name might be placed thereon upon these terms; that he does not know where this paper is; that, if it contains any provisions other than those above referred to, it was obtained by fraud; that the plaintiff, instead of simply working the old boxes and the timber on the 30 acres, without any lawful warrant or authority is beginning to cut new boxes on the land outside of the 30-acre tract, and this conduct has already damaged the defendant in the sum of \$500. He prays judgment against the plaintiff for the damages already done, and for an injunction to restrain the plaintiff from using or interfering with the timber, except to use the old boxes and the timber on the 30-acre tract. At the hearing evidence was introduced by

each party tending to establish the allegations in their pleadings. The writing referred to does not appear in the record. The judge, after considering the pleadings and evidence, passed an order enjoining the defendant from interfering with the plaintiff, or his employes, in working or otherwise using the timber on the land in controversy, provided that the plaintiff, within 10 days, give a bond to indemnify the defendant against loss in the event of his recovery in the case, and refused to grant the injunction prayed for by the defendant.

F. Willis Dart, for plaintiff in error. W. W. Bennett, for defendant in error.

COBB, P. J. (after stating the facts as above). The petition of the plaintiff was, in effect, an application for a decree of specific performance of a contract for the sale of an interest in timber, the application being based upon the fact that the entire purchase money had been paid. It is conceded that there was a transaction between the parties in reference to the purchase of an interest in timber. They are widely at variance with relation to the subject-matter of the contract.

The pleadings make a clear-cut issue on this point, and the evidence at the hearing shows that conflict of which the pleadings were but a forewarning. The case made out by the plaintiff, while not, in all particulars, the same as that disclosed in the case of *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439, is in some respects similar thereto. The case does not fall within the timber cutter's act, for the plaintiff is not the owner of the land seeking to enjoin a timber cutter, but he is a turpentine operator claiming the right to use the timber for turpentine purposes, and alleging that this right has been interfered with by the owner of the land, in violation of the terms of the agreement. While the case is not strong on the question of irreparable damages, there is some evidence indicating that, if he is not allowed to take care of the timber that he desires to use for turpentine purposes, a loss will result to him which is incapable of being estimated in money. We cannot say that the judge abused his discretion in granting the injunction prayed for by the plaintiff, nor imposing the terms upon the plaintiff which provided for the giving of a bond to indemnify the defendant against loss in the event the injunction was wrongfully sued out; but, having reached this conclusion, we think, under the evidence, that he should have also granted the injunction at the instance of the defendant, and have enjoined the plaintiff from doing anything more than using the timber on the 30-acre tract and utilizing the old boxes on the remainder of the tract. The status should have been preserved until a jury could pass upon the conflicting issues. In cases of a similar character an injunction at the instance of each party has been held to be a proper direction to

give the case so as to preserve the rights of each party. See *Johnson v. Hall*, 83 Ga. 281, 9 S. E. 783; *Wells v. Rountree*, 117 Ga. 839, 45 S. E. 215; *Collinsville Granite Company v. Phillips*, 123 Ga. 833, 51 S. E. 666 (29).

The judgment will be affirmed, with direction that the order of the judge be so modified as to grant the injunction prayed by the defendant, upon his giving a bond in the same amount as that required of the plaintiff, to indemnify the plaintiff against loss in the event it should appear at the final hearing that the injunction was wrongfully sued out.

Judgment affirmed, with direction. All the Justices concur.

(129 Ga. 279)

#### WIDINCAMP v. JAMES.

(Supreme Court of Georgia. Aug. 14, 1907.)

##### 1. EXECUTION—CLAIM OF THIRD PERSON—DISMISSAL OF LEVY—REINSTATEMENT.

When, in a claim case, the levy has been dismissed for the want of prosecution, and the case thereafter reinstated by the judge, it was not permissible for the claimant to make up an issue in the claim case and have it determined whether the case was properly reinstated. If, for any reason, the order of reinstatement was irregular or erroneous, a formal motion should be made to review the order reinstating the case.

##### 2. SAME—ISSUES.

In a claim case the sole issue is whether the property is subject or not subject. *Southern Mining Co. v. Brown*, 107 Ga. 269, 33 S. E. 731; *Ray v. Atlanta Banking Co.*, 110 Ga. 305, 35 S. E. 117. And the verdict in such a case should be so phrased as to determine this issue with definiteness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 570.]

##### 3. SAME—VERDICT.

A verdict in a claim case, which contains merely a finding for the plaintiff of a given sum of money, does not determine definitely the issue as to whether the property levied on is subject or not subject.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Claim case between Madison James and E. Widincamp. Judgment for plaintiff, and defendant brings error. Reversed.

W. T. Burkhalter, for plaintiff in error. C. L. Morgan, for defendant in error.

COBB, P. J. Judgment reversed. All the Justices concur.

(129 Ga. 255)

#### ALEXANDER v. THOMPSON.

(Supreme Court of Georgia. Aug. 13, 1907.)

##### EJECTMENT—INSTRUCTIONS.

The misinstruction excepted to required a new trial.

(Syllabus by the Court.)

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Action by Simon Alexander against J. M.

Thompson. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. W. & Jno. D. Humphries, for plaintiff in error. J. F. Gollightly, for defendant in error.

FISH, C. J. Simon Alexander brought an equitable petition against J. M. Thompson to have established as the true line dividing certain lands of the petitioner and lands of the defendant a line alleged to have been agreed upon by them, and to recover all of the land lying west of such line in possession of the defendant. There was a verdict for the defendant; and the case is here for review, upon the exception to overruling of the plaintiff's motion for a new trial.

The contention of the petitioner was that the county surveyor, at the instance of petitioner and defendant, had run a given line on the east side of petitioner's land and dividing it from the land of defendant, which surveyed line the parties had agreed was the true line between their lands, and that defendant was in possession of a strip of land on the west side of this line which belonged to petitioner. The defendant contended that he had never made any such agreement; that the line claimed by petitioner was not the true line, but an old hedge-row, which extended for more than one-half of the distance between the lands of petitioner and defendant, and a line which would correspond with and be a continuation of the line upon which the old hedge-row was situated was the true line; and that such hedge-row had been recognized as the true line for 25 or 30 years by the coterminous landowners, they having, respectively, cultivated up to such hedge-row.

The court charged the jury in effect that if they should determine that the hedge-row line, as contended for by defendant, was the true line, then the plaintiff could not recover. The plaintiff claims that this charge was erroneous, for the reason that it appeared from the evidence that the old hedge-row was west of the surveyed line, claimed by plaintiff as the true line; that the suit was for the recovery of all of the land in possession of the defendant west of this last-mentioned line; that the hedge-row line was west of the surveyed line, and there was evidence that the defendant was in possession of some of the land west of such hedge-row line; and, such being the case, the plaintiff was, in any event, entitled to recover such portion of the premises sued for as lay west of the hedge-row line from the defendant. We are of opinion that the exception to this charge was well taken. There was evidence from which the jury could have found that the defendant was in possession of a small piece of land west of the hedge-row line; and, where an action is brought for an entire tract of land, the plaintiff may recover a portion thereof, if he shows title to the same, and the verdict specifies with certainty such portion as is found to be the property of

the plaintiff. *McCullough v. East Tenn., Va. & Ga. Ry. Co.*, 106 Ga. 275, 32 S. E. 97. As there was evidence which should have authorized the jury to find for the plaintiff all of the land which the defendant was in possession of lying west of the hedge-row line, it was error for the court to instruct the jury that, if they found that line to be the true line, the plaintiff could not recover. *Hogg v. Gammon*, 127 Ga. 293, 56 S. E. 404.

There was no merit in the other ground of the motion for a new trial, complaining of a charge which was a quotation from a Code section, which was pertinent to the issue on trial.

Judgment reversed. All the Justices concur.

(129 Ga. 307)

HICKS et al. v. PORTWOOD et al.

(Supreme Court of Georgia. Aug. 15, 1907.)

1. INJUNCTION — APPLICATION — HEARING — AFFIDAVITS.

In an interlocutory hearing of an application for an injunction, affidavits which do not state the court in which the case is pending or the case in which they are to be used, or otherwise show affirmatively that they are made to be used in that particular case, are inadmissible in evidence.

2. WRIT OF ERROR—DISCRETION OF COURT—REVIEW.

A motion to postpone the hearing of an application for an interlocutory injunction, after the hearing is begun and some evidence has been introduced, upon the ground that the evidence of the applicant has been ruled out on account of the defective way in which the affidavits were prepared, is a matter addressed to the sound discretion of the court; and the Supreme Court will not control this discretion in any case, unless a manifest abuse of discretion appears. No abuse of discretion appears in the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

3. SAME.

No sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by Nancy Hicks and others against John Portwood and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Nancy Hicks and others brought an equitable petition against John Portwood and another, alleging that they were the heirs at law of John Hicks, who died seised and possessed of two described lots of land; that there was no administration on his estate; that John Portwood was in possession; that they claimed title to the same, and were entitled to recover the land and mesne profits; that they were informed that Portwood had sold the timber thereon to his codefendant, Williams, who was about to move a sawmill upon the land and cut all of the timber thereon. The prayer was for the recovery of the land and mesne profits, and for an injunction to prevent the defendants from cutting the

timber. The petition was verified by the affidavit of one of the plaintiffs. The judge granted the restraining order, and set the case down for a hearing as to the application for an injunction. At the hearing the defendants showed, for cause against the granting of the injunction, a demurrer and an answer. The answer denied title in the plaintiffs, and the defendants alleged that they were in possession under Mrs. Annie Portwood, who was the real owner of the property. When the case came on for a hearing before the judge, an order was passed making Mrs. Portwood a party defendant, and the plaintiffs then proceeded to introduce testimony. Two affidavits were tendered in evidence, which were admitted. These affidavits tended simply to establish that there was no administration upon the estate of John Hicks, and to lay the foundation for the introduction of parol evidence as to the contents of certain deeds. They related in no way to the merits of the controversy. The plaintiffs then tendered in evidence the affidavits of three of the plaintiffs. Objection was made to these affidavits, upon the ground that there was no statement of the case nor any reference to the case in the body of the affidavits, and nothing to indicate that they were to be used in any pending litigation. The judge intimated that he would sustain the objection, whereupon one of the counsel for the plaintiffs testified that he had written the affidavits himself; that each of the witnesses understood that they were to be used as evidence in the case; that he had attached the affidavits to his brief in which the case was stated; that he did not notice that the case was not stated in each of the affidavits, but the brief was attached to the affidavits and all were fastened together. The judge, in a note to the bill of exceptions, says: "The 'brief' referred to purported to be a law brief being a memoranda of legal authorities in pencil writing, and was not attached to the affidavits and was no part thereof." One of the counsel stated that none of the clients were present; that they lived 15 or 20 miles from where the hearing was being had, but that the affidavits could be re-executed, or new ones made, if the court would postpone the case until the following morning at 8 o'clock. The court declined to postpone the case, ruled out the affidavits, and entered a judgment dissolving the restraining order and refusing the injunction. Error is assigned upon these rulings.

J. S. James and H. W. Nalley, for plaintiffs in error. Mundy & Mundy, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. The rule is now well settled that an affidavit intended to be used in a legal investigation must be entitled in the cause in which it is intended to be used, or otherwise show upon its face that it is connected therewith. *Hill v. McBurney Oil Co.*, 112 Ga. 788,

88 S. E. 42, 52 L. R. A. 398; Brucker v. O'Connor, 115 Ga. 95 (2), 41 S. E. 245. The mere fact that an affidavit may be attached to another paper in which the case is stated would not, in all cases, make the affidavit admissible, unless the paper was of such a character as that it would necessarily be inferred that the attention of the witness was called to the paper, or it was a necessary or proper exhibit to the affidavit. But, without reference to this question, it appears from the note of the judge on the bill of exceptions that the affidavits were not attached to the brief of counsel in which the case was stated. There was no error in excluding the affidavits offered as evidence.

2. Whether the hearing of the case should have been postponed, even for a day, in order to allow the defects in the affidavits to be cured, was a matter addressed to the sound discretion of the judge; and there is nothing in the record to indicate that the refusal to postpone was, under the circumstances, an abuse of discretion.

3. When the affidavits were ruled out, so far as the merits of the case were concerned, it stood upon the verified petition and the verified answer, and the averments of fact in these two pieces of pleading were conflicting. The case therefore falls within the well-settled rule that, where the evidence is conflicting, a judgment granting or refusing an injunction will not be interfered with.

Judgment affirmed. All the Justices concur.

(129 Ga. 305)

**TALLULAH FALLS RY. CO. v. HARRIS.**  
(Supreme Court of Georgia. Aug. 15, 1907.)

**CARRIERS—INJURY TO PASSENGER—EVIDENCE.**

The evidence, though conflicting on material issues, was amply sufficient to warrant the verdict, and no sufficient reason has been shown for reversing the judgment refusing to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1307-1314.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by H. H. Harris against the Tallulah Falls Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris sued the Tallulah Falls Railway Company for damages, alleging that he was a passenger upon one of its trains, and, when the train reached the terminus of the road, he started to alight, and the train suddenly started at a rapid rate, and was jerked in such a way as to cause the passengers alighting to lose their balance, and the plaintiff, seeing his danger, endeavored to recover himself, but, being burdened with luggage, he could not do so, and lost his balance, and he was thrown violently to the ground, receiving the injuries set forth in detail in the petition.

The defendant filed an answer, denying all liability. At the trial the plaintiff testified that it was dark when the train reached the station at which he was to alight, and, when the station was announced, the conductor came with his lantern, and the passengers prepared to alight; that he was near the middle of the coach, which was "pretty full," and he got up and started out with his baggage in his hand, which was a very heavy valise, weighing 15 or 20 pounds; that he walked out and down the steps to the last step, and was just making the step to the ground when he discovered that the train was moving; that he thought he would go back, and not attempt to alight, but he found that he could not do that; that just about that time the train seemed to "jump right back," and threw him forward, and he fell to the ground; that the train, being in motion, kept him from recovering himself, and he thought that if he endeavored to recover himself, he would fall right down under the car; that he thought first of throwing himself back; that he just turned loose at the time that there seemed to come a quick motion of the train backwards; that the jerk prevented him from getting back on the train; that he could have got back if the train had been perfectly still; that the train was moving slowly when he first noticed the motion, but, when he decided to turn loose, the sudden jerk occurred which pitched him out a considerable distance from the train. The evidence on the part of the defendant tended to establish that the train stood perfectly still for a sufficient length of time for all of the passengers to alight. The jury returned a verdict in favor of the plaintiff, and the defendant assigns error upon the refusal of the judge to grant a new trial.

J. J. Bowden and Pope B. Erwin, for plaintiff in error. J. C. Edwards and Robt. McMullan, for defendant in error.

COBB, P. J. (after stating the facts as above). Whether it is negligence or not, in a particular case, for a passenger to attempt to alight from a moving train, must depend upon the circumstances of danger attending the act, and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or what is not negligence is one for the jury; and, unless the danger is obviously great—as where the train is moving at a high rate of speed—the court cannot hold that leaving the train is as a matter of law such negligence as should preclude a recovery. *Suber v. G., O. & N. Ry. Co.*, 96 Ga. 42, 23 S. E. 387. In this case the question as to the defendant's negligence and the plaintiff's diligence were peculiarly for solution by the jury. The evidence, though conflicting on material issues, fully warranted the verdict. The original motion for a new trial contains only the general grounds. In



the amended motion there is an elaboration of these grounds. There is one assignment of error upon an extract from the charge of the court. The substance of this charge was that if a passenger was attempting to alight from a train, and the same suddenly started, and he received injuries as a consequence, there would be a presumption of negligence against the company, and that the burden would be upon it to establish some defense by a preponderance of evidence. The assignment of error upon this charge was that the controlling question in the case was as to whether the train stopped at the station a sufficient length of time to allow the passengers to alight in safety, and this charge took this question entirely from the consideration of the jury. We do not think the charge was subject to the criticism made upon it. It was merely dealing with the question as to the circumstances under which the presumption of negligence would arise against the company, and there was nothing in it to intimate to the jury that the company would be liable in the event that the jury should be satisfied that the company was not negligent so far as the time given the passengers to alight was concerned. No sufficient reason has been shown for reversing the judgment.

Judgment affirmed. All the Justices concur.

(129 Ga. 275)

RICHARDS v. McHAN et al.

(Supreme Court of Georgia. Aug. 14, 1907.)

1. HABEAS CORPUS—CUSTODY OF INFANT—CONTRACT.

Prima facie the right of custody of an infant is in the father; and, when it is insisted that the father has relinquished this right by contract, the terms of the contract, to have this effect, should be definite and certain, and the proof to establish the contract should be clear and satisfactory. Under this rule, the evidence in this case was not sufficient to authorize a finding that the father had relinquished by contract his right of custody of the infant, concerning the possession of which this controversy is waged.

2. SAME—WRIT OF ERROR—REVIEW—DISCRETION OF COURT.

Upon the issue as to the fitness or unfitness of the father for the custody, control, and care of the infant, the evidence was such as to allow the exercise of its discretionary power by the court below, and this court will not disturb its judgment; no abuse of discretion being made to appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 114.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Habeas corpus by J. B. Richards, Jr., against Catherine McHan and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Richards filed his petition for habeas corpus to obtain the custody and possession of an infant son. The defendants were the maternal grandparents of the child; the mother

being dead. The petition alleges that the plaintiff is the father of the child, and that "petitioner has not parted with said child willingly, nor relinquished nor given up nor forfeited his right to said child by any reason known to the law, or by any other mode." Mr. McHan, the grandfather of the child, filed a general denial to the plaintiff's petition. Mrs. McHan, in addition to her denial of the facts alleged in the petition, further averred "that the child referred to is an infant 16 months old; that said child and its care and custody was given to this defendant under a solemn agreement which plaintiff made with her at the deathbed of her daughter (the mother of the child) then dying, by which plaintiff relinquished entirely any and all rights to the custody and control or care of said child in any way, and placed the same under the entire care, dominion, control, and custody of this defendant as long as she lives, and said agreement has been carried out from that day to this." This defendant also averred that the plaintiff is not a fit person to be intrusted with the care and custody of said infant, because of his drunkenness and immorality, and that respondent is able and willing to take charge of the child, and her circumstances and environments make her a fit person to have the care and custody of such infant. The evidence for the respondents tended to show that at the time of making the alleged contract, while the mother of the child was in a dying condition, she said to her father, one of the respondents: "I give you little Mack. I want you to have him. Pa will stand back of little Mack." To her mother, the other respondent, she said: "Mamma, I give you my baby [the child in question]. I want you to have it." Or to her father: "Pa, you must have little Mack. You must stand back of him." And to her mother: "Mamma, take my baby and raise it the best you can. I am going to leave it." To her husband, the plaintiff, she said: "John, don't you never take my baby away from my mother while she lives"—to which her husband replied: "Aurora, I know your wishes; and they shall be carried out." There is no evidence of any reply by the respondents, or of any conversation between plaintiff and respondents at that or any other time, whereby the former agreed to relinquish his parental rights. Upon the death of the child's mother, the respondents assumed control of the infant, then only 11 days old, and have been in possession of him ever since. The evidence introduced by the respondents upon the other issue was very voluminous, and in parts in conflict with that introduced by the plaintiff. The court awarded the child to the grandmother, one of the respondents. The plaintiff excepted.

Chambers & Smith, W. R. Daley, and Peeples & Jordan, for plaintiff in error. Smith, Hammond & Smith, for defendants in error.

BECK, J. (after stating the facts as above).

1. We agree with counsel for the plaintiff in error that the evidence entirely fails to show any contract upon the part of the plaintiff for the surrender or relinquishment of his right to the care and custody of the infant for the possession of which the habeas corpus proceedings were instituted. Where such a contract is claimed and relied on a clear and strong case must be made and the terms of the contract must be definite and certain. *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304. Tested by this rule, the contract relied on was not established by the evidence; and, when all that was said and done, which is here insisted upon as constituting the alleged contract, is considered, we find all the essentials of a valid binding contract to be wanting.

2. But the conclusion readily reached that the evidence in the case did not authorize the court to award the child to the respondent upon the ground of an established contract between the plaintiff and the grandparents or either of them, we have still to consider whether the evidence as to the unfitness of the plaintiff was such as to authorize the judgment complained of; and, if it was, we will assume, of course, that the judgment was based upon that, and not upon the untenable ground that the contract was established. In awarding the child to the respondent, and in refusing to order him delivered into the custody of his father, the judge was in the exercise of a very wide discretion, with which he is vested by law. It is not an unlimited discretion, and a transgression of those limits would amount to an abuse of discretion which a reviewing court would correct; but, before this court would be authorized to interfere with the decision of the lower court in the exercise of its discretion, it must appear that in the exercise thereof there was a patent and flagrant abuse of the discretionary power. *Prima facie* the right of control and custody of a child until majority remains in the father. Civ. Code 1895, § 2502. And, in order to divest him of this right upon the ground of unfitness for the trust, the proof brought to show the alleged unfitness should be clear and convincing. "A clear and strong case" must be made to sustain an objection to the father's right. *Commonwealth v. Briggs*, 16 Pick. (Mass.) 205. This was determined in a contest on habeas corpus between the mother and father, who had separated. The discretion to be exercised by the courts in such contests is not arbitrary. The rights of the father on the one hand, and the permanent interest and welfare of the infant on the other, are both to be regarded, but the right of the father is paramount, and should not be disregarded except for grave cause. The breaking of the tie that binds them to each other can never be justified without the most solid and substantial reasons, established by plain proof. In any form of proceeding, the sundering of such

ties should always be approached by courts 'with great caution and with a deep sense of responsibility.' *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48. And elsewhere in the opinion the learned justice discusses, defines, and points out the limitations of the rules of discretion as applicable to habeas corpus cases. That opinion we commend as containing sound and wholesome doctrine for application when in habeas corpus proceedings courts are asked to break the tie that binds a father to his child, and to place one man's offspring in the care and custody of another. But, after all due weight is given to what is said in that case and the authorities cited, as to the limitations upon the discretionary power of the judge in habeas corpus proceedings, the fact still remains that his discretion is wide, and the limits within which its free exercise is allowed are broad. And the mere fact that a reviewing court, upon the consideration of the evidence in the record, might feel that a preponderance, even a great preponderance, of the evidence was in favor of the party to whom the judgment in the habeas corpus court was adverse, would not authorize the former court for that reason to disturb the judgment rendered, inasmuch as the latter, and not the former, is the tribunal, clothed with discretionary power. In a case like the one at bar we have to decide whether the evidence was such in its range, or because of conflicts therein, as to allow an exercise of discretion. An affirmative answer to that question requires that the judgment be affirmed.

It is unnecessary, as it would not be helpful to any one, to set forth, even in the most compact form, a statement of the facts in the case. It is enough to say that there were many facts testified to by witnesses, which, taken collectively and considered together with all the deductions that might be legitimately drawn therefrom, compel the conclusion that the court below cannot be held to have clearly transgressed the limits of his discretionary power, with the exercise of which he is charged by the law, in finding that the custody of his infant son should be denied to this applicant. It might be well urged by the plaintiff in error that, even if the evidence authorized the conclusion that the plaintiff's conduct was on a former occasion such as to indicate his unfitness to have the custody and care of his son, there is the testimony of many witnesses to show that for several months prior to the institution of these proceedings he had lived an exemplary life, and that his conduct had been above reproach. But, however strongly this might appeal to us if we were the trial court, we must still recognize the fact that all of this was addressed to the sound discretion of another tribunal, which, under the evidence that authorized it, having found that the plaintiff by his conduct had divested himself of the character of one fit to have the control of the child, was not bound to

find that he had been rehabilitated by evidence of good conduct during the period intervening between the time of the commission of those acts relied on to show his unfitness and the time of the trial which resulted in the judgment complained of. In holding that the judge did not abuse his discretion, it is not to be understood that we adjudicate that the father has forfeited for all time his right to the custody and control of his child. If in the future it should appear that the good conduct of the father, which had only continued a limited time when the trial took place, has continued for such a length of time that it would be reasonable to assume that the errors of the past would not probably again occur, or if there is any other change in the circumstances which show with reasonable certainty that the welfare of the child will be safeguarded under the father's custody, the judgment now rendered will not prevent the father from making an application for the custody of the child.

It was strongly urged in argument before us that "in every case, regardless of the character of the parties, the welfare of the child is the controlling and important fact." Having placed our decision, affirming the judgment, upon the ground that no abuse of discretion by the court below is shown, we think it unnecessary to discuss the doctrine just stated. We are content with saying that the doctrine as stated above requires important qualifications before becoming acceptable. Certainly, where the father is one of the parties to such a case, before the principle just stated becomes active, the father's prima facie right to the possession and control of the child should be shown to have been forfeited or at least very radically impaired.

Judgment affirmed. All the Justices concur.

(129 Ga. 291)

#### CLARK v. KNOWLES.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### 1. EJECTMENT—PLEADING—DESCRIPTION OF PROPERTY.

"It is essential to the maintenance of an action of ejectment that the premises [sought to be recovered] be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment and describing the premises as laid in the declaration shall so identify the premises sued for as that the sheriff, in the execution of the writ, can deliver the possession in accordance with its mandate." *Harwell v. Foster*, 97 Ga. 264, 22 S. E. 994. See, also, *Turner v. Rives*, 75 Ga. 606; *McCullough v. East Tenn., Va. & Ga. Ry. Co.*, 106 Ga. 275, 32 S. E. 97.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 158-164.]

#### 2. SAME—SUFFICIENCY.

Accordingly, where in a suit to recover land the petition described the premises sued for "as about fifty acres on the west side of or in the northwest corner of lot of land number five hundred and twenty-four in the eighth district

of" a designated county, such petition was properly dismissed upon demurrer, on the ground that it contained no sufficient description of the premises sued for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 158-164.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by T. J. Clark against L. A. Knowles. Judgment for defendant, and plaintiff brings error. Affirmed.

T. H. Parker and W. C. McCall, for plaintiff in error. J. A. Wilkes, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(129 Ga. 289)

#### MURRAY et al. v. McGUIRE.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### DEEDS—CANCELLATION—RIGHT OF ACTION—PERSONS ENTITLED.

A petition by the sole heirs at law of the maker of a deed to cancel the deed is properly dismissed where it appears therefrom that the grantor left a will devising the same land, which will has been offered for probate, and a caveat thereto filed by the heirs at law, and the issue thereby made is still pending and undetermined in the court of ordinary.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by Lucretia Murray and others against John J. McGuire. Judgment for defendant, and plaintiffs bring error. Affirmed.

Lucretia Murray and Charles T. Murray filed their petition in Glynn superior court against John J. McGuire, praying the cancellation of a certain deed. The salient features of the petition are that the plaintiffs are the widow and son, respectively, of John Murray, late of Glynn county, deceased, and are his sole heirs at law. The defendant is his nephew. It is alleged that the defendant claims that John Murray on May 17, 1900, signed, sealed, and delivered to him, upon an alleged consideration of \$1,000, a deed to a described lot of land. The deed was recorded on June 21, 1900. It is further alleged that no actual consideration passed, and that the deed was never in fact signed, sealed, and delivered; but, if it was signed and delivered by him, it was void, because at the time of its execution John Murray was an imbecile and non compos mentis. It is charged that, in pursuance of a scheme to acquire the property of John Murray, the defendant in September, 1903, procured him to make an alleged will, by the terms of which the plaintiff Charles T. Murray was bequeathed a nominal sum, and the plaintiff Lucretia Murray a life estate in his realty, with remainder to the defendant. John Murray died on November 18, 1905. The alleged will had been filed in the court of ordinary

of Glynn county for probate, and the plaintiffs had filed thereto in that court a caveat on the grounds of undue influence and want of capacity in the deceased to make a will, which caveat is now pending in that court. The plaintiffs were in possession of the land described in the deed at the time of its alleged execution, and have since been continuously in its possession. Copies of the deed and will are attached to the petition, and from the copy of the will it appears that plaintiff Lucretia Murray and the defendant are the nominated executors. The petition prayed that the deed be delivered up for cancellation, and for general relief. When the case was called for trial, the defendant made an oral motion to dismiss the petition, on the ground that no cause of action was therein set out. This motion was sustained, and the plaintiffs bring error.

D. W. Krauss and F. H. Harris, for plaintiff in error. Bennet & Conyers, for defendants in error.

EVANS, J. (after stating the facts as above). The plaintiffs sue as heirs at law of John Murray. Yet their petition discloses that he left a last will and testament, which has been offered for probate, and a caveat thereto filed, which is still pending and undetermined in the court of ordinary. If the will be admitted to probate, the land therein devised would pass under the will, and the plaintiffs, as distributees of John Murray, would have no interest in it. The will purports to convey the same land described in the deed. The petition is silent as to the person who offered the will for probate, but most probably it was offered by the defendant, because he was one of the nominated executors and the devisee of the testator's entire estate in remainder, and the only person interested in the estate, except the plaintiffs, who are objecting to the probate of the will. If the will is probated upon the application of the defendant, it may be that he would be put to his election to claim under the will or the deed. Civ. Code 1895, § 4013. If the will be probated, the maximum interest in the land which the widow can claim thereunder would be only a life estate, and a subsequent controversy may arise between herself and the defendant as to the validity of the deed sought to be canceled in this proceeding. In this controversy her co-plaintiff would have no interest; and her right to prosecute the suit would be, not as a distributee, but as a legatee under the will, or as a dowress. Hence the plaintiffs, as heirs at law, cannot maintain this proceeding to cancel the deed until it is determined that the decedent from whom they claim to derive their title died intestate. This issue cannot be collaterally tried in the superior court in the present proceeding. The court of ordinary has exclusive and original jurisdiction in the matter of the probate of wills. Civ. Code 1895, § 4232. Where a will

has been proved in common form, the judgment of probate cannot be collaterally impeached in the superior court by any pleading attempting to raise the issue of devisavit vel non. *Maund v. Maund*, 94 Ga. 479, 20 S. E. 360; *Langston v. Marks*, 68 Ga. 435. The superior court has no power to set aside a will which has been admitted to record. *Tudor v. James*, 53 Ga. 302. For a stronger reason, the superior court is without jurisdiction to interfere with the court of ordinary in the probate of a will, in order to determine whether the person under whom the plaintiffs claim died testate or intestate.

As no cause of action was set out in the petition, the defendant could take advantage of the point by a motion in the nature of a general demurrer. *Crew v. Hutcheson*, 115 Ga. 534, 42 S. E. 16; *O'Shields v. Ga. Pacific Ry. Co.*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152.

Judgment affirmed. All the Justices concur.

#### ROBINSON v. STATE

(129 Ga. 326)

(Supreme Court of Georgia. Aug. 16, 1907.)

##### 1. CRIMINAL LAW — INSTRUCTIONS — NEW TRIAL.

A verbal inaccuracy occurring in a charge, and immediately thereafter corrected, furnishes no ground for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1994, 1995.]

##### 2. HOMICIDE—INSTRUCTIONS.

Where the only issue presented by the evidence was that of murder or justifiable homicide, the presiding judge correctly omitted to charge on the subject of voluntary manslaughter.

##### 3. SAME—MALICE.

If the fact of a voluntary homicide is shown, unaccompanied by any circumstances of excuse or extenuation, malice is presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 268.]

##### 4. CRIMINAL LAW — INSTRUCTIONS — ASSUMPTION OF FACTS.

Where the evidence showed without controversy or conflict that the deceased was shot by the accused, and the latter in his statement admitted that such was the fact, but sought to justify the act, there was no error in charging that, if the jury had a reasonable doubt as to whether the accused acted, when he shot, under circumstances calculated to excite the fears of a reasonable man, he should be acquitted. Such a charge was not open to objection on the ground that it contained an expression on the part of the court that the fact that the shooting of the deceased by the accused had been proved.

##### 5. SAME—BILL OF EXCEPTIONS—EXHIBITS.

Affidavits, attached as exhibits to a bill of exceptions after the certificate of the presiding judge, and not identified by his signature thereon, cannot be considered as evidence; and a ground of a motion for a new trial which is dependent upon such evidence cannot be considered.

##### 6. SAME—STATEMENT OF ACCUSED.

Whether the presiding judge will permit counsel for the accused to call the attention of the latter, while making his statement or at its close, to some subject claimed to be pertinent to the case, and as to which he has made no statement, or whether the court will after

wards allow the accused to make a second statement touching such subject, are matters which must rest in the discretion of the judge. In the present case it cannot be said that such discretion was abused.

(Syllabus by the Court.)

#### HOMICIDE—MALICE.

The ruling stated in the third headnote is a correct statement of law, but it is not applicable to the facts of this case. The evidence offered by the state to prove the homicide showed that the fatal shots were fired under such circumstances as rendered it proper to submit the question to the jury whether the defendant acted under the fears of a reasonable man that a felony was about to be committed upon his person. If the defendant shot the deceased, induced by such fears, there could be no malice; and under the ruling in the case of *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, the court should not have charged that malice was presumed upon proof of the killing.

(Per Atkinson, J., dissenting.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Ed Robinson was convicted of murder, and brings error. Affirmed.

Janes & Hutchens and Wm. Janes, for plaintiff in error. W. K. Felder, Sol. Gen., and Jno. O. Hart, Atty. Gen., for the State.

LUMPKIN, J. 1. Ed Robinson was indicted and convicted of the offense of murder. His motion for a new trial was overruled, and he excepted. The motion and amended motion contained 21 grounds. Most of them present no question which it is necessary to discuss, and as to them it will suffice to say that none of them require a new trial. Only a few need be specially mentioned. In some of them there may have been slight verbal inaccuracies, or inapt expressions. Thus, at one time, in defining malice, the presiding judge said: "It is a deliberate intention unlawfully to take away human life, whether it springs from hatred, ill will; revenge, ambition, or drunkenness even, if such should be the case." But he at once corrected himself and informed the jury that there was no question of drunkenness arising under the evidence.

2. There was no evidence requiring a charge on the subject of manslaughter. The evidence showed that the man killed and a woman had been living together in unlawful cohabitation, but had separated. On the night of the homicide he went to the door of her house and knocked. When first asked who he was, he gave a false name, but subsequently gave his own name, and called the woman to the door. When she unlocked it, he pushed it open and entered the room, saying several times, "Strike a match." The defendant was in the room, and in bed at the time, though it was claimed that he was occupying a different bed from that in which the woman slept. Upon the deceased calling for a match, the accused fired twice with a pistol, killing him. There was no evidence that the deceased had any weapon. There was some evidence, introduced by the defend-

ant, that the deceased had previously made threats as to what he would do if he caught any man in the room with the woman, and that the threats had been communicated to the defendant. The issue presented was murder or justifiable homicide. Presumably the presiding judge charged correctly on that issue, including the doctrine of reasonable fears. But there is nothing in the evidence which made it erroneous not to charge the law in regard to voluntary manslaughter.

3. The court charged as follows: "When a homicide or killing is shown, the law presumes malice. So, if you find from the testimony that, beyond a reasonable doubt, the defendant, Ed Robinson, in the county of Polk, on the day named in the bill of indictment, or at any other time before the finding of the bill of indictment in this case, did unlawfully, willfully, and of his malice aforethought kill and murder Charlie Hollifield, by shooting him, the said Charlie Hollifield, with a certain pistol, as charged in the bill of indictment, and nothing further appears in the case, it would be your duty to find the defendant guilty." At other parts of his charge he also referred to the presumption of malice from the commission of the homicide. Under the facts presented by the evidence, there was no error in the charge. The case is controlled by that of *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934. In that case Mr. Justice Evans said: "In the first instance, when the fact of a voluntary homicide is shown, unaccompanied by any circumstances of excuse or extenuation, malice is presumed, and the court may so charge. Also, where the homicide is established by evidence, some of which excludes any inference of alleviation, while mitigation may be inferred from some of the circumstances, it is proper to instruct the jury that the law presumes malice from the proof of the killing, unless the evidence shows alleviation or justification, and leave it to the jury to decide the issue of fact as to whether the killing was with or without extenuating circumstances. As was said by Simmons, J., in *Vann's Case* [83 Ga. 44, 9 S. E. 945]: 'If the proof that shows the killing itself discloses that it was done without malice, of course, the presumption does not exist; but, if the accompanying proof does not, then the burden is thrown upon the defendant to show that it was done without malice.' It is not incumbent on the accused to prove an absence of malice, where the evidence for the prosecution shows facts which will excuse the homicide or reduce its grade." The evidence was not such as to render this charge erroneous. It may be presumed that the general law of the case was charged, including the doctrine of reasonable doubt.

4. Error was alleged because in one part of the charge the judge said: "If you have a reasonable doubt as to whether the defendant, Ed Robinson, acted, when he shot, under circumstances calculated to excite the fears of a reasonable man," etc. The objec-

tion to this charge was that it was an expression on the part of the court that the fact of the shooting of the deceased by the defendant had been proved. All the evidence showed without controversy that the deceased was shot by the accused, and the latter in his statement also admitted that such was the fact, but sought to justify the act by asserting that the deceased had something in his hand and was advancing upon the accused, that when he went into the room he threatened to kill any one who might be there, and that the accused was frightened. Under the circumstances, the charge furnished no ground for a new trial.

5. One ground of the motion for a new trial was to the effect that one of the jurors who tried the defendant had been a member of the coroner's jury who held the inquest over the body of the deceased, that a verdict was then rendered which charged the defendant with the murder, that the juror answered the questions on the voir dire in such manner as to qualify himself, and that neither the defendant nor his counsel had any knowledge or mode of ascertaining, until after the trial, that such juror had been a member of the coroner's jury. In the bill of exceptions it was recited that the defendant introduced, in support of his motion, certain affidavits in regard to the juror. The names of the affiants were stated, and it was added that the affidavits were "copied and hereto attached and made a part of the record, marked Exhibits A, B, C, D, and E." It was then alleged that certain counter affidavits were introduced on behalf of the state; the names of the affiants being given, and it being recited that they were attached to the bill of exceptions and marked Exhibits F, G, and H. After the certificate of the judge, and the acknowledgment of service by counsel, there appear, attached to the bill of exceptions, affidavits which are marked with letters from A to H consecutively; but none of these are identified by the judge's signature upon them. According to the often-repeated rulings of this court, this is not a sufficient identification to authorize such attached papers to be considered by us. What precedes the certificate of the judge as a part of the bill of exceptions is identified by it. What follows the certificate, purporting to be exhibits referred to in the body of the bill of exceptions, must be specially identified by the judge's signature. Merely to attach affidavits or other papers to a bill of exceptions after the judge's signature does not verify or identify such papers as having been attached at the time when the bill of exceptions was signed, or as being proper exhibits thereto, unless the judge places his signature upon them as being the exhibits referred to in the bill. The ground of the motion for a new trial which was dependent on this evidence cannot be considered.

6. The motion for a new trial stated that the court erred in refusing to allow defend-

ant's counsel to call his attention to an important matter necessary to his defense, while the defendant was making his statement; the court saying: "Let him make such statement as he sees fit." Also, that, pending the opening argument of the state's counsel, defendant's counsel stated to the court that there was one matter about which the defendant wished to make a statement, that he (counsel) had called his client's attention to it, and that the accused wished to make a further statement, which the court declined to allow. The presiding judge may, in his discretion, permit counsel to call the attention of the defendant, while making his statement, or at its close, to some subject pertinent to the case as to which he has made no statement. In the present case, however, it does not appear what the subject-matter referred to was, or what it was desired the defendant should make an additional statement about. Matters of this character, including the allowance of an additional statement after the first, must rest to a considerable extent in the discretion of the presiding judge. We cannot say that such discretion was abused. See *Echols v. State*, 109 Ga. 508, 34 S. E. 1038; *Walker v. State*, 116 Ga. 540, 42 S. E. 787, 67 L. R. A. 426; *Brown v. State*, 58 Ga. 212; *Dixon v. State*, 116 Ga. 186, 42 S. E. 357; *Cochran v. State*, 113 Ga. 741, 39 S. E. 337.

Judgment affirmed. All the Justices concur, except ATKINSON, J., who dissents.

(129 Ga. 349)

#### CENTRAL OF GEORGIA RY. CO. v. RAY.

(Supreme Court of Georgia. Aug. 16, 1907.)

##### 1. MASTER AND SERVANT—MACHINEERY IN USE—ORDINARY DILIGENCE.

A railroad company, relatively to its employees, is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use and reasonably adapted to the uses to which it is put; and its liability in this respect is limited to a failure to discharge this duty. It is therefore erroneous to charge the jury that if they believe that the engine which killed the plaintiff's husband, for whose homicide the plaintiff sues for damages, was of the kind in general use and reasonably suited for the business for which it was in use, then it would be for them to determine whether or not, "in having one of that character," the railroad company had exercised ordinary care and diligence.

##### 2. DEATH—DAMAGES—INSTRUCTIONS.

The judge may refer, in his charge on the subject of estimating damages for the value of a life, to the decrease in the earning capacity which naturally results from advancing age, probable loss of employment, and inability to constantly labor and secure continuous work. Juries are presumed to be as cognizant of the common phenomena of human experience as the judge; and, if their attention is specially desired to be directed thereto, a timely written request should be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 145.]

##### 3. TRIAL—INSTRUCTIONS.

The other attacks on excerpts from the charge relate more to the form of expression than to a misapprehension of the correct rules of law; and, as the attention of the trial judge

has been called thereto, they probably will receive due consideration on the next trial.

(Syllabus by the Court.)

**MASTER AND SERVANT—MACHINERY IN USE.**

In respect to the character of the machinery employed by the railroad company, the whole duty of the company to the plaintiff's husband was not necessarily discharged by employing an engine and tender "equal in kind to that in general use and reasonably adapted to the uses" in which they were employed. The qualification to the charge mentioned in the first head-note did not authorize a reversal of the judgment.

(Per Atkinson, J., dissenting.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Emma Ray against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Emma Ray brought her action for damages against the Central of Georgia Railway Company for the negligent killing of her husband, and the jury returned a verdict in her favor. Her petition alleged that her husband was, at the time he was killed, in the employment of the railway company, and engaged in work with an engine used at the time in switching cars in the yards of the company at Macon, Ga. It was his duty to go with the engine and change the switches, that the engines might pass from one track to another in moving cars in the yard. While engaged in changing a switch, that the engine with which he was at work might change to another track, and just as he had straightened himself up and partially turned around, he was struck by another engine of the company, thrown upon the track, and killed. The nature of the work required that it should be done hurriedly. The switch was what is known as a "ground switch," and was worked by a lever which was kept in place by a heavy weight; and, in order to change it, it was necessary that the deceased should place himself in a stooping position, lift the lever and weight attached from the ground, and throw it to the opposite side of the switch. The switch in question was located within about 10 inches of where an engine passing on the next track would extend. At the time he was engaged in this work his back was to the engine, which was approaching him from the rear, and he did not and could not have discovered the approach of the engine before he was struck by it. He was or should have been in plain view, if proper lookout had been kept by persons in charge of this engine; and, if proper care had been used, his position of danger could have been discovered by those in charge of the engine, whose duty it was to have discovered him and stopped in time to prevent the injury, or at least to have given him warning of its approach. No bell was rung or whistle sounded to give her husband notice of the engine's approach, and at the time her husband was killed the engine was being

run at from 10 to 15 miles an hour, which was a dangerous rate of speed at that place, and in violation of a valid municipal ordinance of the city of Macon, which made it unlawful to run an engine at this place at a greater rate of speed than 5 miles an hour, and by reason of the violation of this ordinance her husband was run down and killed. The deceased was entirely free from fault, and his death was caused entirely by the negligence of the agents and employes of the railroad company in placing the switch so near the track, and in running upon him without any warning whatsoever, and in violation of the city ordinance. The earning capacity and expectancy of deceased were also set forth.

By an amendment the plaintiff alleged that the engine which struck the deceased was so constructed that it was impossible for the employes running the engine backwards to keep a lookout or observe the track, because the tender was so high and wide that it completely obstructed and shut out the view of the track from those in charge of the engine, and made it impossible for them to see any one upon the track in the rear of the tender, when the engine was run backwards. The engine which struck her husband was being run backwards, and no proper lookout was kept on the rear of the engine to give warning of its approach, or give notice to those in charge of the same of its close proximity to persons on the track. At the time deceased was killed several engines of defendant were being run in that portion of the yard, and the employes engaged in work in this yard were compelled to be constantly upon the tracks of the company in this yard. This switch was negligently placed by the defendant so near the main line or lead track in the yards as to make it dangerous to the employes of the company who were required to work therein, for the reason that employes engaged at that switch were always in danger of being struck by engines and cars of the company running along the adjacent track; and this switch was unnecessarily and negligently placed in this dangerous position, and maintained there, in utter disregard to the safety of its employes who were called upon to discharge their duties in this yard. It was the duty of the company to furnish the deceased a safe place in which to work, and in placing this switch in such dangerous proximity to this track the company failed in this duty. The company, knowing of the dangerous position of the switch, and that the deceased would be called upon, in the discharge of his duties, to work at this switch, owed him the duty of giving him warning of the approach of its engine at that time and place. This switch was so placed that by reason of a curve in the track at that place the view was obstructed by cars standing in the yard, making it impossible to discover an approaching train until it was within a very few feet of the

switch. The defendant denied the alleged negligence; and to the verdict and judgment in the plaintiff's favor it filed a motion for a new trial, which was overruled, and it accepted.

Wimberly & Jordan and Jno. I. & J. E. Hall, for plaintiff in error. Jno. R. Cooper, Jos. H. Hall, and Warren Roberts, for defendant in error.

EVANS, J. (after stating the facts as above). In the amendment to the petition it was alleged that the engine which killed the plaintiff's husband was so constructed that it was impossible for the employees running the engine backwards to keep a lookout, or observe the track, because the tender was so high and wide that it completely obstructed and shut out the view of the track from those in charge of the engine, and made it impossible for them to see any one upon the track in the rear of the tender, when the engine was being run backwards. From the instruction given on this feature of the plaintiff's case it is quite evident that the trial judge construed (and properly so) this allegation as an averment that the engine was not adjusted to the work of switching cars, where the engine was generally employed in moving both backward and forward, and the employment of an engine so constructed might be considered by the jury on the issue of the exercise of ordinary care by the defendant in the operation of an engine so constructed. The court charged: "Relatively to that question as to the construction of the engine, if the jury believe that the engine was of the kind in general use and reasonably suited to the business for which it was in use, then it would be for you to determine whether or not, in having one of that character, they had exercised ordinary care and reasonable care and diligence." This charge is alleged to be erroneous, because, if the jury should believe that the engine was of a kind in general use and reasonably suited to the business for which it was in use, they should not have been instructed that they might infer that the mere having an engine of this description was a failure to exercise ordinary care in the selection of one of this type. We think the charge is open to the criticisms made of it. A railroad company, relatively to its employees, is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use and reasonably adapted to the uses to which it is put. *Alabama Midland Ry. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655; *Reed v. M., K. & T. Ry. Co.*, 94 Mo. App. 371, 68 S. W. 364. Its liability in this respect is limited to a failure to discharge this legal duty. *Atlanta, etc., Air Line Ry. Co. v. Ray*, 70 Ga. 674. This instruction was calculated to harm the defendant. The plaintiff charged the defendant with negligence (1) in selecting and using this type of engine, and (2) in operating

it without lookouts. The defendant contended in reply that it had selected a type of engine such as was in general use and reasonably suited to the use to which it was put, and that the plaintiff's husband knew it operated this engine without lookouts or warnings, and that his death resulted because he was at a place where it was not his duty to be and from his own failure to exercise ordinary care for his safety. The jury may have believed, under the evidence and the instruction of the court, that the defendant was not negligent in the operation of the engine; yet they were told in effect that, even if the engine was of standard type and was reasonably suited to the use to which it was put, still they might find the defendant negligent "in having one of that character."

2. Complaint is made of an omission of the court, when charging on the subject of damages, to call the attention of the jury to the decrease in the earning capacity which naturally results from advancing age, probable loss of employment, and inability to labor and to secure work. In the process of reaching a correct result from the evidence, juries may take into consideration such universal experiences in human life as criteria in weighing the evidence in the particular case. The judge may refer in his charge to such matters as the plaintiff in error complains he omitted in this case. *Fla. C. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730. The jury are presumed to be as cognizant of these common phenomena of human experience as the judge; and, if their attention is especially desired to be directed thereto, a timely written request should be made.

3. The attack on the other charges complained of relates more to the form of expression than to a misapprehension of the correct rules of law, and on the next trial the judge in all probability will so adjust his expressions as to relieve them of the criticism made in the assignments of error.

Judgment reversed. All the Justices concur, except ATKINSON, J., who dissents.

(129 Ga. 258.)

EDALGO, Town Collector, et al. v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 13, 1907.)

# 1. CONSTITUTIONAL LAW—PLEADING—UNCONSTITUTIONALITY OF STATUTE.

An allegation that a given statute is unconstitutional, in that it violates the constitutional provision which prohibits the passage of a special law in any case for which provision has been made by an existing general law, which fails to point out the general law which is claimed to cover the same subject as such statute, presents no question for decision by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 44.]

# 2. SCHOOLS AND SCHOOL DISTRICTS—CREATION—REPEAL OF STATUTE.

The act approved August 22, 1905, creating the Jenkinsburg public school district (Acts



1905, p. 473), was repealed by the general act providing for the creation of local tax district schools, approved August 23, 1905 (Acts 1905, p. 425), as amended by the act approved August 21, 1906 (Acts 1906, p. 61).

### 3. STATUTES—AMENDMENTS.

An act dealing with a single subject-matter, but with two phases of the same, which is held valid as to one phase, but inoperative as to the other, may be amended by an act relieving the defects applicable to the one portion, so as, in the single act, to complete the scheme of the original act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 202.]

### 4. SAME—REPEALS BY IMPLICATION—LOCAL TAX DISTRICT SCHOOLS.

The act approved August 23, 1905 (Acts 1905, p. 425), as amended by the act approved August 21, 1906 (Acts 1906, p. 61), providing for the creation of local tax district schools, and popularly known as the "McMichael School Law," is not unconstitutional or otherwise invalid for any of the objections urged against it in the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 209, 210.]

(Syllabus by the Court.)

Error from Superior Court, Butts County;  
E. J. Reagan, Judge.

Action by the Southern Railway Company to enjoin J. S. Edalgo, town collector, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

This was an application by the Southern Railway Company to enjoin the tax receiver and collector of Jenkinsburg public school district and the sheriff of Butts county from proceeding to collect two tax executions for school tax alleged to be due by the railway company to the authorities of said district, one for the year 1905, and the other for the year 1906. The judge granted an injunction, and the defendants excepted. The case was submitted to the judge upon the petition, a demurrer thereto, and the answer. The petition and answer were each verified, and they disclosed no issue of fact. The case turns entirely on questions of law growing out of the undisputed facts, and these arise out of certain legislative enactments. Jenkinsburg public school district was incorporated under an act approved August 22, 1905. Acts 1905, p. 473. The district, as laid out, embraced territory lying in each of the counties of Butts and Henry. The town of Jenkinsburg, in Butts county, had been incorporated prior thereto. See Acts 1889, p. 876. The school district embraced territory not included in the town, for the town was wholly in Butts county. The act incorporating the school district provided for an election to ratify the act and to select school trustees, who were to discharge certain duties in the event the act was ratified; such election to be ordered immediately after the approval of the act. The trustees were authorized to levy a tax for school purposes, and to elect a tax receiver and collector. The trustees were authorized to provide a digest, upon which the receiver and collector was to enter all property in the district subject to taxation in the

manner prescribed in the act. There was no distinct mention of railroad property in the act, but it used the broad terms above referred to. The election was held and the act ratified, as contemplated by the act. The act was amended by an act approved August 21, 1906. Acts 1906, p. 470. The amending act contained a voluminous preamble reciting compliance with the details of the original act, and provided all the minute details in a scheme for the assessment and collection of taxes upon all classes of property, the property of railroad companies being specifically mentioned, and this, as well as all other property, was to be returned to the receiver and collector of the district. The executions now in question were issued after the date of the amending act. The original act was approved one day before the general act for the creation of local tax school districts; the latter act being approved August 23, 1905. Acts 1905, p. 425. The amending act was approved on August 21, 1906, the same day when the act amending the general act was approved. Acts 1906, pp. 61, 470.

The original Jenkinsburg district school act is attacked by the plaintiff and declared to be invalid for the following reasons, among others: (a) The act creates a school district embracing territory lying in two counties. (b) The local district school act was repealed by the general act approved the following day. (c) The local act is a special law in a case for which provision has been made by an existing general law. The amendment to the district school act is also attacked for various reasons. The defendants are at issue with the plaintiff on the questions of law raised by the petition, and they also attack the general acts and allege that they are invalid. The general act of 1905 is alleged to be unconstitutional for the following reasons: (a) It contains matter not indicated in the title. (b) It seeks to repeal and amend special acts not distinctly described. (c) It grants donations to chartered schools. (d) It seeks to give sectarian schools a portion of the public school fund. (e) The system for the district school, as to the amount of tax, collection of the same, and in other material particulars, is different from that provided when the whole county adopts the act, thus violating the provision of the Constitution that all taxation shall be uniform. (f) It provides for tuition against nonresident pupils, when the Constitution declares all public schools shall be free to all of the children of the state. (g) It authorizes the county board of education to increase the territory of a municipality for school purposes without submitting the question to a vote of the people of the new territory. (h) It seeks to disregard school districts in existence when the Constitution was adopted. (i) It lacks uniformity, in that, when new territory for school purposes is added to municipalities, the government of the school differs according to the population of the municipality.

(j) It provides for the removal of a school trustee by the board of education, where there is a provision in Pen. Code, § 291, for the removal of officers. (k) It vests the power of impeachment in the county board of education, when the Constitution vests the power solely in the Senate. The act of 1906, amending the general act, is also attacked and alleged to be invalid for the following reasons: (a) The amending act is subject to the same criticisms as made upon the original act in the foregoing subdivisions lettered (a), (b), (c), (d), (e), (f), (g), and (h). (b) The original act was void, and there was nothing to amend. (c) It provides a method for summoning a defaulting taxpayer before the county tax receiver, and no method of summoning a defaulter before the comptroller general.

Moore, Gordon & Branch and J. D. Kilpatrick, for plaintiffs in error. N. E. & W. A. Harris and McDaniel, Alston & Black, for defendant in error.

COBB, P. J. (after stating the facts as above). 1. The Jenkinsburg school district act was approved August 22, 1905 (Acts 1905, p. 473), which was one day before the general act for the laying out school districts was approved; and hence it cannot be said to be a special law in a case where provision had been made by an existing general law, so far as that general law is concerned. But there was, on August 22, 1905, a general law which made provision for the subject-matter dealt with by the Jenkinsburg act. That general law is contained in Pol. Code 1895, § 1353 et seq. It is there declared that each and every county shall compose one school district. The case, on its face, is therefore squarely within the ruling in *Sellers v. Cox*, 127 Ga. 246, 56 S. E. 284. But this point is not made with sufficient certainty in the petition for us to rest the case on that ruling. The petition avers that the local school act is a special law in a case where provision has been made by an existing general law, but it does not specify the general school law in the Code as that law. This was indispensable to raise the constitutional question. *Sayer v. Brown*, 119 Ga. 539, 46 S. E. 649 (5).

2. The Constitution of 1877 contained the following provision: "Authority may be granted to counties upon the recommendation of two grand juries, and to municipal corporations upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits, by local taxation; but no such local laws shall take effect until the same shall have been submitted to a vote of the qualified voters in each county or municipal corporation, and approved by a two-thirds vote of persons qualified to vote at such election; and the General Assembly may prescribe who shall vote on such question." Civ. Code 1895, § 5909. This provision clearly limited

local school districts, so far as the taxing power was concerned, to two classes—counties and municipalities. The General Assembly had no authority to create other school districts and confer upon them taxing power. *Barber v. Alexander*, 120 Ga. 30, 47 S. E. 580. The constitutional provision above quoted was, in 1903, so amended as to read as follows: "Authority may be granted to counties, militia districts, school districts, and to municipal corporations, upon the recommendation of the corporate authority, to establish and maintain public schools in their respective limits by local taxation; but no such laws shall take effect until the same shall have been submitted to a vote of the qualified voters in each county, militia district, school district, or municipal corporation, and approved by two-thirds majority of persons voting at such election, and the General Assembly may prescribe who shall vote on such questions." This amendment adds two new classes of school districts—militia districts and school districts. The first are well-known and well-defined political divisions of the state. They are subdivisions of a county. Every militia district is wholly in one county. A militia district partly in two or more counties is unknown to the law, and would be an impossibility under our present system of political division. The school district is a new creation. It is an innovation. How must it be classified—as belonging to political divisions such as counties and militia districts, or with municipalities? A municipality may be located in two or more counties; but, whenever this has happened, confusion and inconvenience have inevitably resulted. It is to be noted that in the enumeration school districts follow counties and militia districts and precede municipal corporations. Is it not more reasonable that the people intended that their new political division, school districts, should be of the nature of the militia districts—that is, wholly within the limits of one county—than that they should take on the characteristics of the municipal corporation and be subject to all the confusion and inconvenience necessarily attending a political division rent asunder by a county line? It is by no means free from serious doubt that a school district can be laid out so as to embrace territory situated in two or more counties. But we will not rule the present case on this point, and our utterances on this subject are merely to call attention to the grave doubts that arise as to the power of the General Assembly to create school districts the territory of which is located in different counties.

It is to be noted that the general local tax school act of 1905 had a provision for such school districts, but this clause was stricken by the amending act of 1906. The Constitution declares: "There shall be a thorough system of common schools for the education of children in the elementary branches of an

English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The school shall be free to all children of the state, but separate schools shall be provided for the white and colored races." Civ. Code 1895, § 5906. The uniformity required is that which is practicable, taking into consideration the object to be accomplished, that the instrumentalities are to be provided in local subdivisions of the state, and also the exception of existing local systems from the new scheme. While absolute uniformity is impracticable, and this the Constitution recognizes, still that uniformity is the constitutional desideratum must not be lost sight of, and an utter disregard of all effort at uniformity will not be tolerated. The general act of 1905, as amended by the act of 1906, provides a system where the school district is recognized as merely a subdivision of the county. No school district, located partly in two or more counties, is contemplated. Local school systems in municipalities are recognized, and provision is made for the enlargement of the territory of municipalities for school purposes, as well as the management of such systems. The act authorizes local taxation for school purposes in three political subdivisions of the state—counties, school districts created within a given county, and municipalities. The municipality is left where it always has been—a political subdivision of the state, whose extent and limits are determined by its charter or laws amendatory thereof, either general or special in their nature. The location of the municipality as to county lines is immaterial. It may be in one county only. It may be in two or more counties. But as a municipality of whatever grade or class, no matter where located, it is entitled to the rights of local taxation for school purposes upon compliance with the Constitution and the laws. The school district, under the uniform plan called for by the act, must be a subdivision of a county. The act as amended was intended to be exhaustive, and there is no exception stated therein as to school districts such as are not wholly situated within one of the counties of this state. The act declares: "That within thirty days after the passage of this act, or as soon thereafter as practicable, it shall be the duty of the county board of education of each county in Georgia to lay off the county into school districts, the lines of which shall be clearly and positively defined by boundaries, such as creeks, public roads, land lots, district lines, or county lines." Acts 1906, p. 66. If this language is not broad enough to clearly indicate a legislative intent to abolish all school districts other than those provided for in the act, all doubts as to such intent vanish when we consider the following language, which appears in the same section of the act: "The county board of education, in laying off the county, shall disregard any school districts embracing territory not in-

cluded in incorporated towns heretofore created by special act of the Legislature."

Was the local act creating the Jenkinsburg school district repealed by the later general act? Repeals by implication are not favored. It has been by some doubted whether there could be such a repeal under the present Constitution. *Montgomery v. Board*, 74 Ga. 42-44. But it is now settled that there can be a repeal by implication. However, before such a repeal will result, the later statute must be clearly repugnant to a former statute and so irresistibly inconsistent therewith that the two cannot stand together, or it must be clear, from the terms of the later statute, that there was a legislative intent to cover the subject-matter of the former statute and have the later statute operate as a substitute therefor. The intention to repeal must be clear and unmistakable. *Johnson v. Sou. Ass'n*, 97 Ga. 622, 25 S. E. 358. Ordinarily a general law will not have the effect to repeal a prior local law, unless the local law be specially named or necessarily embraced in the terms used in the general law. Still, where the legislative intent to repeal is clear and manifest, a repeal of the local law will result. *Pausch v. Guerrard*, 67 Ga. 319. See, also, *Crovatt v. Mason*, 101 Ga. 252, 28 S. E. 891; *Western & Atlantic R. Co. v. Atlanta*, 113 Ga. 554, 38 S. E. 996, 54 L. R. A. 294. A repeal of a prior local law by a subsequent general law will not result from mere implication. But such a repeal always results when the legislative intent to repeal is clear and manifest. There can be no doubt that the General Assembly intended the act of 1905, as amended by the act of 1906, to be exhaustive of the subject of the creation and location of school districts, and that all school districts embracing territory not included within the limits of municipalities created prior thereto should be abolished. The Jenkinsburg school district, while embracing the territory of the incorporated town of Jenkinsburg, ignored the municipality, and not only embraced territory not included therein, but actually extended into another county. Such a school district has no right to live under the provisions of the subsequent general law. The Jenkinsburg school district act was repealed by the general law of later date.

3. It is contended, however, that no repeal of the local act was effected, for the reason that the general law was itself invalid. It is said that the general act of 1905 was void, and hence the amending act of 1906 is also void, for the reason that there was no law of which it was amendatory. The general act of 1905 dealt with one subject-matter—local taxation for school purposes. Two phases of this subject-matter were attempted to be dealt with—local taxation by counties, and local taxation by school districts. That portion relating to taxation by counties was held to be complete and operative. *Georgia R. Co. v. Hutchinson*, 125 Ga. 762, 54 S. E.

725. That portion relating to local taxation by school districts was held to be inoperative. *Brown v. Sou. Ry. Co.*, 125 Ga. 772, 54 S. E. 729. The entire act was not held to be void. It was therefore competent for the General Assembly to amend the act by relieving it of the infirmity which affected only one portion thereof, and thus by amendment complete the scheme attempted in the original act. It is true that the title of the amending act, in reciting the title of the original act, inserted the words "districts or," preceding the word "counties"; but the title of the original act is correctly quoted in the body of the amending act, and the act of which it is amendatory is so clearly shown in other ways that this error in the title will not affect the validity of the amending act.

4. It remains now to consider the numerous objections raised to the validity of the general act. The defects in the original act, so far as it related to the school districts, which were pointed out in the case of *Brown v. Railway Co.*, supra, were cured by the amending act of 1906. The school district system is therefore to date from the passage of that act. If it was a valid act, the prior local act creating the Jenkinsburg school district was repealed. The acts amending the general act and the local act were approved on the same day—August 21, 1906. For the purposes of this case it is not necessary to determine whether there is any presumption as to which first took effect. If the amendatory local act was first approved, it was immediately repealed by the subsequent general act. If the general act was first approved, the amendatory local act dealt with a subject covered by an existing general law. The objections raised to the original general act need not now be considered, unless the defects therein pointed out also appear in the amended act. It is the act as amended that is now the law, no matter what may have been the defects in the original act from which it sprang. It is alleged that the general act is void, because it contains matter not indicated in the title. What is such matter not being pointed out, no question is presented for decision by this assignment of error. The objection to the act is that it violates that portion of the Constitution (Civ. Code 1895, § 5779) which declares that no law or section of the Code shall be repealed or amended unless the act making such amendment or effecting such repeal distinctly describes the act to be amended or repealed. This provision of the Constitution has reference to repeals and amendments expressly made, and has no application to repeals by implication. *Swift v. Van Dyke*, 98 Ga. 725, 26 S. E. 59. The uniformity rule of the Constitution in reference to taxation and the collection of taxes is not infringed by the act merely for the reason that the scheme of taxation as to amount and method of collection is different when taxes are levied and collected for district schools from what it is

when collected for county schools. The Constitution declares that the public schools shall be free to all the children of this state. When a system is provided where any child may be admitted free to a school in the territory where such child is domiciled, the mandate of the Constitution is satisfied. If a child desires to enter a school in any other territory, it is permissible to charge such child tuition for the privilege. The right of the school authorities to charge tuition for children who are nonresidents of the territory where the school is located has never been and cannot be seriously doubted. *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120.

There are a number of other objections made to the general act, such as that school districts can be made up of municipalities and adjacent territory without an election on the subject of taxation; that the school system antedating the Constitution is to be affected; that donations and gratuities are granted to chartered schools; that sectarian schools are allowed to participate in the public school fund; that the provision for the removal of school trustees violates the provision of the Constitution vesting the sole power of impeachment in the Senate, as well as section 291 of the Penal Code, providing for the indictment of certain officers; and that the act does not operate uniformly over the entire state. These and other objections have been made to the general act, and insisted on in the brief of counsel; and we call attention to them simply to show that they have been under consideration and have been found untenable. We do not consider any of the objections urged against the general act of 1906, as amended by the act of 1906, well taken. The general act is a valid law, of uniform operation throughout the state, and had the effect to repeal all laws, general and special, which are so inconsistent with it that the prior laws and the new law cannot stand together. Such is the case with the Jenkinsburg school district act, and it was therefore repealed. The word "now," in the second line of the fourth section of the amended act of 1906, as that section appears in the recital of the act of 1905 as amended in Acts 1906, p. 69, is manifestly a clerical error. The word "not" appears in the third section of the act of 1905. Acts 1905, p. 427. The act of 1906 provides for striking out the third section of the act of 1905, and substituting a section "to be numbered 4," which contains the word "not." Acts 1906, p. 63.

Judgment affirmed. All the Justices concur.

(129 Ga. 333.)

CICERO et al. v. SCAIFFE et al.

(Supreme Court of Georgia. Aug. 15, 1907.)

1. COSTS—DISMISSAL—FAILURE OF PLAINTIFF TO PAY—ACTION AGAINST PLAINTIFF.

When the case of a plaintiff has been dismissed, nonsuited, or discontinued, he cannot

as plaintiff, renew the suit without paying the costs or filing a pauper affidavit as to his inability to do so; but, if he is sued by the opposite party in a matter relating to the controversy in the former suit, he may, as defendant, file any defense which is appropriate to the suit, without reference to whether the costs of the former suit brought by him have been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costa, § 1049.]

## 2. INJUNCTION—PARTIES ENTITLED TO—WANT OF INTEREST.

There was no equity in the petition, and this was a sufficient reason for the judge to refuse to grant the injunction or appoint a receiver.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by Dan and Charlotte Cicero against W. L. Scaife and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Dan and Charlotte Cicero brought an equitable petition against W. L. Scaife, Mary M. Scaife, and one McLeod, constable, alleging that Charlotte Cicero was the owner and in possession of two cows and calves and two steers, which were described in a possessory warrant proceeding sued out against petitioners by W. L. Scaife as agent for Mary M. Scaife; that prior to the issuance of the possessory warrant she had sold and delivered the cattle to Dasher, and if the cattle were taken from her possession she would be liable in damages to Dasher as warrantor of the title to the cattle; that W. L. Scaife, as agent for Mary Scaife, had brought suit in a justice's court against Dan Cicero on a note, payable to Scaife, agent, for the recovery of the alleged purchase money of the cattle; that the trial resulted in a verdict in favor of the defendant, which was affirmed on certiorari; that thereafter Scaife, as agent, brought an action of trover against Dan Cicero, and that this action was dismissed. It appears, from an exhibit attached to the petition, that it was dismissed for the reason that no title was shown in Scaife, but that title was in another party. Subsequently to all these proceedings a possessory warrant was sued out, the cattle seized, and are now in the possession of the constable, and the expense of feeding them will in a short time amount to more than their value. Scaife, agent, threatens to institute further proceedings against the plaintiffs. It is alleged that the identical question involved in the possessory warrant proceeding was involved and adjudicated in the other proceedings referred to, and the prayer of the petition is that the cattle be restored to Dasher or plaintiffs, that a receiver be appointed, and that Scaife, agent, be enjoined from prosecuting the possessory warrant case and instituting other proceedings. By amendment Charlotte Cicero alleged, that while she had contracted to sell and deliver the cattle to Dasher before the possessory warrant was sued out, as soon as said warrant was sued

out Dasher refused to accept the cattle, and immediately notified plaintiffs that he would not take them, and that they have never been delivered to him, being simply in the possession of plaintiffs, who were croppers on the land owned by him. The defendants filed demurrers, both general and special, and also filed an answer, in which they denied title or legally acquired possession of the cattle in the plaintiffs, and also denied that the issue involved in the possessory warrant case was at all involved in the other suits. The answer averred that Mary M. Scaife was the owner of the cattle and entitled to the possession, and had been wrongfully deprived of the possession by the plaintiffs, and denied that it was the intention of defendants to institute any unwarranted proceedings against the plaintiffs. When the application for an injunction came on for a hearing, the plaintiffs moved to strike the answer, because the costs in the trover case referred to in the petition had not been paid. The judge overruled this motion, and the plaintiffs excepted. After hearing the evidence the judge passed an order refusing to grant the injunction prayed for, or to appoint a receiver; and the plaintiffs excepted.

Ernest M. Davis, for plaintiffs in error.  
Sam. S. Bennet, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. When a case has been terminated by a nonsuit, dismissal, or discontinuance, before the plaintiff can renew his suit, he must either pay the costs or file an affidavit as to his inability to pay them. Civ. Code 1895, § 5043; Acts 1901, p. 80. The rule laid down in the Code section and the act just cited is applicable only where the plaintiff in the former suit seeks, as plaintiff, to bring a new suit on the same cause of action. It has no application whatever in a case where the defendant, either as a matter of defense or by way of cross-action, sets up facts involved in the former suit in which he was the plaintiff, which had been nonsuited, dismissed, or discontinued. He cannot come into court voluntarily as plaintiff with a renewal of the suit, without paying the costs of the former suit or making the affidavit of inability to do so; but, when brought into court as a defendant, he may in his answer set up any matter which is pleadable as a defense, or by way of cross-action, that may be appropriate to such suit against him. Hence there was no error in overruling the motion to strike the answer on the ground that the costs of the trover suit, in which the defendant in the present suit was the plaintiff, had not been paid.

2. The original petition showed upon its face that the plaintiffs were not the owners of the property in controversy, and hence they were not in position to bring a suit which involved title and ownership. The mere fact that it appeared that one of the

plaintiffs was formerly the owner, and that she would be bound on her warranty of the title to her purchaser, did not constitute a sufficient reason for the interposition of a court of equity in her behalf. If the facts set up in the petition were sufficient to authorize the equitable relief prayed for, they would be sufficient to defeat any action that might be brought against her for the breach of her warranty. By amendment it was in effect alleged that the sale of the property set out in the original petition had been rescinded before the suit was filed, and that one of the plaintiffs was the real owner. This amendment was properly allowed, but the admission made in the original petition could be, and was, used as evidence against her. It is contended that the issue involved in the possessory warrant case is the same as that which was involved in the other suits. This is not correct. The only question involved in the possessory warrant proceeding is one of possession, and the question of title is not involved.

It is contended that the question of title was adjudicated in the former case. Even if this was true, such an adjudication would not necessarily bar a possessory warrant proceeding. It is legally possible for one to be entitled to the immediate possession of personalty as against another, although the other may have the legal title to the property. The person to whom the possession of property is awarded in a possessory warrant proceeding is required by law to give bond to have the property forthcoming to answer any suit that may be brought against him by his adversary within four years. Civ. Code 1895, § 4802. The very purpose of this statute is to protect the holder of the legal title in the event his adversary is the one to whom the law allows the immediate possession, notwithstanding the outstanding legal title. Of course, the question of title was directly involved in the trover suit, but it appears that this case was not tried on its merits. The question of title may have been incidentally involved in the trial on the note. The claim of Scaife is that he is entitled to the present possession of the property, and that he has been deprived of it under circumstances where the law will allow him to recover it in a summary manner by possessory warrant. This is the only question involved; and this question was not at all involved in either of the other proceedings, in any view of the matter. If upon the trial of the possessory warrant proceeding the property should be awarded to Scaife, he will be required to give the bond required by the statute, which will protect the plaintiff, who alleges that she was the owner of the property. The mere fact that the property was in the possession of the constable while the possessory warrant proceeding was pending, and there was expense involved in keeping the animals, does not afford any reason for equitable relief. It

certainly would be wise and just to allow a bond to be given by the defendant in a possessory warrant proceeding for the forthcoming of the property; but the statute does not allow this. Injustice may result from this defect in the law; but this gives no ground for equitable relief. See, in this connection, *Sumner v. Bell*, 118 Ga. 240, 44 S. E. 973. There was no equity in the petition, and the judge did not err in refusing to grant the injunction, or to appoint a receiver.

Judgment affirmed. All the Justices concur.

(129 Ga. 236)

#### IVEY et al. v. CITY OF ROME et al.

(Supreme Court of Georgia. Aug. 14, 1907.)

#### 1. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—ELECTION—JUDICIAL INTERFERENCE.

When the General Assembly provides for an election to determine the question as to whether the territory of one municipality shall be annexed to the territory of another municipality, and no provision is made in the law for judicial interference, and there is no general law authorizing such interference, and the authority to interfere cannot be derived from the common law, a court of equity has no power or jurisdiction over the matter, and all questions arising out of the matter must be determined alone by the tribunal constituted by the General Assembly for that purpose.

#### 2. JUDGES—POWERS IN VACATION—DISMISSAL—POWERS OF JUDGE IN VACATION.

The judge of the superior court has no authority to sustain a demurrer to an equitable petition, or motion to dismiss the same for want of equity, in vacation, prior to the term to which the case is returnable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 112.]

#### 3. WRIT OF ERROR—REVERSAL.

As the petition in the present case is clearly subject to dismissal, the judgment will be reversed, with direction that the order of dismissal be entered in term time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4589, 4591.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *Moses Wright, Judge*.

Action by J. E. Ivey and others against the city of Rome and others. Judgment for defendants, and plaintiffs bring error. Reversed, with directions.

See 55 S. E. 1034.

Ivey and others, as taxpayers of the town of East Rome, filed an equitable petition against the city of Rome and certain individuals, who were the mayor and councilmen of that city, alleging that in 1906 the General Assembly passed an act authorizing an election to be held in East Rome to determine whether that town should be annexed to the city of Rome; that the election was held, and the result was reported to be in favor of annexation by a vote of 65 to 63; that before reporting the result the managers recounted the vote, and this count resulted in 65 votes for and 64 votes

against annexation; that 128 persons had voted at the election; that the managers removed 2 ballots against annexation from the box, and excluded them from the final count; that every vote for annexation was included in the count. Other irregularities in the count were set forth in the petition. It is alleged that the true result was a tie. The prayer of the petition was that the authorities of the city of Rome be restrained from declaring the result, and that at the final hearing a decree be entered that the scheme of annexation had been defeated. When this petition was presented to the judge, he declined to grant the restraining order, and merely issued a rule calling upon the defendants to show cause why the prayers of the petition should not be granted. By amendment to the petition certain irregularities in the proceedings of the mayor and council of the city of Rome were set forth. At the hearing, which was in vacation, and prior to the return term of the writ, the defendants moved to dismiss the entire proceeding, upon the ground that the court had no jurisdiction to entertain the same. The court sustained this motion, and dismissed the case. The plaintiffs excepted.

Henry Walker, for plaintiffs in error. Jno. W. & G. E. Maddox, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. The bill of exceptions and record in this case were filed in the office of the clerk of the Supreme Court during the October term, 1906, and were by the clerk entered upon the docket of that term as a fast writ of error. The case was reached in its order, and argument was had; and when the court took the case under consideration it reached the conclusion that it was improperly docketed as a fast writ of error, and by order the case was transferred to the docket of the present term. *Ivey v. Rome*, 126 Ga. 808, 55 S. E. 1034. Further argument was had during the present term, and the case is now ripe for decision. By an act approved August 20, 1906 (Acts 1906, p. 1010), the charter of the city of Rome was so amended as to extend its corporate limits to include all of the territory then lying in the corporate limits of East Rome. It was provided that this act should not become effective until the same was approved by a majority of the voters of East Rome who registered and qualified themselves to vote according to certain provisions of the act. The manner in which the election should be held was also prescribed, and it was provided the managers of the election should file a report of the result of the same, together with the tally sheets and ballots, with the mayor and council of the city of Rome at their next regular meeting after the election, and if, upon examination of the report, it should appear that a majority of the persons voting at the election voted in favor of annexation, the mayor and council of

the city of Rome should by resolution declare the territory of the town of East Rome annexed to the city of Rome from and after the 1st day of January, 1907, and it was declared to be the duty of the mayor to issue a proclamation to that effect. The act does not provide for any contest of the election. The duty is imposed upon the managers to hold the election, ascertain the result, and report the same to the authorities of the city of Rome, and, in the event that the report showed that a majority of the voters had voted in favor of annexation, the duty was imposed upon the city authorities to so declare by resolution, and it was the duty of the mayor, after such resolution was passed, to make proclamation to that effect. The petition seeks to raise questions as to the effect of irregularities in the manner of conducting the election, counting the vote, and declaring the result. In other words, it is sought by the petitioners to have a court of equity hear and determine a contest of this election. The judge of the superior court in the first instance, and the judge and jury of 12 men in the second instance, are called upon to determine questions which, under the act of the General Assembly, were to be determined by the managers of the election in the manner prescribed in the act. The general rule is that, where the lawmaking power provides for an election to determine any question which it is legitimate and proper to submit to a popular vote, and no provision is made in the law for judicial interference, and there is no general law authorizing such interference, and the right to interfere cannot be derived from the common law, neither a court of law nor a court of equity has any power or jurisdiction over the matter, and all questions arising out of such election must be determined alone by the tribunal constituted by the lawmaking power for that purpose. The courts are powerless to interfere, unless the Legislature should see proper to confer such power on them. *Caldwell v. Barrett*, 73 Ga. 804; *Skrine v. Jackson*, 73 Ga. 377; *Ogburn v. Elmore*, 121 Ga. 72, 48 S. E. 702. The petition set forth no cause of action whatever, and was subject to dismissal for this reason.

2. No formal demurrer to the petition seems to have been filed, but a motion was made to dismiss the same, upon the ground that there was no equity therein. This was, in effect, a demurrer to the petition. The motion was made, and an order was passed sustaining the same, in vacation, and before the return term of the case. The case was subject to dismissal, but the judge was without authority to sustain the demurrer to the petition, or the motion to dismiss the same for want of equity, in vacation, preceding the first term of the case. This seems to be well settled. *Johnson v. Cravey*, 120 Ga. 1047, 48 S. E. 424; *Stewart v. Stewart*, 89 Ga. 133, 15 S. E. 23; *Old Hickory*

*Dist. Co. v. Bleyer*, 74 Ga. 201. But it is said that the petition was so palpably without merit that the judge had authority to strike it from the files of the court. It is unquestionably within the power of the judge to strike any proceeding from the files of the court, when it is apparent that the same is not within the jurisdiction of his court; but this power to strike must be exercised at the time when the judge is authorized, under the law, to exercise the powers of a judge in reference to the case. He has no more power to strike the case from the files of the docket in vacation than he would have to sustain a demurrer or a motion to dismiss; the effect and consequence of these proceedings being the same. The judge reached the right result, but at the wrong time. The judgment must be reversed, but direction will be given that the order dismissing the case be entered in term time.

Judgment reversed, with direction. All the Justices concur.

(129 Ga. 290)

**TOWN OF EAST ROME v. CITY OF ROME**  
et al.

(Supreme Court of Georgia. Aug. 14, 1907.)

**1. MUNICIPAL CORPORATIONS — ACTIONS AGAINST.**

A municipal corporation can be sued only in the corporate name set forth in the charter. *Town of Dexter v. Gay*, 115 Ga. 765, 42 S. E. 94; *Augusta Sou. Ry. Co. v. Tennille*, 119 Ga. 804, 47 S. E. 179.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2198.]

**2. SAME.**

When the General Assembly, by an act incorporating a town, declares that it shall be "known and called the town of East Rome," and that the corporate name of said town shall be "the mayor and council of the town of East Rome," by which name it may sue and be sued, such a town can sue and be sued only in the name last referred to; and a suit brought in the name of "the town of East Rome" should be dismissed on demurrer. *Town of Dexter v. Gay*, supra; Acts 1882-83, p. 411.

**3. PLEADING—AMENDMENTS.**

A suit of the character above indicated, not being brought in the name of a natural person, a corporation, or a partnership, was a mere nullity; and there was nothing in the petition in such a suit to support an amendment of any character whatever. *Western & Atlantic R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978, and cases cited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2198.]

**4. DISMISSAL—TIME OF ENTRY.**

The petition was not amendable, as there was nothing to amend by, and the suit was a nullity; but the court should not have dismissed the same in vacation, before the return term, and the judgment will be reversed, with direction that the order of dismissal be entered in term. *Ivey v. Rome* (Ga.) 58 S. E. 852.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by the town of East Rome against the city of Rome and others. From a judgment of dismissal, plaintiff brings error. Reversed, with directions.

Henry Walker, for plaintiff in error. Jno. W. & G. E. Maddox, for defendants in error.

COBB, P. J. Judgment reversed, with direction. All the Justices concur.

(129 Ga. 825)

**ASKEW v. THOMPSON.**

(Supreme Court of Georgia. Aug. 15, 1907.)

**1. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.**

The demurrer to the amendment to the petition on the ground that it sought to add a new cause of action was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686-709.]

**2. MORTGAGES—PAROL EVIDENCE TO EXPLAIN DEED.**

A deed absolute in form may be shown by parol evidence to have been intended as security only, where the grantee has not taken possession of the property. Accordingly, the amendment to the petition was not demurrable on the ground that it was an effort to vary the written terms of an absolute deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 98.]

**3. PLEADING—DEMURRER.**

A ground of demurrer which does not present for decision any distinct question is not properly taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 475, 476.]

**4. TENDER—PLEADING—SUFFICIENCY.**

The petition set forth a cause of action, and the special demurrers not specifically dealt with in the foregoing notes were sufficiently met by amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, § 69.]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by Elizabeth Thompson against Benjamin H. Askew. Judgment for plaintiff, and defendant brings error. Affirmed.

In May, 1906, Elizabeth Thompson brought an equitable petition against Benjamin H. Askew, the substance of which, so far as material to the consideration of the points made in the record before us, was as follows: On January 25, 1889, petitioner conveyed to defendant certain described realty; a copy of the instrument of conveyance being attached to the petition as an exhibit. This copy showed the conveyance to have been an unconditional warranty deed for the expressed consideration of \$500. According to the allegation of the second paragraph of the petition "said deed was made and delivered to said Askew upon the express contract and agreement, then and there made, that said Askew would reconvey said land to said petitioner at any time during her natural life,



upon her repayment to him of the sum of \$500, with interest thereon from the date of said deed." The third paragraph alleged: "Petitioner has remained in possession of said land ever since the date of the making of said deed, receiving rents and profits therefrom, claiming it as her own, with the acquiescence, knowledge, and consent of said B. H. Askew, subject only to the payment to him of said indebtedness." The fourth paragraph alleged: "On the 4th day of October, 1905, said Elizabeth Thompson tendered to said B. H. Askew the full amount of the principal and interest due upon said indebtedness and demanded from him a deed of reconveyance of said property, and, although not denying his contract and agreement, he has neglected, failed and refused to" reconvey the property to petitioner. Continuing tender of the \$500, with interest thereon from the date of the deed, was alleged. The petition was demurred to generally and specially. The grounds of special demurrer were: (a) That the petition failed to set out a cause of action "with sufficient clearness and fullness to apprise defendant of the real nature of [plaintiff's] complaint, but is too general, vague, uncertain, and indefinite"; (b) that it failed "to set forth with fullness and clearness the contract therein referred to," and "to explain why and for what purpose [plaintiff] executed the deed, \* \* \* what consideration, if anything, she received, or any other reason moving her to execute" the same; (c) no certain sum was alleged to have been tendered, and no proper tender was alleged; (d) the contract set forth was not alleged to have been in writing, and no sufficient consideration to support same was set up; (e) the alleged contract was wanting in mutuality and was unilateral. The plaintiff amended the petition by adding to the third paragraph thereof the following allegation: "Said \$500 being an indebtedness which was due by said Elizabeth Thompson to B. H. Askew, by reason of a loan made by him to her, said deed being made merely to secure said indebtedness." This amendment was allowed over the objections of the defendant "(1) that the same was an attempt to vary by parol the written terms of said deed, and (2) that said amendment not only varied, but made a new cause of action." The case is before this court on writ of error sued out by defendant, complaining of the allowance of the amendment to the petition and of the overruling of the demurrer.

W. C. Worrell and Pope & Bennett, for plaintiff in error. C. L. Glessner, and J. R. Pottle, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. In the original petition the plaintiff alleged an obligation on the part of the defendant to reconvey the land covered by her deed to him "upon her repayment to him of the sum of \$500, with interest thereon

from the date of the deed"; that she had remained in possession of the land ever since she conveyed it to defendant, receiving the rents and profits thereof, with his knowledge and consent, subject only to the payment to him of "said indebtedness"; and that she had tendered to him "the full amount of the principal and interest due upon said indebtedness." The original petition clearly indicated that the sum of \$500 was an indebtedness which the plaintiff owed to the defendant, and that upon its payment the defendant had agreed to reconvey the land to the plaintiff. This being true, the clear inference was that the deed was given as security for the indebtedness. The amendment merely added an explanation as to how the indebtedness of \$500 arose; that is, by reason of a loan made by defendant to plaintiff, which the deed was executed to secure. The cause of action set out in the original petition was the alleged right of the plaintiff to have the land reconveyed to her by the defendant, by reason of his contract so to do, upon the payment by her to him of a given amount of indebtedness, which she owed him. If he agreed, when she conveyed the land to him, to reconvey it to her upon "her repayment to him" of a given amount, a strong inference arose, as we have said, that her conveyance was executed as security for the debt. The amendment merely explained how the indebtedness arose. The amendment, therefore, did not change or vary the nature of the suit, nor introduce a new cause of action. *City of Columbus v. Anglin*, 120 Ga. 785 (5), 789-794, 48 S. E. 318; *Central Railway Co. v. Hunter*, 128 Ga. 600, 58 S. E. 154.

2. Nor should the amendment have been disallowed on the ground that "the same was an attempt to vary by parol the written terms of said deed." As we have seen, the plaintiff never gave up the possession of the land she conveyed to the defendant, but has ever remained in possession since the execution of such conveyance. Civ. Code 1895, § 2725, provides: "A deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried." The clear implication of this language is that a deed absolute on its face, when not accompanied by possession in the grantee, may be proved by parol to be a mortgage only. *Denton v. Shields*, 120 Ga. 1076, 48 S. E. 423. In *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165, it was held: "Where a deed in the form of a warranty deed was given to secure an indebtedness, and no bond to reconvey was made, and there was nothing in the written contract to fix the amount of indebtedness secured, but the deed expressed a certain amount as a consideration thereof, in a suit by the grantee against the grantor or his administrator, seeking a general judgment and also to establish a lien on the property, it was compe-

tent to show by parol evidence that the deed was given to secure an indebtedness already existing to the amount expressed as a consideration, and also to secure future advances to be made." The conveyance made by the plaintiff, though in form an absolute deed, could be shown by parol evidence to be a security deed only, as the grantee never had possession of the premises conveyed. The plaintiff in error cites *Waters v. Waters*, 124 Ga. 349, 52 S. E. 425. There the plaintiff sought to ingraft upon a deed of bargain and sale (which she had waited too long to set aside on the ground of fraud) a parol agreement, made contemporaneously with its execution, to the effect that she was to be allowed to remain in possession and control of the deeded premises during her life. The deed being an unconditional conveyance passing title to the entire fee, without any hint of a reservation of a life estate, the court held that the deed would have to be reformed before the plaintiff could assert any interest in the land. In the present case there is no attempt to vary the terms of the deed, or to limit its operation as a legal conveyance passing the entire fee, but the plaintiff is simply asserting her equity of redemption.

3. The ground of demurrer, that the petition as a whole was "too general, vague, uncertain, and indefinite," was itself "too general, vague, uncertain, and indefinite" to raise any question for decision by the court. *Dawson v. Equitable Mortgage Co.*, 109 Ga. 389, 34 S. E. 668; *Mathis v. Fordham*, 114 Ga. 369 (4), 40 S. E. 324. The demurrer should have specified wherein the petition was not sufficiently full and explicit.

4. The special demurrers, that the contract was not fully and clearly set out, was wanting in mutuality, the purpose for which the deed was executed was not explained, nor the consideration which plaintiff received for executing the deed alleged, were all fully met by the amendment allowed to the petition. Nor was there any merit in the special demurrer that the petition failed to show that any certain sum was tendered, or that any other proper tender was made. The petition, in effect, alleged that the plaintiff was indebted to the defendant in the sum of \$500, with interest thereon from January 25, 1889, and that she, on October 4, 1906, tendered to defendant "the full amount of the principal and interest due upon said indebtedness." A continuing tender and offer to pay the amount of such indebtedness into court was also set forth. It was not essential, in order that the defendant might be put on notice of what he was expected to meet, that the plaintiff should allege how much, in dollars and cents, she tendered to him on the day named. The petition set forth, with sufficient clearness and particularity, a cause of action, and the court properly overruled the demurrers.

Judgment affirmed. All the Justices concur.

(129 Ga. 296)

# McGARRY et al. v. SEIZ et al.

(Supreme Court of Georgia. Aug. 15, 1907.)

## 1. APPEAL—REVIEW—RECORD—BILL OF EXCEPTIONS.

Where an amendment to a petition is offered and disallowed by the court, it does not constitute a part of the record; and, in order for this court to review the ruling of the court below in rejecting such offered amendment, it should be set out in the bill of exceptions or annexed thereto as an exhibit properly authenticated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2347.]

## 2. PRINCIPAL AND SURETY—CONTRACTOR'S BOND—LIABILITY OF SURETY—PLEADING.

The original petition set forth no cause of action, and was properly dismissed on demurrer. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mary McGarry and S. J. McGarry against E. C. Seiz and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Mrs. Mary McGarry and S. J. McGarry filed a petition against E. C. Seiz and the Aetna Indemnity Company, alleging that Mrs. McGarry was the owner of a described lot of land and entered into a contract with Seiz to erect a dwelling thereon for the sum of \$7,350; that pursuant to the contract Seiz gave bond, with the Aetna Indemnity Company as surety, in which it was provided that the contract with Seiz should be carried out and completed. The penalty in the bond was \$8,000. A copy of the same is attached to the petition as an exhibit. It is alleged that the plaintiffs have fully complied with all the requirements of the contract and the bond. On December 20, 1905, Randall Bros., materialmen, filed a lien on the property against the plaintiffs and Seiz for lumber and material furnished; the amount of the claim being \$1,497.72. The claim of lien was duly recorded. On April 5, 1906, Randall Bros. brought suit to foreclose their lien against Seiz and Mrs. McGarry, which is now pending. There being doubt as to the validity of the claim, the plaintiffs have interposed a defense, and required Randall Bros. to make out their case. The Aetna Indemnity Company has been notified of the claim of lien of Randall Bros., and also informed that it would be held responsible for any expenses and attorney's fees that would be incurred by reason of their neglect to pay the lien. Notwithstanding, the indemnity company has failed and refused to pay. The plaintiffs have, in compliance with the terms of the bond, retained the last payment due the contractor, which amounts to \$677, which they are ready to pay over to whoever is entitled thereto. They have requested the indemnity company to give authority to pay the same over, and this has been refused. In the event the lien is valid, the plaintiffs will owe Randall Bros. \$820.72, with interest and costs. The

indemnity company has been obstinate and litigious, and plaintiffs ask that they be allowed to recover attorney's fees for the prosecution of this suit. The prayer is for judgment against Seiz and the indemnity company for the amount of the lien claimed by Randall Bros., together with all costs and expenses, including attorney's fees. The bond exhibited recites that Seiz has entered into a contract with Mrs. McGarry for the erection of a dwelling, and the condition of the bond is that Seiz shall faithfully perform his contract according to its terms, covenants, and conditions, except as provided in the bond. It is provided that the indemnity company shall be informed in writing of any act on the part of Seiz, his agents or employees, which may involve a loss for which the company would be responsible, immediately after the act shall come to the knowledge of Mrs. McGarry or her duly authorized representative, and that a registered letter mailed to the president of the company shall be the notice required. It is also provided that the company shall not be liable on the bond to any one except Mrs. McGarry; but it is also agreed that she, in estimating her damages, "may include the claims of mechanics and materialmen arising out of the performance of the contract," and paid by her, only when the same are, under the laws of the state, valid liens against the property. It is also provided that, if any suit at law or in equity is brought against the company to recover on the bond, "the same must be instituted within six months after the completion of the work specified in the contract." Each of the defendants filed demurrers, both general and special. The plaintiffs offered an amendment to the petition, which the court refused to allow. This amendment appears in the transcript of the record, but it is not set forth in the bill of exceptions, or attached thereto as an exhibit. The demurrers were sustained, and the plaintiffs assigned error upon the judgment disallowing the amendment, as well as upon the judgment sustaining the demurrers.

Thos. F. Corrigan, for plaintiffs in error.  
Dodd & Dodd, for defendants in error.

COBB, P. J. (after stating the facts as above). 1. An amendment was offered by the plaintiffs at the hearing of the demurrers, as appears by a recital in the order of the judge disallowing the same. It does not appear, however, to have been filed. Under such circumstances it did not become a part of the record in the case, and therefore cannot come to this court in the transcript of the record under the certificate of the clerk. It should have been embodied in the bill of exceptions, or attached thereto as an exhibit, properly authenticated. *Sibley v. Mutual Ass'n*, 87 Ga. 738, 13 S. E. 838; *Sayer v. Brown*, 119 Ga. 539 (2), 46 S. E. 649; *In McCall v. Herring*, 116 Ga. 235, 42 S. E. 488,

the amendment to the plea had been duly and regularly filed, and had therefore become a part of the record, and was properly brought to this court in the transcript of the record under the certificate of the clerk, notwithstanding that, after the same had been filed, it was stricken upon the ground that it constituted no defense.

2. As we cannot consider the amendment to the petition for the reasons above referred to the only question to be determined is whether the original petition set forth a cause of action. The suit was against the principal and the surety upon the bond. The purpose for which the bond was entered into was to indemnify Mrs. McGarry against loss growing out of the failure on the part of the contractor, who was to erect for her the dwelling, to comply with the terms and stipulations of his contract. While it was distinctly provided that the surety should not be liable under the bond to any one except Mrs. McGarry, the obligee, it was agreed that Mrs. McGarry, in ascertaining her damages, might include the claims of mechanics and materialmen paid by her, provided such claims were valid liens against the property under the law of the state. It was therefore necessary, in order to charge the surety on account of the payment by her of a claim of a materialman, that it must appear that she had paid the claim, and that the claim of the materialman was, under the law of this state, a valid lien upon the property. It appears from the allegations of the petition that she has not paid any of the claim asserted by Randall Bros. It is not alleged that the claim of Randall Bros. is a valid lien under the laws of this state. A suit in which she denies that their claim is a valid lien under the laws of Georgia is now pending. It does not appear, from the petition, that she has yet been damaged by the claim of lien. She has paid nothing.

But it is said the bond also provides that the surety will not be liable unless suit is brought thereon "within six months after the completion of the work" provided for in the contract, and that the work has been completed, and that she certainly must have the right to bring the suit within six months, notwithstanding no payment has been made to the materialman. She has entered into a contract by which she agrees that the surety will not be liable to her unless her claim for damages is asserted by suit within six months from the time the work is completed. She has also entered into a contract that the surety shall not be liable on account of claims of materialmen unless such claims are valid liens under the laws of the state. She must be held to the terms of her contract, there being nothing in the undertakings therein which would be contrary to public policy. The surety had a right to contract with her that its liability should be subject to reasonable conditions, and the conditions above referred to are not in any

sense unreasonable as to the character of the claim for which the surety should be liable or the time in which the suit should be brought. See, in this connection, *Massachusetts Life Ass'n v. Robinson*, 104 Ga. 272, 30 S. E. 918, 42 L. R. A. 261, and citations. In order to hold the surety liable, she must determine, at her peril, whether the claim of the materialman asserted against her constituted a valid lien under the laws of this state. If it does, she may pay the same and bring suit for indemnity within six months from the time the work is completed. If it does not, she may decline to pay the same and defend against such claim. There is nothing in the terms of the contract which either expressly or impliedly provides that the validity of the lien shall be first determined by a judgment of the courts. If she paid the claim, and it thereafter developed that the same was not a valid lien under the laws of the state, there is no liability under the bond. If she paid the claim, and it was a valid lien under the laws of the state, the surety would be liable, provided the other conditions of the bond are complied with, and suit to recover the amount so paid is filed within six months from the time that the work is completed. The petition set forth no cause of action, and was properly dismissed on demurrer.

Judgment affirmed. All the Justices concur.

(129 Ga. 329)

#### WARREN v. ASH et al.

(Supreme Court of Georgia. Aug. 15, 1907.)

#### 1. LOGS AND LOGGING—SALE OF STANDING TIMBER—CONSTRUCTION OF CONVEYANCE.

The conveyance of the timber from the plaintiffs to the persons under whom the defendant claims passed an estate in the growing trees, determinable upon the grantees' failure to cut and remove the timber within a reasonable time, not less than five years.

#### 2. SAME—ASSIGNMENT OF CONVEYANCE.

A grantor who has conveyed timber to another, to be cut in a reasonable time, is not concerned with the validity or formality of execution of his grantee's assignment of title thereto to a third person, made before the grantee's estate therein has terminated.

#### 3. SAME—REVESTING OF TITLE.

Standing timber is part of the realty; and the owner of the soil, who has by deed conveyed the timber, is not divested with the title by a mere verbal declaration of the owner of the timber that he surrendered it to the owner of the soil. Such verbal declaration would not work an estoppel, when the owner of the soil had not acted thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 4.]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by R. P. Ash and others against S. J. Warren. Judgment for plaintiffs, and defendant brings error. Affirmed, with directions.

The plaintiffs, on June 24, 1904, sold to Smith, Sims & Morea, a shingle mill and certain standing timber, and executed to the purchasers the following instrument: "Georgia, Decatur County. This indenture, made and entered into this 29th day of June, 1904, between R. P. Ash, T. H. Wilson, and Mrs. Rosa Ash, parties of the first part, and J. H. Sims, J. F. M. Smith, and G. W. Morea, parties of the second part, sheweth: That the said parties of the first part has this day sold to the parties of the second part a certain millhouse known as the 'Ash shingle mill' and located on lot of land number 192 in the 27th district, being one boiler and engine, and one shingle mill, cut-off saw, all the piping and other fixtures belonging to said mill, one log cart, and four oxen, also all the said timber measuring ten inches at the stump and upwards, on lots of land number 191, 192, 150 acres of lot No. 169, all in the 27th district of said county and state, for the sum of nineteen hundred dollars. I have taken their four promissory notes bearing even date with these presents, and due as follows: One for \$500.00, due October 1st, next; one for \$500.00, due Feby. 1st, 1905; one for \$500.00, due May 1st, 1905; one for \$400.00, due August 1st, 1905—all said notes bearing interest from date at the rate of eight per cent, per annum. It is further agreed that the notes given for said property shall first go to the payment of two certain mortgages held by the Bainbridge State Bank—one given by R. P. Ash, and one given by R. P. Ash and T. H. Wilson. It is agreed that the parties of the second part is to have a lease on the mill site as it now stands for five years from said date. If the said parties of the second part shall want to use sawmill site longer than five years, they are to pay rent for same. It is further agreed that the parties of the first part transfer the contract to the siding to the parties of the second part free of charge. It is further agreed that the parties of the second part shall have the right to build roads and trams for the purpose of hauling said timber to said mill; and it is agreed to the parties of the second part shall have the right to sell or transfer all of said lease privileges to any other parties, with all the rights and privileges herein granted. [Executed by the parties.] The purchasers operated the mill for two years after their purchase, when they removed the mill and sold the houses erected on the mill site. On February 13, 1907, J. F. M. Smith, one of the purchasers, transferred in writing the foregoing timber lease to S. J. Warren. The plaintiff's sought to enjoin Warren from cutting any of the timber on the described lots of land. On the interlocutory hearing the plaintiffs submitted affidavits that one of the firm of Smith, Sims & Morea, when he was moving the shingle mill, stated to one of the plaintiffs that he had cut all of the timber

conveyed by the lease and that he surrendered the premises to the plaintiffs. The defendant submitted the affidavits of every member of the firm denying that they had abandoned the timber, or had so stated to any one. The court granted an injunction, and the defendant excepted.

R. G. Hartsfield and J. D. Talbert, for plaintiff in error. Bower & Bower, for defendants in error.

EVANS, J. (after stating the facts as above). The transaction between the plaintiffs and Smith, Sims & Morea was a sale of a shingle mill and the timber on certain described land, with certain privileges in aid of a contemplated manufacture of the timber. The writing clearly reflects the intention of the parties to have been that the trees were to be cut and removed from the land within a reasonable time from the date of the conveyance. Therefore the estate which the purchaser acquired in the trees was a fee, determinable on a failure to cut and remove the timber within a reasonable time. *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513. The plaintiffs stipulated in their conveyance that the purchasers of the timber and mill should have a lease of the mill site for five years, and longer if necessary; but they were to pay a reasonable rental after five years. This stipulation affords a clear inference that the parties estimated a reasonable time within which to cut and remove the timber would not be less than five years. Under this conveyance the purchasers acquired an estate in the trees, and not a mere license to cut the timber from the land.

The grantees, by moving their mill, did not forfeit their estate in such of the trees as were purchased that remained standing on the land. Forfeiture of title to the trees would have resulted only from failure to cut and remove them within a reasonable time. Growing timber is realty, and title to realty is transferred by writing, and not by parol declarations. The verbal statement of the purchasers, at the time of the removal of their mill, that they had abandoned and surrendered their interests under the lease, was not effectual to revest the title in the timber. *Holder v. Scarborough*, 119 Ga. 256, 46 S. E. 93. Besides, such statement would not work an estoppel, when the plaintiffs had not acted thereon, or done anything to their detriment. From what passed between the parties, according to the plaintiffs' version, there was nothing said which would afford an inference that the parties agreed that a reasonable time had expired.

Objection is made that the timber lease was not legally assigned to the defendant, because only one of the grantees signed the transfer. It did not concern the plaintiff whether all of the grantees joined in an assignment of the lease to the defendant. At

the trial two of the grantees testified that previously to the assignment they had sold their interest to Smith, who assigned the lease to the defendant. The three named grantees took as tenants in common, and the transfer was at least effective to convey the legal title from the party who signed it, and it was immaterial to the plaintiffs whether the two grantees who did not sign the transfer were legally bound thereby. The petition was filed within five years after the plaintiffs' conveyance. The defendant, therefore, was not a trespasser as to the timber covered by the lease; and it is immaterial to the plaintiffs whether he was cutting the timber as a licensee or as a purchaser from their grantees. *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Gaston v. Gainesville R. Co.*, 120 Ga. 516, 48 S. E. 188.

There was evidence submitted that the defendant was cutting timber of less size than that conveyed in the lease. As to such timber the defendant had no authority under his purchase, or as a licensee from the grantees in the original lease. There was also evidence that this timber under 10 inches at the date of the conveyance was necessary to keep up the plantation, and that the trespass was a continuing one. The judge did not err in enjoining the defendant from cutting any timber not embraced in the original lease, but did err in enjoining him from cutting such as was so conveyed. The injunction should, therefore, be so modified as to embrace only the timber not 10 inches or above at the date of the lease.

Judgment affirmed, with direction. All the Justices concur.

(129 Ga. 295)

#### JOINER v. STATE.

(Supreme Court of Georgia. Aug. 15, 1907.)

##### 1. HOMICIDE — INSTRUCTIONS — INVOLUNTARY MANSLAUGHTER.

When, in the trial of a person indicted for murder, there is evidence from which the jury can find that the homicide resulted from a blow inflicted by the accused with an instrument which would not ordinarily produce death, and with which the accused, having hastily seized and picked up the same, without sufficient provocation, struck and killed the deceased, it is error requiring the granting of a new trial for the judge to fail to charge the law relating to the subject of involuntary manslaughter in the commission of an unlawful act. *Farmer v. State*, 112 Ga. 90, 37 S. E. 120; *Jordan v. State*, 124 Ga. 780, 53 S. E. 331; *Dorsey v. State*, 126 Ga. 633, 55 S. E. 479.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 658.]

##### 2. SAME—WRIT OF ERROR—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Under the evidence as it appears in the record, a charge upon the subject of voluntary manslaughter should not have been given; but inasmuch as the jury did not convict the defendant of that grade of homicide, but returned a verdict finding him guilty of the offense of murder, the error of the court in charging the jury upon the subject of voluntary manslaughter was necessarily harmless to the accused, and constitutes no ground for a reversal of the

judgment of the court below. *Joiner v. State*, 105 Ga. 643, 31 S. E. 556.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 720.]

### 3. CRIMINAL LAW—INSTRUCTIONS.

It was not error requiring the granting of a new trial for the court to fail to instruct the jury "as to their duty to reconcile the evidence, if in their power to do so, and the rule of law applicable to the reconciling of evidence, and to their power as to believing the witnesses or disbelieving them in cases where the evidence was irreconcilable"; no written request having been made for a charge upon that subject, and it appearing that the judge charged the jury that they were "the sole and exclusive judges of the evidence in the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

### 4. SAME.

No material error, other than that dealt with in the first headnote, is made to appear in any of the grounds of the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Pete Joiner was convicted of murder, and he brings error. Reversed.

D. M. Roberts & Son, C. W. Griffin, and W. M. Morrison, for plaintiff in error. E. D. Graham, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment reversed. All the Justices concur.

(129 Ga. 230)

### CORDELE SASH, DOOR & LUMBER CO. v. WILSON LUMBER CO.

(Supreme Court of Georgia. Aug. 14, 1907.)

### 1. ERROR, WRIT OF—RECORD—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW.

A ground of a motion for a new trial, assigning error upon the admission of documentary evidence, will not be considered, unless the evidence objected to be set forth, either literally or in substance, in the motion itself, or attached thereto as an exhibit. A mere reference in the motion to another part of the record where the evidence may be found will not suffice. *Hicks v. Webb*, 127 Ga. 170, 56 S. E. 307. In the present case error is assigned upon the admission in evidence of an original amendment, with an exhibit attached thereto, filed by the defendant to an answer in a former suit between the same parties. In the motion for a new trial the evidence is referred to as follows: "Said amendment being incorporated in the brief of evidence in full, and forming pages 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, of said evidence." The substance of the amendment is properly set forth; but the only reference to the exhibit is: "Exhibit A, a checking of certain lumber by Mr. Wilder." What was contained in the body of the amendment tended to sustain the defendant's answer in the present case, and was, therefore, not hurtful to defendant. The only harm that could possibly result to the defendant from the admission of the evidence came from the exhibit, which was merely referred to as stated above.

### 2. TRIAL—INSTRUCTIONS—MATTER NOT WITHIN ISSUES.

Instructions of the court to the jury should be confined to the issues made by the pleadings in the case. *Martin v. Nichols*, 127 Ga. 705, 56 S. E. 995. Therefore a failure of the court

in its charge to present to the jury a contention of one of the parties not pertinent to any issue made by the pleadings is not cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 587.]

### 3. SAME.

Mere failure of the court, in instructing the jury, to give the definitions of such words as "delivery," and "delivered," is not cause for a new trial. *Holmes v. Clisby*, 121 Ga. 241 (7), 48 S. E. 934, 104 Am. St. Rep. 103.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 489.]

### 4. ERROR, WRIT OF—DETERMINATION AND DISPOSITION OF CAUSE—REVERSAL ON CONDITION.

Plaintiff's petition alleged that the property for the value of which the action was brought was converted by defendant on April 14, 1902. The evidence tended to support this allegation. The case was tried September 18, 1906, and the verdict in behalf of the plaintiff was for a given sum, with 4½ years' interest thereon. *Held*, that there was no evidence to authorize a verdict finding interest for more than 4 years, 5 months, and 4 days; and a new trial is ordered, unless the defendant in error, within 10 days after the filing of the remittitur, shall write off from the amount of interest as found in the verdict an amount equal to the interest on the principal sum found in the verdict for 1 month and 4 days at 7 per cent. per annum. In the event this is done, a new trial is refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4467.]

(Syllabus by the Court.)

Error from Superior Court, Crisp County; Z. A. Littlejohn, Judge.

Action between the Cordele Sash, Door & Lumber Company and the Wilson Lumber Company. From the judgment, the Cordele Sash, Door & Lumber Company brings error. Affirmed, on condition.

Hill & Royal, for plaintiff in error. W. H. Dorris and Whipple & McKenzie, for defendant in error.

FISH, C. J. Judgment affirmed, on condition. All the Justices concur.

(129 Ga. 242)

### MCDONALD v. SOWELL, Sheriff.

(Supreme Court of Georgia. Aug. 12, 1907.)

### SHERIFFS AND CONSTABLES—COLLECTION OF ILLEGAL FINE—RECOVERY BY RULE.

A fine paid by one who was convicted under an indictment which was void, for the reason that it charged no offense against the laws of the state, cannot be recovered by rule against the sheriff who collected the same.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by C. D. McDonald against A. C. Sowell, sheriff. Judgment for plaintiff, and defendant brings error. Affirmed.

McDonald filed a petition against Sowell, as sheriff, alleging that the petitioner was tried on an indictment charging him with a misdemeanor; that the indictment contained two counts; that in one count he was charged with selling liquor without a license, and

in the other with taking orders for the sale of liquor in territory where the sale of liquor was prohibited by law; that at the trial the jury rendered a verdict of guilty on the second count, and petitioner was sentenced to pay a fine of \$200; that he paid this sum to the sheriff "against his will, and only because he was compelled to do so" under the sentence of the court; and that the court had no jurisdiction to try the petitioner, for the reason that the acts charged in the second count constituted no offense under the laws of this state. The petition then set forth various reasons why certain laws regulating the sale of liquor in the county where the indictment was found, and certain ordinances of the town in which the order was taken, were invalid, as being in contravention of a named paragraph of the Constitution of this state. The prayer was for a rule against the sheriff, requiring him to show cause why he should not pay to petitioner the sum paid by him as a fine. Upon this petition the judge granted a rule nisi. Amendments to the petition were filed, alleging that the sheriff collected the fine as an officer of the court, and that no question was raised at the trial as to the constitutionality of the acts and ordinances referred to in the petition. By demurrer it was set up that the sheriff was not subject to rule under the circumstances set out in the petition, and that the petition set forth no cause of action. The demurrer was sustained, and the petitioner excepted.

G. W. Bryan, for plaintiff in error. O. H. B. Bloodworth and W. P. Bloodworth, for defendant in error.

COBB, P. J. (after stating the facts as above). If the acts charged in an indictment constitute no offense under the laws of the state, the judgment may be arrested upon a motion made during the term at which the verdict was rendered, or the prisoner may be discharged upon a writ of habeas corpus, provided no question as to the validity of the indictment was adjudicated at the trial. *McDonald v. State*, 128 Ga. 536, 55 S. E. 235, and citations. The verdict and judgment in such a case is an absolute nullity. If, under such a judgment, a person is imprisoned, the imprisonment is unlawful, and he is entitled to a discharge, which will be granted by an appeal to any court having authority to issue the writ of habeas corpus. The person who holds him in custody is a wrongdoer. Good faith on the part of the officer may protect him from an action or an indictment for false imprisonment. Civ. Code 1895, § 3852; *Blocker v. Clark*, 126 Ga. 489, 54 S. E. 1022, 7 L. R. A. (N. S.) 268. But his act is none the less wrongful; and, when the officer is called in question in reference thereto, he must show circumstances which would indicate good faith on his part. If the sentence of the court is such as to require the payment of a fine, and the indictment upon which the

sentence is based is void, the sentence confers no authority upon the officer to demand the payment of the fine. If he collects the fine, he does not do so as an officer of the court. He is as much a wrongdoer in collecting the fine as he would be in imprisoning a person convicted, if the sentence of the court called for imprisonment. He does not collect the fine by virtue of his office, although it may be that he collects it under color of his office, for the reason that there is no law authorizing or empowering him to collect the fine under such circumstances.

Sheriffs are subject to rule for contempt only in reference to matters connected with the discharge of those duties which the law imposes upon them in their official capacity. They are liable to be ruled for money which "they may have collected by virtue of their office." Civ. Code 1895, §§ 4770, 4771. The harsh and summary remedy of rule for contempt, which may be followed by imprisonment or other penalties, is allowed only in those cases where the sheriff has failed to discharge some official duty which the law imposes upon him. If the individual who is sheriff does an act which the law does not authorize him as an officer to perform, and as a consequence of the act another is injured, the sheriff is liable in an appropriate action brought against him as an individual, but is generally not amenable to the penalties which are imposed upon him for acts performed in his official character. We do not think, where a sheriff collects money under a void process, that he is liable to rule at the instance of the party from whom he collected it, although he may be, in some instances, liable as an individual, and possibly upon his official bond. See, in this connection, *Pol. Code 1895*, § 256, par. 4. This view does not conflict with the ruling in *Matter of Flournoy*, 1 Ga. 606. In that case the accused had been convicted upon a valid indictment, and a fine had been imposed and collected by the Attorney General. The Attorney General had not appropriated it in the manner prescribed by law before a pardon was granted. It was held that the effect of the pardon was to remit the fine, and that the accused could, by rule against the Attorney General, recover the amount in his hands. In that case the Attorney General had collected the fine under authority of law, by virtue of his office. The effect of the pardon was to restore it to the accused. The case of *Parrot v. Wilson*, 51 Ga. 255, is to be distinguished upon similar reasons.

Whether the petitioner could, in an action at law against the sheriff as an individual, recover the amount of the fine paid, is a question not involved in the present case, and which we will not now undertake to determine. The solution of this question would depend, to a large extent, as to whether the payment of the fine under the circumstances was voluntary within the meaning of Civ. Code 1895, § 3723. That section de-

clares that the payment of taxes and other claims, made through ignorance of the law, where the facts are all known, and there is no misplaced confidence, and no artifice, deception, or fraudulent practice used by the other party, is deemed voluntary, and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. It may be that the payment of a fine under the circumstances indicated in the petition would be merely a payment under a mistake of law; and there are authorities which hold that, where this is the case, the fine cannot be recovered. 19 Cyc. 558. In *Bailey v. Paullina*, 69 Iowa, 463, 29 N. W. 418, it was held that where a party was convicted under a void ordinance, and paid the fine without protest under the belief that the judgment was valid, the fine could not be recovered, even though he was in custody at the time he paid the same. See, also, *Houtz v. Board of Comm.*, 11 Wyo. 152, 70 Pac. 840.

We have not undertaken to pass upon the question as to whether the laws attacked in the petition are invalid for the reasons therein set forth. For the purposes of this case, we have dealt with the judgment as if it were void.

Judgment affirmed. All the Justices concur.

(129 Ga. 377)

#### COBB v. WRIGHTSVILLE & T. R. CO.

(Supreme Court of Georgia. Oct. 8, 1907.)

##### 1. DEED—CONSTRUCTION—NATURE OF ESTATE.

Where the granting clause of a deed set out a grant to a woman, "her heirs and assigns," and the habendum clause was "to have and to hold \* \* \* unto the said [woman], her heirs and assigns, forever, in fee simple, and after her death to such child or children as she may have by [a named man], share and share alike," such deed created a life estate in the woman, with remainder to such children as she might have by the man named.

##### 2. LIMITATION OF ACTIONS — ACCRUAL OF CAUSE OF ACTION—TRESPASS.

Where, in an action of trespass, it was alleged that a railroad company wrongfully took a strip of land belonging to the plaintiff, constructed their railroad on it, and held it as a right of way, and that such right of way divided the plaintiff's land into two parts and thus lessened its value, this was a complete act of trespass of a permanent nature, causing at once all the damage both from the taking of the strip and from the dividing of the other land of the plaintiff into two parts, and the statute of limitations began to run against the action from the time when the land was taken and the road constructed. If the plaintiff was a minor, it was suspended until her arrival at the age of 21 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 303, 304, 390-398.]

##### 3. TRESPASS—RECOVERY OF MESNE PROFITS.

This is not an action to recover land, with mesne profits, which are recoverable in one action under the law of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 140.]

##### 4. SAME—PLEADING—RIGHT OF ACTION.

Where a woman claimed the land involved in the suit as remainderman under the deed set out in the first note above, and alleged that she was the daughter of the woman named as grantee for life, but failed to allege that she was the daughter of the man whose children the remaindermen were also to be, she set out no right to recover for trespass upon the land, and her petition was demurrable.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by Zenorah Cobb against the Wrightsville & Tennille Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Cobb brought suit against the Wrightsville & Tennille Railroad Company, alleging as follows: The defendant has injured and damaged her in the sum of \$2,000. She is the owner of certain described land. Without her knowledge or consent, about the year 1885, the defendant took possession of a strip of land extending across her tract, constructed its railroad thereon, and has continuously used and occupied it since as a right of way, and is now in possession of such strip of land, 120 feet wide by 1,125 yards long. This strip is of the value of \$500, and of the yearly value for use of \$100. The construction of the railroad over her land injured and damaged it in the sum of \$500, by cutting it up in "ill shape and otherwise destroying the value of said land." Plaintiff's title arose under a deed which conveyed the land to her mother for life, with remainder to her. The life tenant, Mary A. Crawford, died in 1884. Plaintiff was born in 1878, and is now 25 years of age. Since the company illegally took possession of the land she has had no representative who was authorized to grant to the defendant authority to construct a railroad over it, and therefore the construction and possession was illegal and a trespass, and it has so continued. She prayed damages against the defendant for illegal occupancy of the land, for its yearly value for 19 years, for the damage to her other land, for the value of the land so occupied, and for such other and further relief as the exigencies of this cause may demand. Attached to the petition as an exhibit, setting out the plaintiff's title, was a deed dated December 17, 1881. In it William T. Crawford was named as the party of the first part and Mary A. Crawford as the party of the second part. The consideration expressed was \$61. The granting clause was: "Unto said Mary A. Crawford, her heirs and assigns." The habendum clause was as follows: "To have and to hold the aforesaid bargained premises unto the said Mary A. Crawford, her heirs and assigns, forever, in fee simple, and after her death to such child or children as she may have by the said W. T. Crawford, share and share alike. And the said William T. Crawford to the same



will, and his heirs, executors, and administrators shall, the said property to the said Mary A. Crawford, her heirs, executors, and administrators, forever warrant and defend against the lawful claim or claims of all persons whatsoever." The defendant demurred to the petition on the ground that it set forth no cause of action; that it showed no title or interest in the plaintiff, under the allegations and exhibit attached, but under the deed the title was in Mary A. Crawford; that the action was barred by the statute of limitations, not having been filed within four years of the alleged trespass, or within four years after the removal of plaintiff's disabilities; that any cause of action for illegal occupancy would be barred in four years; that the petition set up distinct and inconsistent causes of action, which could not be joined, and also inconsistent prayers, and that the prayers seek to recover twice for the same alleged injury. The demurrer was sustained and plaintiff excepted.

W. R. Daley, T. L. Griner, and J. S. Adams, for plaintiff in error. Daley & Bussey, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. Since the adoption of the original Code, taking effect in 1863, the strictness of the old rule as to repugnant clauses in a deed has been much modified. Substance, rather than technical nicety in the location of clauses, is controlling. The intention of the parties is the cardinal rule of construction. If it be clear, and sufficient words be used to arrive at the intention, and it contravenes no rule of law, it is to be enforced, and is not to be sacrificed to arbitrary rules of construction. Civ. Code 1895, § 3673. "If two clauses in a deed be utterly inconsistent, the former must prevail, but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect." Civ. Code 1895, § 3607. The modern trend of decisions is in this direction. 13 Cyc. 618. Here the granting clause of the deed was to "Mary A. Crawford, her heirs and assigns." The habendum clause was "to have and to hold \* \* \* unto the said Mary A. Crawford, her heirs and assigns, forever, in fee simple, and after her death to such child or children as she may have by the said W. T. Crawford, share and share alike." Construing the whole deed together, we think it was clearly the intention of the maker to create a life estate in Mary A. Crawford, with remainder to such child or children as she might have by W. T. Crawford. *Thurmond v. Thurmond*, 88 Ga. 182, 14 S. E. 198; *Rollins v. Davis*, 96 Ga. 107, 23 S. E. 392; *Henderson v. Sawyer*, 99 Ga. 234, 25 S. E. 312; *Hule v. McDaniel*, 105 Ga. 319, 31 S. E. 189; *Collinsville Granite Co. v. Phillips*, 123 Ga. 830 (6), 838, 51 S. E. 666.

2, 3. "A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance and against which the statute of limitations begins, from that time, to run. \* \* \* Where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance, for which a fresh action will lie." *City Council of Augusta v. Lombard*, 101 Ga. 727, 28 S. E. 994, and cases cited; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153. Where a structure, though permanent in character, is not necessarily and of itself a permanent and continuing nuisance, but becomes so in consequence of some supervening cause, which produces special injury at different periods, separate actions may be brought, and the statute of limitations begins to run when the special injury is occasioned. *Lombard's Case*, supra. Here the taking of a right of way and the constructing of a railroad was a complete act, permanent in its nature. If the taking was a trespass, the loss of the value of the land to the true owner then occurred, and, if the construction of the railroad through the plaintiff's land damaged its value by dividing it into two parts, the damage was then consummated and complete. The cause of action then arose to the plaintiff, and the statute of limitations then began to run against her. If she was then a minor, it was suspended during her minority. Actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues. Civ. Code 1895, § 3898. It is evident that the plaintiff was barred from suing for the damage arising from taking the land alleged to be hers, and from the dividing of her other land into two parts by the construction of a railway.

It is contended that the retention of possession by the defendant constituted a continuing trespass, and that the statute did not run. "Damages for a continuing trespass are limited to those which have occurred before action is commenced. Subsequent damages flowing from a continuance of the trespass give a new cause of action." Civ. Code 1895, § 3884. But, as already shown, this was not a continuing trespass or nuisance, which should be stopped or abated, but a complete and perfect act, permanent in its nature, from which apparently all the damage alleged to the plaintiff's property which ever would happen had already occurred. It was not alleged that from the operation of the road any additional damages had resulted, or that there was a continuous, progressive, or added injury. *Danielly v. Cheeves*, 94 Ga. 263 (3), 21 S. E. 524. This is not an action of ejectment, with an added prayer

for mesne profits, which, under our Code, are recoverable by a plaintiff in ejectment in that action, and not by a separate suit. Civ. Code 1895, §§ 4997, 4998. Even if a separate action could have been brought, on the ground that the unlawful retention of possession of the strip had deprived the plaintiff of its use during the four years last past, and caused a continuing injury to the remainder of the land, certain it is that a plaintiff cannot recover both for the entire value of the strip of land taken and also for the loss of its use, nor for the entire depreciation in value of the rest of the land, and also its depreciation for four years.

4. The deed under which the plaintiff claimed title created a life estate in Mary A. Crawford, with remainder to such child or children as she might have by W. T. Crawford, share and share alike. The plaintiff alleged that she was the daughter of Mary A. Crawford, but did not allege that she was the daughter of W. T. Crawford. She thus failed to show that she was entitled to bring the action. The demurrer was properly sustained.

Judgment affirmed. All the Justices concur, except EVANS, J., disqualified.

(129 Ga. 341)

**GEORGIA GRANITE R. CO. v. VENABLE**  
et al.

(Supreme Court of Georgia. Aug. 16, 1907.)

**1. EMINENT DOMAIN—PROCEEDINGS TO CONDEMN—APPEAL—WAIVER OF IRREGULARITIES.**

Where it was claimed that there were certain irregularities in a proceeding by a railroad company to condemn property for a right of way, but the parties agreed to waive them and proceed with the assessment, which was done, on appeal from the award of the assessors to the superior court it was error to dismiss the proceedings on motion on account of such irregularities, although it was also agreed that any question might be raised on the appeal trial which might have been made before the assessors.

**2. SAME—TITLE OR RIGHTS ACQUIRED.**

Although in such a proceeding the notice stated that it was desired to condemn a right of way, with the fee simple in the land, the statute would attach to such proceeding the restriction that the company would only acquire such an interest as would be necessary for the exercise of the franchise and the conduct of the business, with a reversion to the owners, their heirs and assigns, if the property should cease to be used for conducting the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 836.]

**3. SAME—AMENDMENT OF NOTICE.**

If the notice stated that it was desired to condemn a fee-simple estate in the land, upon appeal an amendment could be made stating that it was a proceeding under the statute, and that it was really desired to acquire by condemnation such interest as the statute authorized, reciting it.

**4. SAME—AWARD OF ASSESSORS—AMENDMENT.**

The award of the assessors could not be amended by mere act of one of the parties. If amendable at all, it could only be done by the assessors themselves, by permission of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 603.]

**5. SAME.**

It was unnecessary to amend the assessment in the respect indicated above, after appeal from it.

**6. SAME.**

It was also competent to amend by alleging that after the assessment the company had tendered, and the landowners received the amount of the award. Under the statute this did not prevent the appeal, but waived any mere irregularity in the notice or the assessment.

**7. SAME.**

Where the notice recited previous negotiations for a fee-simple interest in the land sought to be condemned as a right of way, an amendment could be made, on appeal to the superior court, reciting that negotiations had been attempted to obtain a right of way only, and that the owners had refused to negotiate at all.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Condemnation proceedings by the Georgia Granite Railroad Company against S. H. Venable and another. An award having been made and an appeal taken to the superior court, the proceedings were by that court dismissed, and the railroad company brings error. Reversed.

The Georgia Granite Railroad Company desired to condemn a right of way through certain land of W. H. and S. H. Venable. It issued a notice, under the statute, for the purpose of commencing condemnation proceedings, dated March 17, 1904. It recited that, "Whereas, the Georgia Granite Railroad Company (a railroad company duly incorporated and organized under the laws of said state) has endeavored to enter into contract with you by which it would procure from you a right of way one hundred feet in width, with title in fee simple to the land embraced therein, as hereinafter described, and offered to pay you a just and adequate compensation for said land; and whereas, you not only refused to fix a price on said land, but positively refused to entertain any offer whatever"—therefore notice was given that the right of way would be condemned, referring to the route located in its charter and the petition therefor on file in the office of the Secretary of State. It was stated that "said railroad corporation seeks to condemn a right of way with the fee therein, one hundred feet in width across your land as hereinafter described, for its railroad." Then followed a description of the strip of land 100 feet in width, a statement that an assessor named had been appointed by the company, and a request that the landowners appoint one also, to meet with him on the premises on April 5, 1904, to proceed with the condemnation. Service was acknowledged on April 4th, with a statement that the landowners declined to appoint an assessor, denying that the railroad company had a right to condemn the property sought to be condemned. Notice of this fact was given to the ordinary, who appointed an assessor to act for the land-

owners. The person so appointed declined to act, and upon notice the ordinary appointed another, who accepted. The two assessors then named a third assessor, who agreed to act. The landowners filed a protest on the grounds that they had no notice of the appointment of the second assessor for them; that the third assessor selected by the other two was not impartial, and could not do them justice on account of ill-will existing toward them; that the notice was not filed within the time prescribed by law; that there was no authority of law for the condemnation of a right of way for a private railroad; and that this was such a railroad, organized and being built purely for the purpose of serving private interests, and not for the purpose of serving the public at large. Subsequently an agreement was entered into between the parties, reciting briefly what had previously transpired, and stating that the landowners desired to select an assessor in the place of the one whom they deemed hostile to them. It was agreed "that any and all irregularities should be waived, and that said hearing on the 30th inst. shall be held and considered in all respects as a meeting duly held in pursuance of the statute for such cases made and provided." It was also agreed that the two other assessors should be requested to select a person named by the landowners, and that the three should meet, "qualify, and proceed to hear and determine the matters included in said proceeding, according to law, in all respects as though they had been selected, and the hearing had, as provided by the statute for condemnation of private property, all irregularities of any sort being waived; it being the purpose of the parties to comply with the statute relative to condemnation of private property, and to waive any irregularities that may have occurred or shall occur in the proceedings." The objectionable assessor resigned, and another, who was apparently satisfactory, was substituted in his place. An award was made, and an appeal to the superior court entered. It was further agreed that "appellants can, on the trial of the appeal, raise any question that they could have raised before the assessors." The court passed an order reciting that the agreement "contemplated that said case should be tried in this court without objection by either party, on any issue that could have been made before the arbitrators."

When the case came on for trial, one of the landowners had died, and his executor was made a party in his stead. He and the other landowner moved to dismiss the proceedings, on the grounds that they showed on their face that the Georgia Granite Railroad Company is not authorized by law to condemn the property sought to be condemned; that it was seeking to condemn an absolute or fee-simple estate in the land, which the law did not authorize; that, as a con-

dition precedent to condemning private property for public use, it must appear that the person seeking to condemn has been unable to secure by contract or agreement the property which he has a right to condemn; and that it affirmatively appeared that the only effort made to procure the lands was an effort to procure an absolute fee-simple title thereto, and not an easement. The company moved to amend the proceedings by striking from the original notice any and all words showing an effort to condemn a fee-simple interest, and substituting therefor the statement, "such interest as will enable said company to use said property for railroad purposes during the period of its charter, or any renewal thereof"; also, by striking from the award of the assessors words indicating that a fee-simple estate was condemned, and inserting the words, "a right of way for railroad purposes during the period of the charter or any renewal thereof." It was further sought to add by amendment a statement that, before the condemnation proceedings were instituted, the company sought to agree with the landowners upon a mere right of way and use solely for railroad purposes of said strip of land, and the owners refused to agree upon any compensation for any use and to any extent of said strip for railroad purposes, and that, after the award was made, the company tendered to the owners the full amount of the award made by the assessors, and the same was accepted by them. The amendment was rejected, the proceedings were dismissed, and the company excepted.

Candler & Thomson and Candler, Thomson & Hirsch, for plaintiff in error. J. W. Moore and J. D. Kilpatrick, for defendants in error.

LUMPKIN, J. (after stating the facts as above). 1. After the proceedings to condemn were in progress, and it had been claimed that there were irregularities, it was agreed between the parties that they should be waived, and that the hearing should be had before the assessors. If the notice of the intention to condemn was not duly served, or if it was more extensive in describing the interest sought to be condemned than it should have been, these things at most were irregularities, and, under the terms of the agreement, were waived. Nor was this altered by a subsequent agreement, after the appeal, that the appellants might on the trial raise any question that they could have raised before the assessors. After having waived all irregularities, they could not have raised this question before the assessors. 2 Lewis, Eminent Domain (2d Ed.) §§ 382, 541.

2. The notice served by the railroad company stated, in one part of it, that the company desired to condemn a right of way 100 feet in width, with title in fee simple to the

land embraced therein, and, in another, that it was seeking to condemn a right of way with a fee therein. It was contended that, under such proceedings, the company could not acquire a fee-simple title, and that this statement in the notice rendered it void. Under the statutes in some states it has been held that a railroad company acquired a fee in the land condemned for a right of way, subject to revert to the owner or his heirs if the land should cease to be used for the purposes for which it was condemned. Under other statutes the interest condemned has been held to be a mere easement. Under still others the condemnation is said to vest complete title. Generally, in construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is necessary to satisfy the language and object of the act; and, if the Constitution and statute are both silent on the subject, usually only an easement can be taken. If the statute declares the amount of interest which can be acquired, it will control. 13 Cyc. 1021, and notes. In the general law for the incorporation of railroads in this state, codified mainly from the act of 1892 (Acts 1892, p. 42), occur certain expressions from which it might be argued that the condemnation by a railroad company for a right of way carried something more than a mere easement. Civ. Code 1895, §§ 2167 (3), 2170. Where the condemnation is merely to allow one railroad to use in part the right of way of another, it would seem clear that the condemning road could acquire no more than an easement. The first road to condemn would not acquire a fee-simple, indefeasible title, and the second, in condemning the right to use a part of its right of way, would apparently obtain only an easement. Civ. Code 1895, §§ 2167, 2170. In 1894 (Acts 1894, p. 95; Civ. Code 1895, § 4657 et seq.) an act was passed providing for the method of condemnation of property and assessment of damages by all corporations or other persons authorized by law to take or damage private property for public purposes. This does not confer the right of condemnation where it does not otherwise exist, but regulates the manner of exercising the right, and provides the extent of the interest which shall be acquired. It is applicable to a variety of persons, natural or artificial. Civ. Code 1895, § 4685. In respect to most, if not all of these, an easement is all that is necessary and all that is acquired by condemnation. Thus it has been held that a telegraph company, condemning a part of a right of way of a railway, obtained merely an easement. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co.*, 120 Ga. 268, 48 S. E. 15. Civ. Code 1895, § 4683, provides that, upon condemnation and payment, the corporation or other person "shall become vested with such interest in the property taken as may be necessary to enable the cor-

poration or person taking to exercise their franchise or conduct their business; and whenever the corporation or person shall cease using the property taken for the purpose of conducting their business, said property shall revert to the person from whom taken, his heirs or assigns." Under this law, whether a railroad company can obtain by condemnation a fee defeasible upon ceasing to use the property for the purposes of its business, or a mere easement, it is unnecessary to decide. Certain it is that the condemnation does not vest in the company a fee-simple estate, but that the reversion provided for in the section just quoted attaches itself as a condition of the law. A railroad seeking to condemn under this law cannot acquire an indefeasible fee-simple estate, although it may seek to do so.

The notice of intention to condemn showed that it was a proceeding to have compensation assessed and determined "as provided by the law of said state." The law of the state on the subject is that to which reference is made above. Although the notice stated that it was desired to condemn a fee-simple estate, or "a right of way, with the fee therein," the amount of interest which would be acquired is limited by the law, whether distinctly stated in the notice or not. It did not, therefore, render the proceeding void because the notice referred to the acquirement of the fee, instead of such interest as might be necessary for the conduct of its business, as the law provides. The law would prevail over the notice as to the extent of the interest obtained by condemnation. At most, describing the estate which the company desired to obtain by condemnation as a fee or fee simple was an irregularity. In a somewhat similar case it was said that the condemning company would acquire at least an easement. *Gurney v. Minneapolis, etc., Co.*, 63 Minn. 70, 65 N. W. 186, 30 L. R. A. 534.

3. When objection was made to the statement in the notice that it was desired to condemn a fee-simple interest, the company proposed to amend the notice so as to show that it was desired to condemn such interest as the statute authorized. It was proposed to amend, not only the notice, but also the award of the assessors, for that purpose, and to state that before the condemnation proceedings were instituted the company had sought to agree with the landowners upon a mere right of way and use of the strip of land described for railroad purposes, and that the owners refused to agree upon any compensation for any use of the strip for railroad purposes, and also by alleging that after the award the company had tendered to the landowners the full amount thereof, and it had been accepted by them. The proposed amendment was rejected. The award of assessors could not be amended by the mere act of one of the parties; but the case was on appeal in the superior court, and the award

was no longer binding, but was like the judgment of an inferior tribunal from which an appeal has been taken.

4. If the notice served on the landowners for the purpose of commencing condemnation proceedings was void, and objection was duly made, it could not be amended after the assessment and appeal so as to make it valid. The notice is the commencement of the proceeding. If such proceeding has not a valid basis at its beginning, it cannot be amended into validity after the assessment, by an amendment seeking to relate back and furnish a lawful basis, where none existed before. But if the proceeding was valid, even though irregular, upon appeal in the superior court we know of no reason why such an amendment could not be made as merely to concede that the fee-simple title could not be condemned, and to show that the company would only claim by condemnation the amount of interest in the land which the statute would give them. This is different from an effort on the part of the company seeking to condemn to ratify a notice which was unauthorized when given. *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624. In *Savannah Railway Co. v. Postal Telegraph Cable Co.*, 115 Ga. 554, 42 S. E. 1 (3), the right of amendment as to mere description of the property sought to be condemned was recognized.

5. Civ. Code 1895, § 4669, declares that the notice shall describe the property or franchise and the amount of interest therein sought to be condemned. No reason appears why a mere misdescription could not be amended on appeal. Especially so after waiver of any irregularity.

6. Nor do we see why an amendment could not be made to the pleading, so as to allege that the landowners had received the amount awarded by the assessors. An owner cannot receive and hold money under an award, and on appeal dismiss the proceedings for irregularity. Such receipt and holding would itself operate as a waiver, and leave for determination the question of the proper amount of damages or compensation to be assessed. Civ. Code 1895, § 4680.

7. The notice of an intention to condemn stated that the company had endeavored to buy the strip of land described for the purpose of a right of way. While the case was pending on appeal in the superior court, an amendment was offered, stating that the company had endeavored to obtain a right of way only and the use for railroad purposes, and that the owners had refused to agree upon any compensation for any use or to any extent for such purposes. We do not see why this could not be done. A recital of preliminary negotiation in the notice is not a jurisdictional or unalterable statement.

Judgment reversed. All the Justices concur.

(120 Ga. 126)

**AMERICAN NAT. BANK OF MACON v. FIDELITY & DEPOSIT CO. OF MARYLAND. EXCHANGE BANK OF MACON v. SAME.**

(Supreme Court of Georgia. Oct. 4, 1907.)

**1. BANKS AND BANKING—IMPROPER WITHDRAWAL OF FUNDS—LIABILITY OF BANK.**

If a bank has notice or knowledge that a breach of trust is being committed by the improper withdrawal of funds, it incurs liability, becomes responsible for the wrong done, and may be made to replace the funds which it has been instrumental in diverting; and it appearing that the funds alleged in this case to have been diverted and misapplied were the assets of an insolvent corporation, and that the funds had been deposited in the bank by a receiver appointed by an order of the superior court, which provided that such funds should only be paid out on checks signed by the receiver and countersigned by the judge, of which order and the provisions thereof the bank had knowledge, the creditors of the corporation, to whom the receiver sustained a fiduciary relation, would have had the right to enforce the liability incurred by the bank because of having paid out such funds upon checks not countersigned as provided.

**2. SUBROGATION—SURETY—RIGHTS OF CREDITORS.**

But when the creditors, or the obligee in a bond given by the receiver for the faithful performance of his duties relating to the funds, upon a breach of trust by the receiver, participated in by the bank, brought suit and recovered judgment against the receiver and the surety on the bond, and the surety paid the judgment, such surety is subrogated to the rights of the creditors to enforce the liability incurred by the bank on account of its participation in the breach of trust by the fiduciary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 18.]

**3. LIMITATION OF ACTIONS.**

It appearing that the right of action against the defendant, once existing in favor of the parties to whose rights the plaintiff in this case is subrogated, is barred by the statute of limitations, the right of action upon the part of the plaintiff is also necessarily barred.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; Robt. Hodges, Judge.

Actions by the Fidelity & Deposit Company of Maryland against the American National Bank of Macon and by the same plaintiff against the Exchange Bank of Macon. Demurrers to the petitions were overruled, and defendants bring error. Reversed.

The Fidelity & Deposit Company of Maryland, hereinafter called the "Fidelity Company," brought separate actions against the American National Bank of Macon, Ga., hereinafter called the "National Bank," and against the Exchange Bank of Macon, Ga., hereinafter designated as the "Exchange Bank," alleging substantially the same matters of complaint in both petitions. In each case the defendant bank filed general and special demurrers, which demurrers were overruled, and the defendants excepted. The issues presented by the bills of exceptions in the two cases are identical, and will be decided together, as a decision in one case will

necessarily control the decision in the other.

The petitions of the Fidelity Company allege the following material facts: In December, 1893, H. C. Tindall and others, owners of all the capital stock of the Macon Hardware Company, hereinafter called the "Hardware Company," a private corporation, filed their petition to the superior court of Bibb county, alleging the insolvency of the Hardware Company, and praying that a receiver be appointed to administer the assets of the corporation for the benefit of its creditors. The Hardware Company and its creditors, including the National Bank and the Exchange Bank, were made parties defendant to this petition. Thereafter the Exchange Bank, the National Bank, and numerous other creditors of the Hardware Company entered their appearance in said suit, set up certain claims against the Hardware Company, and asserted their rights to share in the distribution of its assets. On January 9, 1894, the court passed an order appointing said Tindall permanent receiver of the Hardware Company, and designated certain banks, among them the Exchange Bank and the National Bank, as depositories to receive, hold, and disburse the funds of the receivership, "provided that the said banks will pay the customary rates of interest on such deposits at the rate of 5 per cent. per annum, if left in the banks for six months, and no interest to be charged for the last 30 days prior to said money being checked out; each bank to have 30 days' notice of the intention to check." Said order also provided that "the said receiver is hereby authorized and directed to make his deposits as aforesaid in his name as receiver, and no checks shall be drawn against said deposits, except in his name as receiver, countersigned by the judge presiding of this court, except that checks drawn for expenses may be drawn without being countersigned by the judge as aforesaid, but the said checks shall specify for what expenses drawn." The Exchange Bank, the National Bank, and certain other named banks accepted said designation as depositories under the terms of said order, and the Fidelity Company became security upon the bond of the receiver.

It is alleged in the petition that, by virtue of said order of the court and the acceptance of the terms of said order by the Exchange Bank, the National Bank, and the other named banks, said banks so designated as depositories agreed with the court and with the creditors of the Hardware Company not to pay out the funds so received, except on checks drawn by the receiver and countersigned by the judge of the superior court, unless said checks were drawn for expenses and so specified; that the Exchange Bank and the National Bank failed and neglected to comply with the requirements of the aforesaid order of the court, and paid, out of the funds deposited with them, various sums, aggregating \$2,901.53 and \$475.44, re-

spectively, upon checks signed by "H. C. Tindall, receiver"; that none of said checks had upon them any statement with reference to expenses, and were not countersigned by the judge, as provided in said order; and that the receiver appropriated the money so withdrawn to his own use, and has never accounted for the same. On the 22d day of February, 1901, a judgment was entered in favor of a number of the creditors of the Hardware Company, decreeing that said creditors should be entitled to participate in the distribution of the assets of the receivership in the hands of said receiver; and said receiver failed to account to the court for the sum of money which he had withdrawn from said depositories and misappropriated as above set forth. Thereafter, on March 26, 1901, R. A. Nisbet, clerk of the superior court, the obligee in the receiver's bond, brought suit, for the use of the creditors of the Hardware Company, on said bond, against Tindall, receiver, as principal, and the Fidelity Company, as security, to recover the amount for which Tindall as receiver failed to account when required by the court to do so, which amount was composed in part of the sum of \$2,901.53 which had been withdrawn from the Exchange Bank and misappropriated by the receiver, and the sum of \$475.44 which had been withdrawn from the National Bank in a like manner and misappropriated. Judgment against Tindall, receiver, and the Fidelity Company, security, was obtained on January 9, 1903, and on the 8th day of February, 1904, the judgment was paid in full by the Fidelity Company.

Petitioner alleges that the Exchange Bank and the National Bank knew that the drawing of said checks, the same not being for expenses and not countersigned by the judge, was unauthorized by the decree or order of the court, and said banks thereby enabled said receiver to commit a breach of trust by misappropriating the money so obtained; that the creditors of the Hardware Company had a right to recover from the banks the sums of money which had been paid out on said checks; and that, having paid the judgment rendered against it, as security on the receiver's bond, in favor of such creditors, it is subrogated to the rights of said creditors as against the Exchange Bank and the National Bank. The insolvency of said Tindall, receiver, is also alleged, and petitioner prays judgment against the defendant banks for the respective amounts which had been withdrawn from them on said unauthorized checks.

Two of the grounds of demurrer are "that there is no right of action in said petition, as amended, in the plaintiff against this defendant," and "that, as it appears from the face of the petition that the checks alleged to have been illegally paid by this defendant were drawn and paid by this defend-

ant more than four years prior to the bringing of this action, therefore said cause of action is barred upon the face thereof."

Davis & Miller, Miller & Jones, and Geo. S. Jones, for plaintiffs in error. Erwin & Callaway and Jno. P. Ross, for defendant in error.

BECK, J. (after stating the facts as above). 1. In the absence of notice or knowledge, a bank cannot question the right of a customer to withdraw a fund, nor refuse the demands of the depositor by check; and it is also true that, if money be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and, in the absence of knowledge or notice to the contrary, the bank would have a right to presume that the trustee would appropriate the money when drawn to a proper use; but it is also true that, if a bank has notice or knowledge that a breach of trust is being committed by the improper withdrawal of funds, it incurs liability, becomes responsible for the wrong done, and may be made to replace the funds which it has been instrumental in diverting. The Supreme Court of Maryland held that a bank, which credited a check to the individual account of a named person, when the check itself stated that it was for "deposit to the credit of" the person named, with the word "trustee" added to his name, was liable for participating in the breach of trust in case of loss ensuing to the trust estate by reason of his drawing out the fund by checks on his personal account. In the case referred to the court said: "To deposit to the credit of Henry W. Clagett, trustee, was an explicit notification to the bank that Clagett was not the actual owner of the money. It was an equally explicit instruction to the bank not to place the fund to the credit of Clagett's personal account. \* \* \* Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit; and, if loss ensued by reason of Clagett drawing the fund out by check on his personal account, the bank is liable to make restitution to the trust estate. The bank, in the eye of the law, participated in the breach of trust of which Clagett was guilty." *Duckett v. Nat. Bank*, 86 Md. 403, 38 Atl. 983, 39 L. R. A. 89, 63 Am. St. Rep. 513, citing *Bundy v. Monticello*, 84 Ind. 119. "If the bank participates with the trustee in a misappropriation of the funds, or knowingly permits such misappropriation to take place, it must answer to the beneficiary for loss thereby occasioned." 3 Am. & Eng. Enc. Law (2d Ed.) 832. See, also, cases cited supporting the text.

Much stronger is the reason for holding, in the case at bar, that the bank participated in the breach of trust, than in the case of

*Duckett v. Nat. Bank*, supra. It was agreed in this latter case, in behalf of the bank, that if the bank had obeyed the direction given to it, and had opened an account with Clagett (the depositor) as trustee, still Clagett could have withdrawn the funds on checks appropriately signed, and could then have misapplied the money without involving the bank. But in the case at bar *Tindall*, the receiver, could not by checks, however appropriately signed by himself, unless they were also countersigned by the judge, have withdrawn the funds. Such were the express terms of the order or decree. The defendants knew the provisions made in the decree as to the manner in which checks, except checks for expenses, should be signed. They knew that they were depositories of trust funds, for the safeguarding of which extraordinary care and caution was being exercised by the court. We do not know by the use of what terms of direction, in a decree or order for the deposit of funds in a designated bank, more emphatic notification could have been given this defendant that payment upon any check, not countersigned as prescribed in this order, would amount to an aiding of a trustee in the misapplication of the funds. By the improper withdrawal of the funds *Tindall* was clearly guilty of a breach of trust. The bank had knowledge of this breach of trust, knowing, as it did, the express terms upon which *Tindall* might check out the money—terms which, so far as affect the sum now sued for, were plainly violated. Having the knowledge that a breach of trust was being committed, by payment of the checks improperly drawn and not countersigned by the judge of the superior court, it aided in that breach, and in the consequent misapplication of the funds; and, having done so, it became liable to the beneficiaries of the trust—that is, to the creditors of the *Macon Hardware Company*, to whom *Tindall* sustained a fiduciary relation.

2. That liability determined, we have to decide whether the surety, having paid the judgment against its principal, the receiver, was subrogated to all the rights and remedies of the obligee in the bond and the creditors of the *Macon Hardware Company* against the bank for having participated in the breach of trust and enabled the receiver to misappropriate the funds. "A surety who has paid the debt of his principal is subrogated both at law and in equity to all of the rights of the creditor, and in a controversy with other creditors ranks, in dignity, the same as the creditor whose claim he paid." Civ. Code 1895, § 2995. "He is entitled also to be substituted in place of the creditor as to all securities held by him for the payment of the debt." Id. 2996. That the surety was entitled, under the facts alleged in the petition, to the beneficial application of the doctrine of subrogation, seems to admit of little doubt. We find a

general statement of the doctrine as follows: "Sureties of a fiduciary, who are compelled to satisfy a liability occasioned by his default, devastavit, or breach of trust, will be subrogated to all rights and remedies of the cestui que trust, the creditors, or other beneficiaries, against the fiduciary or those participating in the default, devastavit, or breach of trust. This rule is applicable to receivers." 27 Am. & Eng. Enc. Law (2d Ed.) 219. In the case of *Orem v. Wrightson*, 51 Md. 84, 34 Am. Rep. 286, it was held that the doctrine of subrogation "is not founded on contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien, and security to which the creditor could have resorted for the payment of his debt."

These general statements of the doctrine of subrogation receive a special application in an adjudicated case directly in point upon the question now before us. In the case referred to it was said that, where a bank has participated in the clerk of the court's breach of trust in receiving to his personal credit and converting to his own use interest allowed to him for the use of the state's money placed to his credit as clerk a surety on the clerk's official bond, who has paid a judgment recovered by the state, is subrogated to every right of the state in respect of the claim, including the right of the state against the bank. The court says: "The theory of the appellant's case is that the bank so aided and participated in Van Sant's diversion to his own use of the interest on the deposits as to have been equally guilty with him of the breach of duty thereby made, which, in view of his relation to the deposits, amounted to a breach of trust; that under those circumstances the state could have recovered from the bank the amount of the diverted interest; and that the appellant, having as surety satisfied to the state the amount of its loss, is entitled to be subrogated to its rights against the bank in the premises." And the court added, in upholding the contention of the appellant: "The facts of the present case, in our opinion, bring it within the class of cases last referred to [holding that the surety of a fiduciary is subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act], and we think, both upon principle and authority, the appellant should be subrogated to the right of the state to recover from the appellee as a participant in Van Sant's breach of trust in receiving to his personal credit and converting to his own use the sum of \$3,774.70, allowed to him by the appellee in return for the use of the state's money deposited to his credit as clerk of the court of common pleas." *American Bonding Co. v. National Mechanics' Bank*, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466.

3. But while, as we have seen, the plaintiff in this case, as the surety, became subrogated to the rights of the creditors to enforce the liability incurred by the banks on account of their participation in the breach of trust, relatively to the right to enforce that liability the plaintiff in this case stands in the place of the obligee in the bond or of the creditors, for whose benefit this bond was taken. The participation by the bank in the breach of trust, in paying out the money improperly upon checks drawn by the receiver without being countersigned as provided in the order, was a wrong or tort against the creditors, giving rise to a right of action against the wrongdoer, the bank, at the time of the commission of the wrongful act; and inasmuch as the tort on the part of the bank was complete at the time of the wrongful payment of the checks, and it became immediately liable to suit for such wrongful act, the statute of limitations began to run immediately, and at the expiration of four years from that date the right of action was barred by the statute of limitations. This is clearly so, had the obligee in the bond or the creditors sought to enforce the liability incurred by the bank; and with reference to the enforcement of that liability, the surety, the plaintiff in this case, stands in no better position than would the party to whose rights he is subrogated. "The plaintiff, being subrogated, as he was, to all the rights of A., can have and exercise no greater rights than he had. This is a cardinal principle in all cases of subrogation. Where one takes the place of another, he can take and exercise no greater rights than such other could have done." *Harris on Subrogation*, p. 580, § 841, citing *Walker v. Vaudry*, 4 Rob. (La.) 395. See, also, *Rodman v. Sanders*, 44 Ark. 504.

In the present case, the first of the unauthorized payments by the bank upon the receiver's checks was made on the 20th day of January, 1894, and the last was made on the 23d day of January, 1899; and this action was instituted on the 29th day of July, 1904. It is clear, therefore, that the creditors could not enforce this demand against the bank; and, if they could not, the plaintiff, who was subrogated to their rights, could not. This being true, and these facts appearing on the face of the petition, the demurrer setting up the bar of the statute of limitations should have been sustained, and the court erred in overruling it.

Judgment reversed. All the Justices concur.

(129 Ga. 411)

CAMP et al. v. A. G. GARBUTT LUMBER CO.

(Supreme Court of Georgia. Oct. 8, 1907.)

1. WRIT OF ERROR—RULINGS ON EVIDENCE—REVIEW.

When the bill of exceptions recites that in an interlocutory hearing before the judge certain documentary evidence was introduced,



subject to specified objections as to its admissibility, and it does not appear whether the evidence was excluded, or any ruling upon its admissibility was made, nor is there any assignment of error thereon, no question as to the admissibility of the evidence is presented, and such evidence will be treated by this court as having been considered by the judge in arriving at his judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 2297.]

## 2. INJUNCTION—CONTINUING TRESPASS.

The cutting of timber by one who shows no title or claim of right should be enjoined at the instance of an owner in severalty or in common of the timber, where the circumstances show that the trespasses are constantly recurring and the defendant threatens to continue to cut the timber from day to day.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 101, 105.]

(Syllabus by the Court.)

Error from Superior Court, Echols County; R. G. Mitchell, Judge.

Action by R. J. and B. F. Camp against the A. G. Garbutt Lumber Company. Judgment for defendant, and plaintiffs bring error. Reversed.

J. L. Sweat, for plaintiffs in error. Cranford & Wilcox, for defendant in error.

EVANS, J. R. J. and B. F. Camp sought to enjoin the A. G. Garbutt Lumber Company from cutting and removing the timber from lot of land No. 90 in the Sixteenth district of originally Irwin, now Echols, county. The writ of injunction was refused, and the plaintiffs excepted.

On the interlocutory hearing it was made to appear that this particular lot of land was granted to Benjamin S. Jordan. In 1860 the administrator of Jordan conveyed the land to Skelton Napier, but no order of court authorizing the sale was exhibited to the judge. It was shown that Emily E. Jordan and Leonidas Jordan were the sole heirs at law of B. S. Jordan, and these heirs conveyed by deed, in 1871, land lot No. 90 to John T. Napier, executor of the last will and testament of Skelton Napier. Skelton Napier died, leaving a widow and seven children, among whom was John T. Napier. Plaintiffs also introduced a certified copy of the will of Skelton Napier, dated in 1852, and the codicil thereto, purporting to have been executed in 1856. In the will the testator directed that all his property, both real and personal (save that devised to his wife, the Spivey plantation and his negro slaves), be sold by his executor, and the proceeds "be divided share and share alike between my wife and each of my children; that is to say, my wife and each of my children having an equal share," etc. The will further provided that the devise to his son William "be and is hereby invested in trust to my sons John T. Napier and Thomas N. Napier as trustees, and not otherwise, for the sole and separate use of said William and his children. The property to remain in trust

as aforesaid during the natural life of said William, and then go to his children, or, on failure of children, to his heirs by consanguinity." It was also stipulated in the will that the devise to the testator's daughters "be held in trust for them and their children, should there be any," etc. No trustee for the daughters was named in the will, nor was it shown that they had children at the testator's death. The plaintiffs also introduced a certified copy of "the agreement of the heirs of the estate of Skelton Napier, late of Bibb county, Ga., deceased, to divide the estate of the said Skelton Napier, deceased, between the heirs of said estate as it all now appears of record in this [ordinary's] office, in Book of Returns M, No. 2, folio 509." The general scheme of this written agreement was to divide the estate in kind, and the wild land was to "go and belong to John T. Napier in his own right, and said John T. Napier, trustee for William P. Napier, as directed and provided as to said trust in the will of the said Skelton, deceased; that is, one-half to each." Plaintiff also introduced letters of administration on the estate of John T. Napier, an order from the court of ordinary authorizing a sale of land lot No. 90 by the administrator of John T. Napier, and a deed by the administrator of John T. Napier to John T. Wiley, and mesne conveyances from John T. Wiley to the plaintiffs. An affidavit by D. W. Barnes was offered by plaintiffs, wherein affiant deposed that the plaintiffs and their predecessors in title had been in continuous possession of lot 90 for more than seven years, evidenced by such acts as extracting turpentine from the trees and cutting cross-ties off the land. The only evidence offered by the defendant was an affidavit of W. A. Ham, wherein affiant deposed that plaintiffs and their grantors had not been in exclusive or continuous possession of the land for seven years. The bill of exceptions recites that the plaintiffs introduced in evidence certified copies of the will of Skelton Napier, and of the division in kind among his distributees and legatees, "subject to the objections interposed thereto by defendant's counsel," which objections are set out in the bill of exceptions. At the conclusion of the evidence the judge refused the injunction, which is the only error complained of in the bill of exceptions.

1. Before discussing the character of the plaintiffs' title, we will take up the recital in the bill of exceptions that certain documentary evidence was received in evidence, subject to certain objections. The record is silent as to whether the court ever passed upon the merits of the objection. The documents were allowed in evidence, subject to the objections, and must necessarily have been considered by the court, in the absence of any statement or recital to the contrary. Hence we cannot consider the merits of the several objections, and must treat the case as if no objections had been interposed to this

evidence, or, if interposed, had been overruled, and no exception taken thereto.

2. It is said in the brief of counsel for defendant in error that the record discloses that all the heirs and legatees of Skelton Napier did not sign the agreement of division of his estate, and on this account, as well as for other reasons, the agreement did not have the effect to assign to any particular distributee or legatee a title in severalty to any particular property of their testator. Without discussing the merits of this contention, we think that, even if it be sound, the plaintiff had such an interest in the land as gave him the right to preserve the property from spoliation by a trespasser. There can be no doubt that whatever interest John T. Napier had in this land passed to these plaintiffs. If the deed from the heirs of the grantee from the state to John T. Napier, as executor of Skelton Napier, be treated as conveying the title to John T. Napier individually, then the plaintiffs would have title to the land. If it be construed to vest the title in Skelton Napier's estate, then John T. Napier would have an interest in it, whether this particular land passed under the will or not. Independently of the partition of Skelton Napier's estate, the plaintiffs became tenants in common with the other legatees by the purchase of this land from the grantees of the administrator of John T. Napier. Section 4999 of the Civil Code of 1895 declares that any tenant in common or other person having a part interest in lands may have and maintain an action in ejectment or trespass for the recovery of such lands, or for an injury thereto, without joining with him any other person as plaintiff. The plaintiffs, therefore, have title at least to an interest in this land, and therefore may protect their estate from trespass by showing grounds for injunction. *Downing v. Anderson*, 126 Ga. 373, 55 S. E. 184. In *McArthur v. Matthewson*, 67 Ga. 143, it was said: "In a suit for injunction, complainants, on showing they have prima facie even an interest in the property, may maintain their bill." The plaintiffs having at least an interest in the land, did they show any right to the equitable remedy of injunction? This lot of land contains 490 acres. The defendant was engaged in cutting and removing the sawmill timber thereon when the suit was instituted. The officers and agents of defendant threatened to continue cutting the timber, unless lawfully prevented from so doing. It will require some time to complete the cutting and removal of the sawmill timber from so large a body of land. The defendant did not even attempt to show any title to support its claim of ownership. Under such circumstances, if the plaintiffs show title to an undivided interest in the land and timber, the defendants should be enjoined from committing a continuous and destructive trespass by denuding the land of its most valuable timber. *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164. We

therefore think his honor should have enjoined the cutting and removal of the timber until the final trial of the merits of the case. Judgment reversed. All the Justices concur.

(129 Ga. 337)

**ZIPPERER v. SEABOARD AIR LINE RY.**  
(Supreme Court of Georgia. Oct. 8, 1907.)  
**MASTER AND SERVANT—INJURY TO SERVANT—PLEADING.**

No cause of action was alleged in the petition, and the general demurrer thereto was properly sustained.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by R. P. Zipperer against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff brings error. **Affirmed.**

D. H. Clark, for plaintiff in error. J. Randolph Anderson, for defendant in error.

EVANS, J. Zipperer sued the railroad company for damages for personal injuries alleged to have been caused by the negligence of the railroad company. The court dismissed the petition on general demurrer, and this is assigned as error.

The plaintiff depended upon substantially the following allegations as showing the defendant's liability: Plaintiff was a train hand upon one of defendant's work trains, and was directed by the conductor in charge of the train to uncouple one of the cars, that it might be placed upon the switch. In attempting to obey this command, and while walking along the side of the track, he violently struck his foot against a steel rail, which lay in his path, and was thrown under the moving train, sustaining serious injuries. The rail against which he stumbled was 30 feet long, weighing 70 pounds to the yard, and lying on its side, and presented a sharp, projecting surface. The defendant's negligence was alleged to consist in permitting the steel rail to remain in a place where the defendant knew, or in the exercise of diligence could have known, that plaintiff, in the performance of his duties as such train hand, would be compelled to travel. There is no allegation that it was not necessary for the railroad company to place the rail where it was, or that it was not placed there in a proper manner.

We do not think the plaintiff makes a case of negligence against the railroad company. The bare fact that a steel rail was placed on the roadbed, near its track, in full view of a passer-by, cannot be deemed a negligent act. If so, a railroad company could never repair its track, by placing necessary material at a convenient place and in a proper manner, without subjecting itself to liability for every accident occurring on that account at that point. As was remarked in the case of *Lee v. Central Railroad Co.*, 86 Ga. 233, 12

S. E. 307, by Bleckley, C. J.: "It cannot be incumbent on railroad companies, or any one else, in such a world as this, to keep the whole face of the earth, on which servants and employes are to execute their functions, clear of every object that may cause an employe to slip up or be thrown down." Besides, the plaintiff, though affirming in technical phrase that he was free from fault, does not explain why, in the broad, open day, he did not see such a plain and distinct object as a steel track rail 30 feet in length. We concur in the judgment of the superior court that no cause of action was set forth, and that the general demurrer was properly sustained.

Judgment affirmed. All the Justices concur.

(129 Ga. 333)

### HARRIS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Oct. 8, 1907.)

#### 1. NEGLIGENCE—PLEADING.

General allegations that a plaintiff was injured by reason of the negligent conduct of a railroad company, or the like, unless accompanied by allegations of fact showing negligence, are subject to special demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 174.]

#### 2. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Although the agents of a railroad company may be negligent in running its engine and cars at a high rate of speed over a public road crossing, and in approaching a station where the train is to stop, and in not keeping a lookout, yet if a person, with knowledge of the impending danger, steps on the track and seeks to cross immediately in front of the engine, and is injured, he cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1028.]

#### 3. SAME.

Under the rule that pleadings are to be construed most strongly against the pleader, the case made by the petition was substantially as set out in the preceding note, and a demurrer to it was properly sustained.

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Jr., Judge.

Action by Z. T. Harris against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Z. T. Harris brought suit against the Southern Railway Company, alleging substantially as follows: On the 9th day of November, 1905, plaintiff was injured by an engine operated by the defendant company; "said injury being caused by the negligent running of the said engine, and being caused without any negligence on the part of petitioner." The plaintiff had a contract to carry the United States mail from Roberta to Knoxville. He was also a hotel keeper at Roberta, and both of these occupations required his attendance at the depot of the defendant company upon the arrival of passenger trains. On the day mentioned, in the performance of his duties, he left the hotel

to go to the depot of the defendant company, and in order to do so it was necessary to cross the railroad track at the depot. "As the plaintiff stepped upon the track, the engine of the north-bound passenger train struck the plaintiff," inflicting injuries upon him. The place where the engine struck him was a point on the track located almost at the depot, near the point where the trains always stop to receive passengers. A few yards south of this point there is a public crossing, which constitutes a part of the main thoroughfare of the town of Roberta, and is used constantly by the citizens. The train had to pass over the crossing before striking the plaintiff. The defendant was negligent in approaching the crossing at such a high rate of speed that it was impossible for the engineer operating it to stop the train within a sufficiently short distance to be safe for the public using the crossing. If the engineer had approached the crossing at such rate of speed as would have enabled him to control the train, as the law required and as the safety of the public demanded, the plaintiff would have crossed the track in safety.

By amendment the plaintiff alleged as follows: It was well known to the defendant and its engineer that the plaintiff was in the habit of crossing at the point where he was struck. It was in an incorporated town, and at a place where people congregated and assembled at the time when this train was due to arrive. Plaintiff used ordinary care, and would have succeeded in crossing in safety, but for the fact that the locomotive was running at an unusual and excessive rate of speed—at such a negligent rate of speed as this plaintiff did not know of and could not necessarily have anticipated. At the time he stepped upon the track he was far enough ahead of the engine to have been seen by the engineer, and for the engineer to have checked his speed, so as to have prevented the striking of the plaintiff and the injuries which were inflicted upon him. The negligence of the defendant and its engineer consisted in running the train at a negligent rate of speed at the place and under the circumstances named, and in not keeping a lookout at the time and place mentioned, "by which plaintiff could have been seen and the speed of the train checked, so as to have avoided the striking of the plaintiff." The crossing is part of the street in an incorporated town, and all that part of the railroad from the crossing to the station, beyond the point where plaintiff was injured, is and has been for many years used as a thoroughfare by the public in approaching the station, and that part of the road between the street and the station is constantly used by the public, all of which was well known to the defendant. The point at which the train struck the plaintiff was 25 yards north of the public crossing and 10 yards south of the depot. The train was going at such a rate of speed "at this point" as to be dangerous to passen-

gers and to constitute negligence as to all persons whose business required that they cross the track of the defendant company at this point. Plaintiff was under contract with the United States government to deliver and receive the mails transported by the defendant. The railroad was also under contract with the United States government to transport the mails to and from the town of Roberta. By reason of this employment the plaintiff's presence was necessary at the depot of the defendant company upon the arrival and departure of its passenger trains as alleged.

The defendant demurred to the declaration, both generally and specially. The demurrer was sustained, and the plaintiff excepted.

A. C. Riley, L. L. Brown, and H. A. Mathews, for plaintiff in error. Arthur Heyman, A. J. Danielly, and C. E. Battle, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. The special demurrer attacks almost every allegation in the petition. As we shall affirm the judgment sustaining the general demurrer, it will not be profitable to deal at length with the various grounds of the special demurrer. Some of them were well taken, and some were not. The plaintiff in his petition must allege facts, not merely conclusions. General allegations that the defendant was negligent, or that the plaintiff was injured by the negligent conduct of the defendant, or the like, will not alone withstand a special demurrer. The pleader should state wherein the negligence consisted. He must plainly, fully, and distinctly set forth his cause of action. If he has done this, he is not required to enter into elaborate statements of minutiae. If he sets forth the negligent conduct complained of, a subsequent reference to it as the negligence above stated, or "above enumerated," does not render the petition demurrable.

2. Ordinarily a person who is injured by a railway train is not required to allege as a part of his case that he was without fault or negligence; but, if the facts alleged in his declaration show that he was wanting in ordinary care, the point may be raised by demurrer. It is a familiar rule that pleadings are to be construed most strongly against the pleader. In the light of this rule, how stands the plaintiff's case? He alleges that the defendant's train was running very rapidly in passing over the crossing and approaching the station close by; that there was negligence, both in not having the engine under control and in not keeping a lookout. But what does he show as to himself? He does not deny that he saw the engine approaching at a rapid rate of speed, or that he knew that the speed was not checked, or that there was no lookout kept. Indeed, so far as the petition shows, he is to be taken as having full knowledge of the dangerous position he assumed in going

upon the track. He alleges that the engineer could have seen him, and it would seem that he could as easily have seen the engine. He says generally that there was "such a negligent rate of speed" as he did not know of; but he does not say that he did not see the rapidly moving train. It does not appear how far distant the engine was when he undertook to cross, but apparently he stepped immediately in front of it, since he alleged that "as the plaintiff stepped upon the track the engine of the north-bound passenger train struck the plaintiff." If it struck him as he stepped upon the track, he must have gone on the track very close in front of it. It was not stated whether the engine had already passed beyond the road crossing before he made his attempt to go in front of it. We have, therefore, presented to us a case where the plaintiff voluntarily went upon a railroad track immediately, or almost immediately, in front of a rapidly moving train, with knowledge of the danger, and miscalculated on his ability to cross the track before being struck. Such a declaration does not authorize a recovery. *Thomas v. Central of Georgia Ry. Co.*, 121 Ga. 38, 48 S. E. 683; *Atlanta Railway & Power Co. v. Owens*, 119 Ga. 833, 47 S. E. 213; *Ivy v. East Tenn., etc., Ry. Co.*, 88 Ga. 71, 13 S. E. 947.

Under the ruling above made, it is not necessary to discuss the effect of the law in regard to public crossings in determining the question of the existence of negligence on the part of the railroad relatively to persons who are near such crossings.

Judgment affirmed. All the Justices concur.

(129 Ga. 123)

T. B. REDMOND & CO. v. ATLANTA & BIRMINGHAM AIR LINE RY.

ATLANTA & BIRMINGHAM AIR LINE RY. v. T. B. REDMOND & CO.

(Supreme Court of Georgia. Oct. 4, 1907.)

1. ACCORD AND SATISFACTION—WHAT CONSTITUTES.

Where one has an unliquidated demand against another, and the debtor sends a check to his attorney, together with a receipt to be signed by the creditor, and the latter receives from the attorney the check, though protesting that a much larger sum is due him, and signs a receipt under seal which contains the stipulation that in consideration of the amount of the check, or voucher, the debtor releases the creditor "from all claims and demands whatsoever for or on account of the said contract, or for work and labor done and for materials furnished by us in connection with the same," the receiving and retaining of the sum offered, and the signing of the receipt, becomes an executed agreement, and constitutes a good accord and satisfaction, and, as such, is binding upon the creditor holding the demand, although he entered upon the receipt at the time of signing the same, or prior thereto, the letters "E. & O. E.," which mean "errors and omissions excepted."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, §§ 88-93.]

**2. SAME—RESCISSIION—TENDER OF BENEFITS RECEIVED.**

Even if the amount tendered and accepted was the amount fixed by the estimate of the debtor's engineer, and such estimate was incorrect, and the result of a mistake or fraud, the creditor would not be entitled to retain the proceeds of the check received upon the terms above set forth, and sue for the remainder of his unliquidated demand. Before he would be entitled to maintain such an action, it would be necessary for him to tender back the amount received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, § 145.]

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Action by T. B. Redmond & Co. against the Atlanta & Birmingham Air Line Railway. Judgment for defendant, and plaintiff brings error, and defendant assigns cross-error. Judgment affirmed on main bill of exceptions. Cross-bill of exceptions dismissed.

T. B. Redmond & Co. brought suit against the Atlanta & Birmingham Air Line Railway Company to recover various amounts alleged to be due to the plaintiffs for work done and material furnished in the construction of a single track railroad along sections 37, 38, 39, and 40 of defendant's line. Both general and special demurrers were interposed by the defendant. Some of the demurrers were overruled and others sustained. The plaintiffs filed their bill of exceptions to the order sustaining certain grounds of the demurrer, and the defendant by cross-bill excepted to the order overruling certain other grounds. The petition alleged that the petitioners had entered into a contract in March, 1903, with the East & West Railroad Company to do certain work required in the construction of a single track railroad for the latter company on the sections above mentioned. Profert was made of said contract. It was further alleged that the Atlanta & Birmingham Air Line Railway Company, the defendant, was formed by a consolidation of the East & West Railroad Company and the Chattahoochee Terminal Railway, and that the defendant company had undertaken the construction of said sections of railroad and assumed the place of the East & West Railroad Company under the contract with petitioners, and became liable to petitioners in the same manner as the East & West Railroad Company would have been had not said substitution taken place. The contract provided, among other things, that "all questions, differences, or controversies which may arise between the company and the contractor, under or in reference to this agreement and specification, or its performance or non-performance, or the work to which they relate, or in any way whatever pertaining to or connected with said work, shall be referred to the engineer of the company, and his decision shall be final and conclusive as to both parties \* \* \*

And it is distinctly understood and agreed between the parties that the work under this contract shall at every stage of its progress from beginning to end be subject to the directions, inspection and acceptance of the engineer, who shall determine without appeal what in any case a fair construction of the contract requires to be done by either party, and whose measurements, classifications and estimates, monthly or final, shall be absolutely conclusive upon both parties." The petition alleges that the final estimate, which was furnished to them about the 31st day of August, 1904, was erroneous and fraudulent in various particulars, and failed to allow petitioners the amount to which they were entitled for work done and material furnished. It further appears from the petition and amendments thereto that the final estimate was presented to petitioners, together with a voucher for the amount represented by said final estimate to be due them, by the attorney at law for the defendant. When the same was so presented, they protested that it was incorrect, and were thereupon referred to the engineer of defendant, one Jones. They sought to obtain access to said Jones, but he was not in Atlanta, so they wired to him at Birmingham, Ala., as follows: "Amount of voucher tendered us to-day is not the full amount due us. \* \* \* Will accept voucher pending future adjustment of our claim." This telegram, it is alleged, was delivered to said Jones, and after waiting 24 hours for a reply, and no reply having been received, petitioners accepted the amount shown to be due them by said final estimate, and signed the following receipt: "We acknowledge to have received from the Atlanta & Birmingham Air Line Railway the sum of \$41,664.67 in full payment for all materials furnished and for all work and labor done by us under or in connection with the contract [identifying the contract above set out]. The said contract being now completed and the said amount being the final payment to us under the same, and we do hereby release the said Atlanta & Birmingham Air Line Railway from all claims and demands whatsoever, for or on account of the said contract, or for work and labor done and for materials furnished by us in connection with the same. In witness whereof, we have hereunto set our hands and seals the seventh day of October, 1904. E. & O. E." Petitioners further allege that, at the time said voucher was signed by them, they were in great financial distress and in the most pressing need of money, by reason of the work which they had done for the defendant, which fact was known to the defendant, and that they were forced, by reason of such financial condition, to accept said sum, or await the result of protracted and expensive litigation, and that defendant took advantage of said condition of petitioners and required them to sign said receipt. By amendment it was further alleged that, before accepting the

said sum of money and signing said receipt, plaintiffs entered thereon the letters "E. & O. E.," being an abbreviation of the words, "Errors and omissions excepted"; that said abbreviation is of well-known meaning in the business world, the purpose being to call in question the correctness of the statement, account, or receipt, and indicate that the correctness of such statement, account, or receipt is not admitted; and that the defendant took from the plaintiff said receipt, and turned over to them said voucher with full knowledge that it was indebted to them more than the sum called for by said voucher, and that the same was being received by plaintiff only in partial settlement and subject to future adjustment. The defendant filed general and special demurrers. The third, fourth, and fifth grounds of the general demurrer are as follows: "Because it appears by said petition that the said contract sued on has been settled and final estimates have been furnished to petitioner thereon, and payments have been made and accepted according to said final estimates and have been received by said plaintiffs on said final estimates. Said settlement thus made is sought to be set aside upon the ground of fraud, but no tender is alleged to have been made, or is in said petition made, to this defendant of the amount alleged to have been paid and received under said final estimate and settlement. Because the petition sets forth no cause of action. Because said petition shows that the said defendant hath paid said plaintiff for and on account of said work done under said contract and that said payment was accepted by said plaintiff, and shows no sufficient reason why said payment and settlement should be set aside, or any reason why plaintiffs should be allowed to recover." The court sustained the general demurrer on the grounds just quoted, and dismissed the suit. The plaintiff excepted.

Smith, Berner, Smith & Hastings and Peeples & Jordan, for plaintiff in error. King, Spalding & Little, for defendant in error.

BECK, J. (after stating the facts as above). It appears from the petition in this case that the plaintiffs accepted a certain sum tendered by the other party as the full amount due under the contract, though protesting that it was an improper amount and less than they were entitled to, and released the defendant, in consideration of such payment, from all further liability under the contract sued on. And it is insisted by defendant's counsel that this constituted an accord and satisfaction, and that under Civ. Code 1895, § 3735, the plaintiffs are concluded; the agreement having been actually executed by the payment of the money. Defendant insists that the payment and acceptance of the money, under the facts set forth

in the petition, under the provisions of the Code section of the Code just cited, is binding upon the plaintiffs as an accord and satisfaction, whether the demand of the latter was liquidated or unliquidated. Under the view that we take of the questions made by the record, it is not necessary to decide whether that contention be sound, or whether section 3735 of the Code is so modified by the provisions of section 3734, when the two sections are construed together, that, if plaintiffs' demand was for a liquidated amount, the acceptance of the amount embodied in the receipt constituted accord and satisfaction, for in this case the demand was unliquidated. The contrary view, urged by the plaintiffs, is not countenanced by the authorities when applied to their case as stated by them. "A debt or demand is liquidated when agreed on by the parties, or fixed as to the amount, by the operation of law." *Hargroves v. Cooke*, 15 Ga. 321. "The word 'liquidated,' in the sense of the rule that payment of a lesser sum is a discharge of the remainder where the amount in dispute is unliquidated, but that it is not a discharge where it is liquidated, means that the amount due has been ascertained and agreed on by the parties or fixed by operation of law. The rule does not apply where there is a bona fide dispute as to the amount actually due. *Treat v. Price*, 47 Neb. 875, 66 N. W. 834, 836." "A demand is not liquidated, even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as 'unliquidated' within the meaning of the term as applied to the subject of accord and satisfaction. *Lestienne v. Ernst*, 5 App. Div. 373, 39 N. Y. Supp. 199, 200, citing *Nassoly v. Tomlinson*, 148 N. Y. 326, 331, 42 N. E. 715, 51 Am. St. Rep. 695; *Ives v. Jefferson County Sup'rs*, 18 Wis. 166, 168; *Clark v. Dutton*, 69 Ill. 521, 523; *Greenlee v. Mosnat*, 116 Iowa, 535, 90 N. W. 338, 339, citing *Nassoly v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695." The two latter quotations were taken from 5 Words & Phrases, 4174.

A brief reference to some of the items of the account upon which the plaintiffs' demand in this suit is based will produce the conviction at once that it was unliquidated. One of the items alleged to be due to petitioners was for removing a certain number of cubic yards of dirt, which "petitioners show that they were compelled to handle in a manner not contemplated by the contract, and not provided for by the contract, and that said work was reasonably worth the sum at which it has been charged up [in the petition]." Another large item was for handling "wet excavation," and "petitioners show that no contract price was fixed for handling wet excavation, and that a customary and reasonable allowance for the same would

have been \$1.50 per cubic yard," and that only 70 cents per cubic yard "was allowed for the same according to the final estimate of the defendant." And "petitioners further show that the fills or slides in the tunnel amounted to 3,215 cubic yards, and that \$3 per cubic yard was a reasonable price for handling this work, and petitioners show that no price was fixed in the contract for the payment of the same, but the defendant company arbitrarily undertook to fix the price at \$1.25 per cubic yard." Another item was for lumber which it is alleged was improperly rejected by the defendant's engineer. It is unnecessary to enumerate all of the items charged in the petition, as it sufficiently appears from what has been shown that the indebtedness due to the plaintiffs by the defendant was not ascertained or agreed upon by the parties, and can not be regarded as "liquidated" within the meaning of the term, as applied to the subject of accord and satisfaction.

The mere fact that the defendant acceded to the estimate of the engineer, and was willing to pay that amount without attacking it, and tendered that amount with the condition embodied in the receipt or release, did not have the effect to render the plaintiffs' unliquidated demand a liquidated one. It did not render it one "ascertained and agreed upon by the parties or fixed by operation of law." In the case of *Chicago Railway Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099, it was said: "The proposition is that the release was given without consideration, and that Clark was entitled to recover, so far as the items of \$40,000 and \$9,558.63 were concerned, on the principle that, where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such, for want of consideration. *Cumber v. Wane*, 1 Strange, 426. The rule therein laid down has been must questioned and qualified. *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Sibree v. Tripp*, 15 M. & W. 23; *Couldery v. Bartrum*, 19 Ch. D. 394; *Foakes v. Beer*, 9 App. Cas. 605; *Notes to Cumber v. Wane*, in 1 *Smith's Leading Cases*, 606; 12 *Harvard Law Review*, 521. The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and, while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it. \* \* \* And the cases are many in which it has been held that, where an aggregate amount is in dispute, the payment of a specified sum conceded to be due—that is, by including certain items, but excluding disputed items—on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole. In *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785, where certain items of an account were

disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain of the items made the account an unliquidated one, and that plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand."

The demand of the plaintiff being unliquidated, it necessarily follows that the tender or offer of the sum mentioned in the receipt upon the terms recited therein was in effect an accord and satisfaction. By the acceptance on the part of the plaintiffs of the sum named and the signing of the receipt containing the conditions upon which it was offered, the agreement to accept less than the amount of the unliquidated demand became executed, and, when the plaintiff attempted to collect the balance of his demand, the defendant could plead the executed agreement as an accord and satisfaction. And this conclusion is not affected by the fact that at the time of signing said receipt the plaintiffs entered thereon the letters "E. & O. E.," which were abbreviations for the words, "errors and omissions excepted." It appeared by said petition that said voucher was presented to the plaintiff by J. J. Spalding, attorney at law for defendant; that the said receipt was signed and delivered to the said Spalding; that the petitioners were informed in effect by the said Spalding, prior to accepting said voucher and cashing the same, that he had no authority and could not give them any relief in regard to their complaints, as set forth in their petition and amendments thereto; and that, without other or further communication from any agent, officer, or attorney of the defendant, the said plaintiffs received the amount of said voucher and signed the said receipt. Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accept it, he accepts the condition also, notwithstanding any protest he may make to the contrary. "A., being indebted to B. in an uncertain amount, sent to the C. Bank the amount which A. conceded to be due, with instructions to pay the sum to B., but only in full settlement, and on his signing a receipt to that effect. B., protesting that more was due, accepted the money, and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account, and not in settlement. Held that, by receiving the money, he had accepted the condition on which it was tendered, and that his protest availed nothing. Held, further, that the terms of the receipt, and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it, except

on the condition that it should be received in full settlement." *Treat v. Price*, 47 Neb. 875, 66 N. W. 835. "When a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the sum, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party at the time of receiving the money declares that he will not receive it in that manner, but only in part payment of his debt as far as it goes." *McDaniels v. Lapham*, 21 Vt. 222. "The mere act of receiving the money is an agreement to accept the same on the conditions upon which it was offered." *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406.

The claim that this release is not binding, because the sum named in the final estimate was fraudulently fixed, cannot avail the plaintiffs. As plaintiffs themselves did the work and were on the ground, they were in possession of all data necessary to determine whether the engineer's estimate was correct or incorrect, and, if incorrect, to what extent, and whether his conduct was fair or unfair. The petition shows not only opportunity of knowledge and notice, but actual knowledge of the facts by which they could have made good their present complaint that the final estimate was incorrect, unfair, and fraudulent. That being the case, they did not sign the receipt in ignorance of the fraud upon the part of the engineer, or of the mistake made by him; and having so signed the release with such notice, and accepted payment, they are now bound by the same. The plaintiffs had full opportunity for knowing the truth, and, if they did not ascertain it with such opportunity to inform themselves, it was because of negligence upon their own part, and equity will not now relieve them of its consequences. "It is true courts of equity will grant relief for ignorance, as well as for a mistake of fact; but the principles on which relief is granted in those cases are very different. When the party has acted in ignorance of facts merely, courts of equity will never afford relief where actual knowledge could have been obtained by the exercise of due diligence and inquiry. That was the very point determined in the case of *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 567. Justice Story has also observed (1 Eq. Jur. § 146, and note) that 'It is not sufficient that the fact is material, but it must be such that he could not by reasonable diligence get knowledge of when he was first put upon inquiry; for, if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.'" *McDaniels v. Bank of Rutland*, supra. But, even if this were not the case, we think the contention of the defendant company is sound when it in-

sists that the plaintiffs, having received the amount of money tendered by the defendant in settlement of this claim, and having executed a full release, cannot set aside the same without having first, as a condition precedent to filing his suit, tendered back the money received. The plaintiffs received the sum of \$41,664.67. They received it on terms and conditions stated in the receipt signed by them, and they ought not to be permitted to retain it and repudiate an executed agreement. The case as presented by the record makes applicable the language of Mr. Justice Cobb in the case of *Hamilton & Co. v. Stewart*, 105 Ga. 300, 31 S. E. 184: "The retention of the amount forwarded, declared to be in full settlement of the claim held by the person to whom it is sent, coupled with a failure within a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. While, of course, a party cannot be bound by a settlement, unless he assents to its terms, still this assent may be implied from the circumstances, and conduct inconsistent with a refusal would raise a presumption of assent, upon which the other party would have a right to act. Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it cannot retain the property and repudiate the condition." See, also, the cases of *East Tennessee, V. & G. Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350, and *Walker v. Wadley*, 124 Ga. 283, 52 S. E. 904. Again, it was held in the case of *Strodder v. Southern Granite Co.*, 94 Ga. 626, 19 S. E. 1022: "Where an accord and satisfaction is fully executed, the party receiving the money from the other cannot rescind on the ground of fraud \* \* \* without refunding or offering to refund the money which was the fruit of the accord and satisfaction. If any exception to this general rule results from inability, by reason of poverty, to restore the money, it is only when the fraud is not discovered \* \* \* until after the money has been expended, or otherwise put beyond the power and control of the plaintiff. To use and appropriate the money with knowledge of the imposition would be a ratification of the settlement." We do not think that this ruling is in conflict with the case of *Robinson v. Leatherbee*, 120 Ga. 901, 48 S. E. 380, as it does not appear in that case that the money was tendered on condition that it should be accepted in full settlement of the account; but, if it is in conflict, then the case of *Robinson v. Leatherbee* must yield to the earlier decisions which are authority for the ruling here made.

It follows from the foregoing that the court did not err in sustaining the general demurrer and dismissing the action.

Judgment affirmed on the main bill of exceptions. Cross-bill of exceptions dismissed. All the Justices concur.



(129 Ga. 267)

**PINNEBAD v. PINNEBAD.**

(Supreme Court of Georgia. Aug. 14, 1907.)

**1. NEW TRIAL—BRIEF OF EVIDENCE—DISMISSAL OF MOTION.**

Unless there is an order of the court relieving the movant in a motion for a new trial of the necessity of filing a brief of the evidence in accordance with the terms of Civ. Code 1895, § 5484, whenever the time fixed by the provisions of that section for the filing of the brief of evidence has expired, the motion for a new trial is ripe for dismissal at any time that the judge has jurisdiction to entertain a motion to that effect. Leave to prepare and file a brief of the evidence on or before the hearing in vacation must be unequivocally granted, else the movant cannot justify the omission to follow the practice required in the section above cited. *Gould v. Johnston*, 123 Ga. 765, 51 S. E. 608. [Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 273.]

**2. APPEAL—REVIEW—MOTION FOR NEW TRIAL—DISMISSAL.**

Where the order setting the hearing of the motion for a new trial in vacation is susceptible of a construction which would allow the movant to prepare and file a brief of the evidence at a given time in the future, and of a construction which would not preserve this right, the Supreme Court will adopt that construction of the order which is placed upon it by the judge who granted it, when at the final hearing he dismisses the motion for a new trial on account of the failure to file the brief of the evidence. *Brown v. Richards*, 114 Ga. 318, 40 S. E. 224.

**3. SAME—CONSTRUCTION OF ORDER.**

Inasmuch as the statute expressly declares that a brief of the evidence accompanying a motion for a new trial must be filed during the term at which the trial was had, and it is frequently true that the purpose of a movant in procuring the order allowing additional time after the expiration of a term to amend the motion at any time before the final hearing is simply to reserve the right of amending the grounds of the motion, an order which, after reciting that it is impossible to make and complete the brief of the testimony in a case before the adjournment of court, provides that the motion be heard and determined on a named date in vacation, "and that movant may amend said motion at any time before the final hearing," will not, when construed by the judge who granted it as authorizing only 30 days from the time the motion is filed within which to file the brief of the evidence, be differently construed by the Supreme Court. *Barnes v. M. & N. R. Co.*, 105 Ga. 495, 30 S. E. 883.

**4. STIPULATIONS—BRIEF OF EVIDENCE—FAILURE TO FILE.**

When, in a case of the character referred to in the preceding note, there is nothing to indicate, from the orders passed from time to time postponing the hearing of the motion for a new trial, that the respondent has waived the right to object to a brief of the evidence being filed after the expiration of 30 days from the date that the motion was filed, it is no sufficient reason to overrule a motion to dismiss the motion for a new trial that there was an agreement between counsel to insert, in one of the orders continuing the motion, passed after the expiration of 30 days from the date that the motion for a new trial was filed, a provision that the motion might be thereafter perfected in any way; it not appearing that such agreement was in writing, and no steps having been taken to amend the order which it is claimed should have contained this provision.

(Syllabus by the Court.)

Error from Superior Court, Glynn County;  
L. A. Parker, Judge.

Action by Vincent Pinnebad against E. J. Pinnebad. From the judgment, plaintiff brings error. Affirmed.

See 57 S. E. 80.

Crovatt & Whitfield and Jno. M. Graham, for plaintiff in error. D. W. Krauss, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified.

(129 Ga. 392)

**JORDAN v. DOOLY.**

(Supreme Court of Georgia. Oct. 8, 1907.)

**1. WRIT OF ERROR—REVIEW—GRANT OF NEW TRIAL.**

The rule that the first grant of a new trial will not be disturbed, except where the verdict is demanded by the evidence, is applicable to a case where two successive verdicts have been rendered, one for the plaintiff and the other for the defendant, and where in each instance a new trial was granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 33, 63.]

**2. NEW TRIAL—CONFLICTING EVIDENCE.**

The evidence was conflicting, and the court did not abuse his discretion in vacating the verdict and granting a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 144, 145; vol. 3, Appeal and Error, § 3871.]

(Syllabus by the Court.)

Error from Superior Court, Banks County;  
O. H. Brand, Judge.

Action by G. W. Dooly against R. H. Jordan. Verdict for defendant. From an order granting a new trial, he brings error. Affirmed.

C. R. Faulkner and Fletcher M. Johnson, for plaintiff in error. J. C. Edwards, J. J. Bowden, and A. J. Griffin, for defendant in error.

EVANS, J. The case was complaint for land, and the paramount issue was that two of the plaintiff's muniments of title were void for usury. The evidence upon this point was conflicting. The jury returned a verdict for the defendant, and the court granted a new trial. The bill of exceptions complains of the judgment granting a new trial.

It appears from the record that the case was tried at a previous term of the court, and resulted in a verdict for the plaintiff, which was set aside on motion for new trial. Counsel for plaintiff in error insist that there is no merit in the various grounds of the motion, and that, as this is the second verdict which has been rendered in the case, the court abused his discretion in ordering a new trial. It is true that this is the second verdict, but it is not the second concurrent verdict. The reason of the rule that a second concurrent verdict (where no error of law has been committed) should not be disturbed except in cases where the verdict is strongly and decidedly against the weight of the evi-

dence, and manifestly wrong, is that the jury are the judges of the facts, and, when this arbiter has twice spoken, their conclusions should not be lightly set aside. *Dethrage v. Rome*, 125 Ga. 806, 54 S. E. 654, and cases cited. But where the verdict is for one litigant, and that is set aside, and the next verdict is for the other litigant, the last verdict, instead of having the indorsement and approval of the first, is actually repugnant thereto. Hence the rule that the first grant of a new trial will not be disturbed, except in cases where the verdict is demanded by the evidence, is applicable to a case where two successive verdicts have been rendered, one for the plaintiff and the other for the defendant, and where in each instance a new trial has been granted.

The evidence in the case at bar upon the controlling issue was in hopeless conflict, and the judge did not abuse his discretion in granting a new trial.

Judgment affirmed. All the Justices concur.

(129 Ga. 374)

SHREVE et al. v. PENDLETON, Judge.

(Supreme Court of Georgia. Oct. 8, 1907.)

1. JUDGES — MANDAMUS TO CO-ORDINATE JUDGE.

When duties are imposed on a judge of the superior court as an officer, another judge of the superior court has no power to issue a mandamus to compel the performance of such duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 94.]

2. APPEAL—REVIEW.

One superior court judge having no power to issue a mandamus against another superior court judge to compel the discharge of an official function, this court will not inquire into the merits of the case, but will affirm the judgment refusing to grant a mandamus absolute.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; H. M. Holden, Judge.

Application by S. C. Shreve and others for writ of mandamus to J. L. Pendleton, judge. From an order denying the writ, applicants bring error. Affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. W. O. Wilson, for defendant in error.

EVANS, J. Applicants desired to incorporate a town agreeably to the provisions of Pol. Code 1895, §§ 685-687. They filed a petition in the superior court of Fulton county (which is embraced in the Atlanta judicial circuit), in which it was alleged that the various provisions of the foregoing Code sections had been complied with, and prayed an order directing the clerk of the superior court of Fulton county to issue a certificate of incorporation. A property owner filed a caveat to the granting of the order prayed for, and the case was submitted to the judge on an

agreed statement of facts. The judge of the Atlanta circuit, for reasons assigned in his judgment, based on conclusions of law from the admitted facts, refused to direct the clerk of the superior court of Fulton county to issue a certificate of incorporation. Whereupon applicants applied to the judge of the superior courts of the Northern circuit for the writ of mandamus to compel the signing of the order directing the clerk to issue a certificate of incorporation. The judge of the Northern circuit granted a mandamus nisi, and upon the coming in of the answer denied a mandamus absolute. The writ of error complains of the refusal to make the mandamus absolute.

We think an insurmountable obstacle confronts the plaintiffs before the merits of their case can be considered. It involves a question of such grave concern that it is well that it should be settled before any serious complication may arise from one judge invading the jurisdiction of another judge of co-ordinate power, and compelling him by mandamus to do an act which, though not strictly judicial in character, appertains to, and is devolved upon, the judicial officer. If one judge of the superior court is without jurisdiction to issue the writ of mandamus against another judge of the superior court to compel the performance of an act appertaining to the latter's judicial office, this court will not reverse the judgment refusing the writ. *Harris et al. v. Sheffield*, Judge, 128 Ga. 299, 57 S. E. 305.

At common law, the writ of mandamus issued from the court of King's Bench, and was directed to any person, corporation, or inferior court of judicature, requiring them to do some particular thing, therein specified, which pertains to their office and duty, and which the court of King's Bench had previously determined, or at least supposes, to be consonant with right and justice, and where there is no other adequate and specified remedy. *Merrill on Mandamus*, § 1. In the Constitution of Georgia adopted in 1798 (article 3, § 7), power was conferred on the judges of the superior court to issue writs of mandamus, and all other writs which may be necessary for carrying their powers fully into effect. In cases where the manner and time of exercising this power is not prescribed by statute, we have to look to the common and statute law of England, as of force at the time of our adopting statute. *Johnson v. State*, 1 Ga. 273. Our present Constitution omits any reference to the writ of mandamus, but the statute (Civ. Code 1895, § 4321) declares that the judges of the superior courts have authority to grant for their respective circuits writs of mandamus. "All official duties should be faithfully fulfilled, and whenever, from any cause, a defect of legal justice would ensue from a failure or improper fulfillment, the writ of mandamus may issue to compel a due performance, if there be no

other specific legal remedy for the legal rights." Civ. Code 1895, § 4867. This section of the Code at first blush seems sufficiently broad to cover every case of official inaction; but, comprehensive as it is, it cannot extend to every case of failure to perform official duty. For instance, suppose the Supreme Court should arbitrarily refuse to decide a case within the time limited by the Constitution, no one would contend that the judge of the trial court, whose decision is under review, could compel action by issuing the writ of mandamus at the instance of either litigant. This is so for the reason that the writ issues only from a superior court to an inferior court to do those acts which clearly appertain to their duty. The very etymology of the word "mandamus—we command"—implies superior power, the power of a superior authority to compel an official or inferior judicature to act. The same reason which prohibits an inferior court from controlling the conduct of a superior tribunal applies just as cogently to the effort of one judge to compel the action of another judge of co-ordinate jurisdiction and power. The statute requires a judge of the superior court to decide a motion for a new trial within a specified time, yet no one would contend that a judge of another circuit had such supervisory power as to compel his action by mandamus. The question was squarely before the Alabama Supreme Court, in *State ex rel. Thompson v. Circuit Judge of Mobile*, 9 Ala. 338, where it was held that where the statute imposes the duty, not upon the individual, but upon the officer, in the absence of an express statute, one circuit judge has not the power to issue a mandamus to another circuit judge. The incorporation of a town or village is not by the judge sitting as an individual, but by the superior court. Pol. Code 1895, §§ 685-687. A part of this machinery consists of a petition filed in the superior court. The Code sections contemplate a vote by the qualified voters of the territory to be included in the proposed town, and a certificate of the result, by the managers of the election to "the superior court of the county in case a majority of all the qualified voters residing within such boundary shall vote in favor of such incorporation." Then follows section 687, which provides that "upon the filing of such certificate, the superior court shall, by an order, direct the clerk of said court to issue a certificate of the incorporation of such town or village," etc. It seems clear to us that the purpose of the Legislature was to confer upon the superior court power and authority to incorporate towns or villages. For the purpose of this argument it is immaterial whether the power was conferred on the court or the judge thereof as an officer. Certainly it was not conferred upon the individual temporarily filling the judicial office to act as an individual. The action which applicants for incorpo-

ration desired the judge to take was official, was the performance of an act as judge of the superior court. In our judgment one judge of the superior court cannot issue a mandamus to another judge of the superior court to compel the performance of an official act.

But it may be argued, if the applicants for incorporation are denied this particular remedy, they will be without any, inasmuch as the Supreme Court cannot issue a writ of mandamus in a case of this character (*Central R. R. v. Miller*, 91 Ga. 83, 16 S. E. 256), nor review by writ of error the action of the superior court granting or refusing a charter (*Mangham v. Mallory*, 128 Ga. 430, 57 S. E. 638). We reply in the language of Mr. Justice Crawford, in *Russell v. Cooley*, 69 Ga. 218: "The same difficulty would arise, and the citizens be equally remediless, if the judge were to refuse to hold his courts, refuse to punish persons convicted of crime, or discharge any other official duty incumbent upon him. The remedy in all such cases lies in impeachment." There may be found some loose obiter dicta among our decisions not entirely harmonious with our conclusion, but we think that no case will be found where the point decided conflicts with what we rule in this case.

Judgment affirmed. All the Justices concur.

(129 Ga. 154)

# RUSSELL v. EQUITABLE LOAN & SECURITY CO.

(Supreme Court of Georgia. Oct. 5, 1907.)

## WRIT OF ERROR—DIVIDED COURT—AFFIRMANCE.

This case being for decision by a full bench of six justices, and the justices being equally divided in opinion, the judgment is affirmed by operation of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4421-4427.]

Fish, C. J., and Lumpkin and Evans, JJ., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Lewis C. Russell against the Equitable Loan & Security Company. Judgment for defendant, and plaintiff brings error. Affirmed by divided court.

Lewis C. Russell instituted suit against the Equitable Loan & Security Company, a corporation, in the superior court of Fulton county. In the petition it was alleged, among other things, as follows: "(2) That your petitioner is the holder and owner \* \* \* of four certificates, numbered 740, 742, 743, and 745, respectively, class A. (3) By the terms of said certificates, the Equitable Loan & Security Company agreed, undertook, and obligated itself to pay \* \* \* the sum of \$505.54 upon each of said certifi-

cates, making \$2,022.16, should the holders of each of said certificates pay as specified therein 130 monthly installments of \$1.25 each upon each certificate. (4) The said certificates are identical in form; \* \* \* the only difference being that each certificate shows its proper number, and a copy of one of said certificates is hereto attached as a part of this petition, and marked 'Exhibit A.' (5) Your petitioner shows that upon his part he has fully complied with each and all of the stipulations, conditions, and requirements devolving upon him under said contract. (6) Having paid all dues and charges according to the requirements mentioned in paragraph 3, the said company is indebted to him in the sum of \$2,022.16. (7) The said Equitable Loan & Security Company refuses to pay said sum of money according to its undertaking and obligation, though requested so to do and in duty bound thereto. \* \* \* Other allegations were made which involved certain certificates known as "Class B"; but, as the judge did not pass upon them, it is unnecessary to set them out.

Exhibit A, which is referred to in paragraph 4 of the plaintiff's petition, is as follows:

"United States of America. Incorporated under the laws of the state of Georgia. Equitable Loan & Security Company. Atlanta [\$505.54] Georgia. Class A. No. 2,049. The Equitable Loan & Security Company of Atlanta, Georgia, promises to pay to — of —, Georgia, or order, at its home office in Atlanta, Ga., five hundred and five dollars and fifty-four cents (\$505.54) upon the following express terms and conditions: (1) That there shall be paid by the holder to the maker hereof, at its home office in Atlanta, Georgia, without any other or further notice, an installment of one dollar and twenty-five cents (\$1.25) on the fifth day of each and every succeeding month hereafter until one hundred and thirty installments shall have been thus paid, time being of the essence of this contract. (2) That the holder hereof shall surrender for cancellation this certificate whenever the same shall be called, upon the payment to him of its then redemption value, the maker reserving the right to call and pay the same before maturity under the following rules and regulations. Certificates paid before maturity shall be paid in the following order, to wit: The first paid shall be No. 1, the second paid shall be No. 3, the third paid shall be No. 9, the fourth paid shall be No. 2, the fifth paid shall be No. 6, the sixth paid shall be No. 18, the seventh paid shall be No. 27, the eighth paid shall be No. 4, the ninth paid shall be No. 12, the tenth paid shall be No. 36, and so on, according to the table which is printed on the back hereof, and which table is hereby referred to and made a part of this contract. (3) That the redemption

value of this certificate, if paid prior to its maturity, shall be fifteen dollars, if paid one month after date eighteen and  $\frac{5}{100}$  dollars, if paid two months after date twenty-one and  $\frac{11}{100}$  dollars, if paid three months after date twenty-four and  $\frac{18}{100}$  dollars, if paid four months after date twenty-seven and  $\frac{26}{100}$  dollars, if paid five months after date thirty and  $\frac{35}{100}$  dollars, if paid six months after date, and so on, the redemption value increasing three dollars with each installment paid, besides interest at the rate of 4 per cent. per annum on the redemption value of said certificate for the month next preceding the date of redemption hereof.

(4) That of each and every installment paid as aforesaid the maker hereof shall place twenty-five cents to a reserve fund, which shall be used and held for the protection of all live outstanding certificates issued by this company, and seventy-five cents to a redemption fund, which may be used as follows:

(a) For paying certificates issued by this company in order and manner that they shall mature. (b) For paying off and retiring certificates prior to their maturity according to the terms hereinbefore stated. (c) For paying the heirs, executors, or administrators of any deceased holder hereof the sum that installments paid by such deceased may have contributed to the redemption and reserve funds, provided said certificate is in full force at death of holder, and satisfactory proof of such death is furnished the maker hereof within sixty days after death occurs, and the remaining twenty-five cents and all transfer fees shall be used for the expenses of said company. (5) That a failure to pay any one of said installments when due subjects the holder hereof to a fine of fifty cents, which, together with the omitted installment, must be paid by the fifth day of the next succeeding month, and, if said installment and fine are not paid within the said time, then this certificate shall be null and void and of no value, and the holder hereof forfeits all payments and fines, provided, however, that this company will reinstate said certificate at any time within three months after such forfeiture, upon the holder hereof first paying all dues hereon, together with fines assessed at the rate of fifty cents for each payment in default. If this certificate shall, according to the plan of redemption herein stated, become payable after it shall have been forfeited and before its reinstatement, then it shall be entitled to payment the next month after its reinstatement, and provided, further, that after six monthly installments shall have been paid in the manner herein provided, and all other stipulations herein shall have been fully complied with by the holder hereof and such holder shall thereafter default in any subsequent installment, the maker agrees to issue to such defaulting holder a new certificate, which shall bear the next unsold num-

ber for an amount equal to the payments made on such defaulted certificate, less the amount deducted for expenses, which new certificate thus issued, shall be nonassessable, and shall bear interest at the rate of 4 per cent. per annum and shall be payable in its regular order as per plan of redemption herein stated, provided application for such new certificate shall be made to the home office of the company, and the old or defaulted certificate surrendered within three months after such defaulted certificate shall be canceled on the books of the company. (6) That all receipts and fines shall be paid into the redemption fund. (7) That the contributions to the reserve and redemption funds may be loaned to the holders of certificates issued by this company upon terms and security to be accepted by the board of directors, provided that not more than one hundred dollars can be loaned on account of any one certificate and no loan can be made for a longer time than five years. (8) That after the reserve fund shall have reached the sum of one hundred thousand dollars, the interest earnings therefrom may at the option of the board of directors of this company be applied to the redemption of certificates then in force issued by this company. And, when the reserve fund shall have reached the sum of two hundred thousand dollars, then 50 per cent. or any other portion or all the further current contributions thereto may be applied to the redemption of certificates in force in like manner with the interest thereon when the board of directors shall so authorize. (9) That no transfer of this certificate shall be valid or binding on the maker hereof, until such transfer has been made in writing hereon, and the same duly recorded on the books of the company at its home office, and for each transfer a fee of one dollar must be paid before a transfer will be made. (10) That each and every transferee of this certificate accepts it subject to all the stipulations herein. (11) That no statement made by any one except as herein set forth shall be binding on this company. (12) That no part of the reserve, redemption, or other funds shall ever be loaned to any officer or director of this company. (13) That no part of the reserve and redemption fund shall be loaned, except (a) upon improved real estate within the incorporate limits of the city in which it is located, and then not in excess of 50 per cent. of its cash market value; (b) upon government, state, county, or city bonds that have never defaulted the payment of interest, and this provision can never be changed, except by the consent of every holder of live certificates issued by this company in class A. In witness whereof this company has caused this certificate to be executed in its name and behalf under its corporate seal and by its president and secretary. This — day of —. Equitable Loan & Security Co., by H. E. W. Palmer, President, Jno. S. Owens, Secretary."

On the back of the certificate appears the following:

Table Referred to in Body of This Certificate.  
(Read from left to right.)

Numerical column.		First multiple column.		Second multiple column.	
No.		No.		No.	
Pay first	1	then	2	then	3
then	2	then	3	then	4
then	4	then	12	then	27
then	5	then	15	then	36
then	7	then	21	then	45
then	8	then	24	then	54
then	10	then	30	then	63
then	11	then	33	then	72
then	13	then	39	then	81
then	14	then	42	then	90
then	15	then	45	then	99
then	17	then	51	then	108
then	19	then	57	then	117
then	20	then	60	then	126
then	22	then	66	then	135
then	23	then	69	then	144
then	25	then	75	then	153
then	26	then	78	then	162
then	28	then	84	then	171
then	29	then	87	then	180
then	31	then	93	then	189
then	33	then	99	then	198
then	34	then	102	then	207
then	35	then	105	then	216
then	37	then	111	then	225
then	38	then	114	then	234
then	40	then	120	then	243
then	41	then	123	then	252
then	43	then	129	then	261
then	44	then	132	then	270
then	46	then	138	then	279
then	47	then	141	then	288
then	49	then	147	then	297
then	50	then	150	then	306
then	53	then	156	then	315
then	53	then	159	then	324
then	55	then	165	then	333
then	56	then	168	then	342
then	58	then	174	then	351
then	59	then	177	then	360
then	61	then	183	then	369
then	63	then	189	then	378
then	64	then	192	then	387
then	65	then	195	then	396
then	67	then	201	then	405
then	68	then	204	then	414
then	70	then	210	then	423
then	71	then	213	then	432
then	73	then	219	then	441
then	74	then	222	then	450
then	76	then	228	then	459
then	77	then	231	then	468
then	79	then	237	then	477
then	80	then	240	then	486
then	83	then	246	then	495
then	83	then	249	then	504
then	85	then	255	then	513
then	86				
then	88				
then	89				
then	91				

And so on.

The prayer of the petition, among other things not necessary to state, was for a judgment for the amount due upon the certificates. Upon the hearing, the defendant demurred on eight grounds, of which the substance of the last only need be stated, for the reason that the court placed its ruling solely upon that ground, which presents the only question which is argued by counsel. That ground is as follows: "Defendant demurs generally to said petition upon the ground that said certificates A show upon their faces that the contract evidenced by them is illegal and contrary to the public policy of this state, being in the nature of lottery contracts, which being true, a court of equity will not render its aid, either directly or indirectly, for their enforcement or collection." Upon consideration the court passed the following order:

"After hearing argument of counsel on the foregoing demurrer, it is ordered that ground No. 8 be sustained and the case dismissed, it having been stated by counsel for the plaintiff on the hearing that all matters connected with certificates B had been adjusted, and the judgment was claimed only on certificates A."

The plaintiff excepted.

Anderson & Anderson, for plaintiff in error.  
Peoples & Jordan, for defendant in error.

ATKINSON, J. This is a suit for the recovery of the amount promised to be paid according to express stipulations by the Equitable Loan & Security Company, made in its certificates known as "Class A." There were no allegations in the plaintiff's petition showing the character of the company's business, its charter powers, the purpose of its organization, its assets or liabilities, or manner of transacting business. The petition consisted of a full recital of the contents of the certificates sued upon, and allegations to the effect that the plaintiff had paid the certificates to maturity in accordance with their stipulations, and that the company had refused payment in accordance with its promises. With nothing else appearing in the petition, the trial court sustained that ground of the defendant's demurrer, in which the position was taken that the petition showed upon its face that the certificates declared upon were in the nature of a lottery, and for that reason were contrary to public policy, and collection could not be enforced. Exception was taken to that ruling, and we have nothing else for consideration. Similar certificates were involved in the case of *Equitable Loan & Security Company v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177, but for sufficient reasons this court, in express terms, eliminated class A certificates from the ruling therein made. See page 649 of 117 Ga., page 341 of 44 S. E. (62 L. R. A. 93, 97 Am. St. Rep. 177). Certificates of classes A and B are set forth in the majority opinion in that case. A careful examination will show that the substantial difference between the two classes consists of a difference in arriving at redemption values to obtain in the event the company elects to redeem before maturity. In class A the value is fixed at certain specifically named sums, if redeemed at certain times. See condition 3 in class A, page 644 of 117 Ga., page 339 of 44 S. E. (62 L. R. A. 93, 97 Am. St. Rep. 117). In class B the values of redemption at specified times are not specifically named, but the method of ascertainment is given; that is to say, the redemption value at any given time before maturity is "the full amount of the first payment and all installments paid hereon, with interest on said amount at the rate of 8 per cent. per annum, and its proportionate share of all dividends or accumulations from fines, lapses,

and interest earned in excess of 8 per cent. per annum." See condition 2 in class B, page 650 of 117 Ga., page 341 of 44 S. E. (62 L. R. A. 93, 97 Am. St. Rep. 117). Dealing with this provision in class B certificates, the majority, admitting for the sake of the argument that the element of chance entered into the certificates, for reasons fully set forth by Mr. Justice Cobb in the opinion, held that there was no element of prize, and consequently the certificates of that class were not unlawful. Chief Justice Simmons and Mr. Justice Lamar, dissenting, held that in class B, as well as in class A, certificates, under the evidence submitted, the elements of prize and chance appeared, which rendered both classes obnoxious to the laws of this state. The court was unanimous in the conclusion that in order to render the certificates of either class lottery contracts, and for that reason obnoxious to the laws of this state, there must be somewhere in the enterprise union of three elements, to wit: (a) Consideration; (b) chance; (c) prize. The evidence is not before us which in that case played an important part in inducing the conclusions expressed both in the majority and dissenting opinions. What we shall say will deal with the case on demurrer, and refer strictly to the pleadings construed in the light of our statutes. The Penal Code of 1895 of this state (section 406) provides that "if any person, either by himself or his agent, shall sell or offer for sale, or procure for, or furnish to, any person any ticket, number, combination, or chance, or anything representing a chance in any lottery, gift enterprise, or other similar scheme or device, whether such lottery, gift enterprise, or scheme shall be operated in this state or not, he shall be guilty of a misdemeanor." Section 407 provides that "no person, by himself, or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing." These statutes are directed against "lotteries," gift enterprises, or other similar schemes.

In a lottery there must be union of the three elements, consideration, chance, and prize. *Equitable Loan & Security Company v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177. A "gift enterprise" is a sporting artifice by which, for example, a merchant or tradesman sells his wares for their market value, but, by way of inducement, gives to each purchaser a ticket which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery. See *Meyer v. State*, 112 Ga. 23, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17. As the gift enterprise contemplates lottery and lottery involves chance, it follows that the element of chance is an essential of a gift enterprise. The expression "similar schemes," as used in these statutes, necessarily refers to schemes like lotteries or gift enterprises, and consequent-

ly the element of chance is essential to their existence. These code sections 408 and 407 of the Penal Code of 1895 are to be construed together, and the use of the word "hazard," as employed in section 407, emphasizes the construction which we have given. If the contracts are not forbidden under the express terms or policy of those statutes, the court should not, on account of them, refuse, in a proper case, to require their enforcement. As "chance" is an essential element in either a "lottery," "gift enterprise," or "other similar scheme," it is proper to inquire: What is "chance" as contemplated in these statutes? The chance here referred to is that chance which is employed in connection with lottery schemes, where the attempt is to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. If the result in a given transaction could be accomplished or foretold by the exercise of skill or foresight, its ascertainment would not be attributed to chance, but to the exercise of skill or foresight, and consequently to design. Chance and design are exactly opposite, and the presence of either will exclude the other. Where design enters into a transaction, it immediately partakes of the nature of contract, and will be governed by other principles. In the gaming sense there is no chance whatever where either party has means of knowing the result at the inception of the wager. There may be fraud, but not chance. Such is the element of chance as contemplated in the statutes which we have quoted. The International Dictionary gives the general definition of chance as "the unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune." 6 Cyc. p. 890, defines chance thus: "Possibility; hazard; risk; or the result or issue of uncertain and unknown conditions or forces neither understandingly brought about by one's act nor pre-estimated by one's understanding." Illustrative of the definitions given, the case of *Meyer v. State*, supra, is in point. There a slot machine was employed. Whether a prize would be won or not depended upon an unknown display of cards which the machine would make. In several of the cases cited in the opinion other devices were employed, but each was of such character as to eliminate the idea of arriving at the result by human design. So in the case of *Homer v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237. That case involved the sale of certain bonds issued by the Austrian government, which were to be paid at some period between 1 and 30 years after date, the date of payment to be ascertained by reference to the arbitrament of a wheel. In that case, the court, on page 462 of 147 U. S., on page 414 of 13 Sup. Ct. (37 L. Ed. 237), approvingly quoted from *Bullock v. State*,

73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 359, where it was said: "The investment may run 1 year or it may run 30 years, according to the decision of the wheel. It cannot be said that this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency."

It was not the mere contingency but the method of settling the contingency, that introduced the objectionable element of chance. Wherever it is sought to employ the element of chance in any kind of lottery or gambling scheme show is made of an attempt to displace the exercise of human design, and employ in its stead some uncertain scheme or device, which, uninfluenced by any possible design of the parties, may, according to mere blind luck, designate a particular result. Inasmuch as chance is an element of lottery, we frequently find illustrations of the meaning of chance made in the decision of lottery cases. The note found on page 168, which follows the decision of the case of *People v. Lavin*, reported in 1 American & English Annotated Cases, p. 165, is in point. There it is said: "If success in a guessing contest depends upon an exercise of judgment and the power of calculation, there can be no lottery. *Barclay v. Pearson* (1893) 2 Ch. 154. Thus it has been held that a reward offered by a newspaper for the successful guessing of the winning horses in a race is not a lottery. *Caminada v. Hulton*, 17 Cox C. C. 307; *Stoddart v. Sagar* (1895) 2 Q. B. 474. Neither is horseracing for a stake a lottery. *People v. Fallon*, 152 N. Y. 12, 46 N. E. 302, 37 L. R. A. 419, affirming 4 N. Y. App. Div. 88, 89 N. Y. Supp. 865; *Matter of Dwyer* (Supm. Ct. Spec. T.) 14 Misc. Rep. (N. Y.) 204, 35 N. Y. Supp. 884. Similarly betting on a horse race or other contests of skill cannot be considered a lottery. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47, explained in *People v. Elliott*, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640. Where a prize was to be awarded to the one who guessed the weight of a mass of soap, it was held that there was no lottery. *Dunham v. St. Croix Soap Mfg. Co.*, 34 N. Bruns. 243. The offer of a prize for the most suitable name for a town, to be determined by a committee on its own judgment, has been held not to constitute a lottery. *Holt v. Wood*, 14 Pa. Co. Ct. R. 499. Whether the guessing in contests for prizes is dependent on skill and judgment to such an extent as to remove the transaction from the realm of chance must depend upon the circumstances of such case." Applying the absence of human design test to certificates of class A, what are the recitals of the certificates which affirmatively show the element of chance? It does not appear that the certificates were issued in the first instance in pursuance of any plan involving any kind of

contingency or uncertainty. It does not appear how they were issued. In the absence of anything to show affirmatively that the original holder obtained his certificates by any uncertain plan or other contingency, it will not be presumed that he did obtain them in such manner. It does not appear therefore, that there was any chance involved in the issue of the certificates. If not issued in pursuance of a plan involving chance, the mere fact of the right of the company to redeem according to the table of multiples would not introduce the element of uncertainty. The holder of a given certificate designated by a number would know as certainly the order in which it would be paid under the table of multiples as if they were to be redeemed in numerical order. For example, the holder of certificate No. 9 would know from the express terms of the certificate that, in the event the company should elect to call certificates for redemption, No. 9 would be the third in order for redemption, just as he would have known that No. 3 would have been third in order, if the plan of redemption had been in numerical order. The redemption values at all periods of redemption are certain and stipulated. The holder has nothing to do in order to preserve the life of his certificate, except pay his dues at the several times specified. It does not appear that the company is dependent upon subscription or lapsing of other certificates for money with which to redeem. The company may employ certain portions of the money arising from subscriptions and lapses to the redemption of redeemable policies (see conditions Nos. 2, 4, 6), but it nowhere appears that it is dependent upon that source of income. In the absence of something shown to the contrary, it will be presumed that the company has a legitimate business, and that its earnings from that business will authorize the payment of the redemption values promised to be paid. The recitals of the certificates are not such, upon the face, as to overcome that presumption. But it is insisted that the element of uncertainty is introduced by reason of the stipulations made in condition 5. For example, if there were no forfeitures or lapsing of any certificate, No. 9 would be third in order for redemption, while, if certificates Nos. 1 and 3 should lapse, No. 9 would be first in order. This presents only a contingency expressly created by contract and in full contemplation of the parties, and does not manifest that character of uncertainty which shows an absence of design.

Forethought, consent, and design of the parties are manifest throughout the transaction. As a reasonable business proposition, and creation of the contingency and likewise its settlement were in advance expressly provided for by contract. Not in any sense were the creation or settlement submitted to the arbitrament of a machine or any other mere scheme of uncertainty. If the contin-

gency happens which was provided for by contract, which advances the order of redemption of a given certificate from a lower to a higher rank, there is nothing else to be done to accomplish the advancement. The advancement goes by force of the contract. Many forms of insurance policies and other classes of contracts which are upheld everywhere may be found to embody stipulations as closely kindred to chance as the provisions of certificates of class A. The case of *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, involves a transaction which was held to be a lottery; Justice Peckham dissenting. In view of what has been said, we do not deem it necessary to comment upon that case. We only suggest that it is not controlling here, and that the decision there rendered was after a full hearing of all the facts, and not upon demurrer as in the present case.

Thus far we have dealt only with the element of chance; and, in order not to be misunderstood with respect to prize, we may, in the light of what has been said, make a few references to that element of a lottery. It is not mere value of the thing to be obtained that makes it a prize. Chance is a condition precedent to the existence of prize. A stipulation to furnish an article, however valuable, would not impress the article with the character of prize. The transaction would be merely contractual. But the same article, not obtained by stipulation, but through some scheme of mere chance, founded upon consideration, would impress the article with the character of prize. As the element of chance does not appear from the face of the pleadings, it follows that the element of prize is also absent, so far as the pleadings disclose. The pleadings in the case before us failing to show upon the face that the certificates involved the element of chance or prize, the court was not justified in dismissing the suit upon demurrer.

I am authorized to say that Presiding Justice OOB and Associate Justice BECK concur in the views above presented.

LUMPKIN, J. I cannot concur in the views expressed by Mr. Justice ATKINSON. The fallacy underlying the opinion of my learned Brother is that it deals with the certificates sued on as single, separate contracts, disconnected from the general plan of operation of the company which they disclose. On the face of each certificate it is evident that it was only one of many, which it was contemplated should be issued as a part of a general scheme. The nature of the scheme sufficiently appears, in my opinion, to show its illegality. From the face of the certificates the following facts may fairly be said to appear: The company exercised the business of issuing certificates like these in large numbers. Those on which the suit was brought are of a class known as "Class A." The plan was for the subscribers to pay, on



each certificate, \$1.25 per month for 180 months. Of each installment 25 cents was used for expenses, leaving \$1 net to be used by the company, or an aggregate for the whole time of \$180. Of each \$1 thus paid in 25 cents was placed in the reserve fund, for the protection of live outstanding certificates. This was all which was required to be thus held. The other 75 cents was to be carried to a redemption fund. This could be used to pay off certificates maturing, or before maturity, according to a multiple table presently to be referred to, or for returning the \$1 per month to representatives of deceased certificate holders. The contributions to the reserve and redemption funds might be loaned to certificate holders upon their certificates, or they might be loaned with real estate or bonds as security. For these installments the company agreed to pay to the holder, at the end of the period, \$505.54. Certificates could be called in before maturity. Certificates paid before maturity were to be paid in the following order: First No. 1, then No. 3, then No. 9, then No. 2, then No. 6, then No. 18, and so on indefinitely under a multiple table based on 3. If paid prior to maturity, the redemption value should be \$15 if paid in one month after date, \$18.05 if paid in two months, \$21.11 if paid in three months, and so on; the redemption value increasing \$3 with each installment paid, besides interest at 4 per cent. on the redemption value for the preceding month. For a failure to pay installments on any certificate, a forfeiture would result. Thus, omitting the expense item, the plan or scheme was to promise large numbers of people \$505.54 for each \$180 paid in monthly installments during 180 months (ten years and ten months) or nearly 390 per cent. of the total payments (about 70 per cent. per annum on the amount for the average time of the payments); or, to those who should be paid off by the use of the multiple table, \$15 for a total of \$1.25 paid in, if the certificate should be paid in one month, or 1,200 per cent. of the amount paid in, 1,500 per cent. of the \$1 having an earning capacity. Other fixed sums would be paid at times later than the first month, all entirely without regard to what the money paid in might earn. If they loaned out the money in the reserve or redemption funds, in this state they could only lawfully charge 8 per cent. per annum interest, while they promised the enormous percentages above mentioned. Whence were they to come? If all remained in, nothing short of a financial miracle could make payment possible. It was alone through lapses of many that some could hope for redemption. These lapses played a double part in the transaction: (1) The whole scheme evidently looked to the uncertain chance of the ruin of some for the possibility of complying with the promise to others. It was based and founded on the possibility of lapses. This is a wholly different thing from a life insurance company, which lays aside a

reserve that, at some reasonable and fixed rate of interest, is estimated to accumulate enough to meet the policy at maturity, according to tables of expectancy. The states generally, if not universally, by statute now require this to be done. Lapses may add to profits, but are not the *sine qua non* in any legitimate business. Nor is there any analogy between such a scheme and the contracts of indemnity involved in fire, marine, or accident insurance. (2) The effect of lapses on the numbers of the certificates to be called in under the multiple table is to create a mere hazard or chance. To take a simple illustration: Let us suppose that at the end of five months after starting, for the first time a payment was to be made of 20 certificates—which would they be? By the table Nos. 1, 3, 9, 2, 6, 18, 27, 4, 12, 36, 5, 15, 45, 54, 7, 21, 63, 8, 24, 72. Suppose five of these had lapsed (say 1, 12, 8, 24, and 72), then five others would have to take their places, and thus become subject to redemption by the accident of lapses before other certificates of earlier date. The regular numerical order of issuance did not fix the order of payment. And the multiple table was subject to shifting and uncertainty by lapses. It is said that there is no evidence here that the purchasers took the certificates in numerical order, and could not select the number desired, so as to choose a number subject to redemption by the table. It does not clearly appear that this was universally true; but there is an indication that such was generally the case, and that under some circumstances it was certainly so. In the fifth paragraph of the certificate it was provided that after six installments had been paid, if a default should then take place, the holder might apply within a limited time, surrender his old certificate, and have a new one issued to him for the amount paid in, less the amount carried to expense fund, "which shall bear the next unsold number." This indicates that the certificates sold were numbered in regular order. If the one thus numbered happened to be named in the multiple table as subject to early redemption, no other purchaser could choose and buy it. If it happened not to be so, the taker could not ask for a different number.

But it is said that the language of the certificate as to redeeming and paying the arbitrary amounts fixed (prizes) was permissive. While the words are permissive in form, it is palpable that the scheme was to hold out early redemption at arbitrarily large amounts as a method of doing business. After deducting 25 per cent. from each installment paid for expenses, of the remaining \$1 it was declared that 75 cents should be placed to "a redemption fund." What is a redemption fund, if not a fund with which it is intended to redeem? What was the meaning of declaring that the redemption value of a certificate "shall be fifteen dollars if paid one month after date," if it was not intended to hold out a possible redemp-

tion in one month? How? By the use of the multiple table and possible lapses. True it is said that the redemption fund "may be used" to pay for redeeming before maturity. But it is also said that the fund "may be used" to return to the estate of a deceased certificate holder the amount paid in by him (less the expense deduction). Suppose that the administrator of such decedent should call for his money within the time limited, would it be any answer to say to him, "We merely said we 'may' pay you, not that we would do so." Or suppose that a lottery company should issue tickets stating that they "may" have drawings, not positively that they will do so, would this be any reply to a charge that they would be conducting a lottery scheme?

In *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177, the nature of this company and of its certificates were fully considered. Certificates like the one now before us, belonging to class A, were practically treated as unlawful both by the majority and the minority of the court (pages 602 [1], 652 of 117 Ga., pages 321, 342 of 44 S. E., 62 L. R. A. 93, 97 Am. St. Rep. 177), though the majority of the court did not pass upon the question. The main point of difference was whether a new series of certificates, known as "Class B," issued after the United States mails had been closed to class A, was legal or not. Three of the Justices held that they were. Two dissented. One was absent. The writer of this, then on the bench of the superior court, wrote an opinion, expressing his views, which will be found published in 117 Ga. 604, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177, et seq. In that case the facts were more fully developed by evidence than they here appear; but under what was there said and the authorities cited I am of opinion that enough appears to hold that this scheme was a lottery, or at least a similar scheme or device, and contrary to public policy. In the case just referred to, Mr. Justice Cobb, in delivering the opinion of the majority, said of certificates of class B (page 660 of 117 Ga., page 346 of 44 S. E., 62 L. R. A. 93, 97 Am. St. Rep. 177): "If under the contract no certificate can ever be called for redemption until it has earned at least 8 per cent., then there is no element of prize in the contract." He construed the certificates of class B not to be subject to be redeemed until they had earned 8 per cent. This cannot be said of certificates of class A. By inference from this statement of Mr. Justice Cobb, there was a prize element in class A. And, if what has been said above, as to the issuing and numbering of the certificates, the chance application of a multiple table thereto, the effect of lapses on the application of the multiple table, and the gathering by chance lapses and distributing by chance numbers, is correct, then the scheme indicated on the face of the certificates was a scheme

or device in the nature of a lottery, and contrary to public policy. It is suggested that the company might have had other money not arising from the sale of certificates, and might use it to meet them at maturity. The reply is that the suggestion goes to the solvency of the company, not to the legality of the scheme of which the certificates sued on form a part. But it may be remarked that the certificates indicate that the company was conducting the business of dealing in these certificates (which I think illegal) for profit, charging 20 per cent. of all installments, and all transfer fees, for expenses. There was nothing to indicate that they did anything else; nor can we well assume or infer from what appears that this scheme was designed as a mode of giving away money outside of that gathered in. Design which distinguishes a legitimate business from an illegitimate one does not mean merely the design to conduct, for a consideration, a scheme of chance, with prizes to the fortunate.

The company has invoked a ruling, by its demurrer, that its class A certificates were illegal; and I think the demurrer was properly sustained. For recent cases on the subject, see *Silver v. Guarantee Investment Co.*, 183 Mo. 41, 81 S. W. 1098; *State v. Nebraska Home Co.*, 66 Neb. 349, 92 N. W. 763, 60 L. R. A. 448, 103 Am. St. Rep. 706, and note; *Stevens v. Cincinnati Times-Star*, 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586.

I am authorized to state that FISH, C. J., and EVANS, J., concur in the views expressed.

(129 Ga. 352)

#### NUGENT v. WATKINS.

(Supreme Court of Georgia. Oct. 8, 1907.)

#### 1. WITNESSES—TRANSACTIONS WITH DECEASED.

The death of the grantor of one of the parties to a litigation in regard to an alleged private way does not render the other party or his agent entirely incompetent to testify as a witness, but only incompetent to testify to transactions or communications with the deceased. Independent physical facts, which do not involve any such communication or transaction, are not within the rule.

#### 2. EVIDENCE—ADMISSIBILITY.

Evidence which tends to establish the issue is admissible, even if not of itself sufficient for that purpose.

#### 3. EASEMENTS—PRIVATE WAYS—PRESCRIPTION—EVIDENCE.

Under a proceeding to cause obstructions to be removed from a private way, based on the act of 1872 (Pol. Code 1895, §§ 678, 679), and alleging solely that the way was one established by prescription for more than 7 years, the applicant is not entitled to a judgment by proof that the road has been in use as a private way for more than a year, and that the owner has closed it without giving to the common users 30 days' notice in writing, in order that they might take legal steps to have it made permanent, as required by section 678 of the Political Code of 1895.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 93.]

**4. WRIT OF ERROR—ASSIGNMENTS OF ERROR.**

An assignment of error, "that said ordinary erred in rendering said judgment of March 15, 1906, denying your petitioner the relief prayed by her," is too general to raise any specific ground of error in rendering the judgment in question, in addition to those pointed out in special assignments of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 2997.]

**5. CERTIORARI.**

There was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action by Eliza Nugent against Sarah E. Watkins. Judgment for defendant, and plaintiff brings error. Affirmed.

Eliza Nugent filed with the ordinary of Richmond county her petition against Sarah E. Watkins, seeking to have obstructions removed from an alleged private way, under the provisions of section 879, Pol. Code of 1895. She alleged that the way had existed, and had been worked and kept open and in repair by her and her grantor, and was in their constant and uninterrupted use, for more than seven years prior to its obstruction. The ordinary, under the evidence, rendered judgment for the defendant. On certiorari his judgment was sustained, and the plaintiff excepted.

Salem Dutcher, for plaintiff in error. Austin Branch and O. H. and R. S. Cohen, for defendant in error.

LUMPKIN, J. (after stating the facts as above). This case is here for the second time. The ordinary dismissed the petition on demurrer. The judge of the superior court sustained his decision. On exception this court reversed the judgment. *Nugent v. Watkins*, 124 Ga. 150, 52 S. E. 158. On the trial, under the evidence, the ordinary found for the defendant. The case was carried to the superior court by writ of certiorari, and from the judgment of that court sustaining the decision of the ordinary it was brought by writ of error to this court.

The assignments of error may be grouped under three heads: (1) Overruling objections to the competency of the defendant and her employé as witnesses, and allowing them to testify as to obstructions placed in the alleged way at different times, in order to show that there had not been seven years' continuous and uninterrupted use of it. Objection was made to this on the ground that petitioner relied on use both by herself and her grantor, Watkins, and that what occurred during his lifetime amounted to transactions with him. (2) Allowing several witnesses to testify that one end of the lane or way had been obstructed for a number of years; that the obstruction consisted of a post put up in the lane and some signs containing the words "Private Lands"—one witness testifying that the

post stayed there for a time, and then some person moved it or took it away, and another that it had remained there. They stated that this end of the alleged way was obstructed before the death of Watkins. The evidence was objected to on the ground of its legal insufficiency to change the character of the way as an established dividing line, or to break the legal continuity of its use. (3) Because "said ordinary erred in rendering said judgment of March 15, 1906, denying your petitioner the relief by her prayed."

1. The death of the grantor of one of the litigants did not render the other and her agent incompetent to testify at all as witnesses, but prevented them from testifying to transactions or communications with the deceased grantor. *Murphy v. Bush*, 122 Ga. 715, 50 S. E. 1004. The fact that she caused obstructions to be placed in the alleged way at different times, and closed the lower portion of it, so as to prevent wagons from going through, and the physical condition of the alleged way, did not constitute communications or transactions with the deceased grantor. The evidence did not show that there was any discussion or agreement in regard to this matter, or that there was any communication or transaction between the defendant and the deceased grantor in connection with it. So far as shown it was merely the independent physical act of the defendant, with which he was in no way connected by communication or action; and it did not even appear that he was present. What has just been said applies even more clearly to the evidence of the defendant's employé, who stated that he had put posts in the lane to block it up three times during the preceding 14 years, and that they would stand for a year or two, except the last, which still remained. Evidently this could not be called a communication or transaction between the employé and Watkins. *Puryear v. Foster*, 91 Ga. 444, 18 S. E. 816; *Trimble v. Mims*, 92 Ga. 103, 18 S. E. 362; *Gomez v. Johnson*, 106 Ga. 513 (1), 32 S. E. 600; *Parker v. Salmons*, 113 Ga. 1167, 39 S. E. 475 (which goes quite far); *Horton, Adm'r, v. Smith*, 115 Ga. 68, 41 S. E. 253 (also a strong case arising prior to the act of 1900). In *Mayfield v. Savannah R. Co.*, 87 Ga. 374, 13 S. E. 459, it was sought to show by the plaintiff, an employé of the railroad company, that while engaged in the discharge of his duties, just as he had put one foot upon the rim of the pilot of the engine, the engineer put on steam and thus caused the engine to jerk, resulting in an injury to the plaintiff. This was a "transaction" in which both the plaintiff and the engineer were engaged, and the plaintiff was incompetent to testify in regard to it after the death of the engineer. The ruling is discussed in *Atlanta, K. & N. Ry. Co. v. Roberts*, 116 Ga. 509, 42 S. E. 753. There is nothing in *Hendrick v. Daniel*, 119 Ga. 358 (1), 46 S. E. 438, or in *Parker v. Ballard*, 123 Ga.

443 (1), 51 S. E. 465, which conflicts with the ruling now made. In her testimony the defendant did make use of the expression, "and Wilson Watkins never objected." Had attention been specially called to this, it should, and doubtless would, have been rejected. But the objection covered a considerable amount of evidence, in which these few words occurred. We do not think this requires a reversal.

2, 3. The petitioner alleged that the private way had been opened and in use continuously for more than seven years. The defendant denied this, and introduced evidence to show that she had caused the way to be closed at different times, so as to prevent wagons passing over it, and that she had had posts erected in it and signs put up declaring it to be private grounds. This evidence tended to sustain her contention, and was admissible. There was no error in refusing to rule out parts of it on the ground that the portions so objected to did not constitute a complete defense. Evidence which tends to establish the issue is admissible, even if not of itself sufficient for that purpose. *Columbus Omnibus Co. v. Semmes*, 27 Ga. 283; *Smith v. Griffin*, 32 Ga. 81; *Walker & Chapman v. Mitchell & Co.*, 41 Ga. 102; *Talbot v. R. Co. v. Gibson*, 106 Ga. 229 (5), 236, 32 S. E. 151. If the admissibility of evidence is doubtful, the tendency is rather to let it in, leaving its weight and efficacy to be judged of afterwards. But the evidence here objected to bore directly upon the issue between the parties.

It was contended that by section 673 of the Political Code of 1895, it is provided that, "when a road has been used as a private way for as much as one year, an owner of land over which it passes cannot close it up without first giving the common users of the way thirty days' notice in writing, that they may take steps to have it made permanent;" that no notice in writing was given, and therefore the closing up or obstructing the private way was unlawful; and that such an obstruction could not interrupt the continuity of the use. It was further urged that the fact that no written notice was given necessitated a judgment in favor of the petitioner, requiring the obstructions to be removed. Whether the method of procedure to have obstructions removed from a private way provided for by the act of 1872 (Pol. Code 1895, § 679) applies only to the private ways mentioned in that act, viz., those which have been in constant and uninterrupted use for 7 years or more without legal steps having been taken to abolish them, or whether this mode of procedure also applies to roads which have been used as private ways for more than a year, as to which it had previously been declared that the owner could not close them up without giving to the common users 30 days' written notice (Pol. Code 1895, § 673) we need not decide. The decisions do not

seem to be quite harmonious on this subject. Some of them deal with the act of 1872 (Pol. Code 1895, §§ 678, 679) without reference to section 673. Others seem to assume that the method of procedure applies to both situations. See *Brown v. Marshall*, 63 Ga. 657; *Powell v. Amoss*, 85 Ga. 273, 11 S. E. 598; *Peters v. Little*, 95 Ga. 151, 22 S. E. 44; *Dodson v. Scarborough*, 110 Ga. 4, 35 S. E. 291; *Buchanan v. Parks*, 111 Ga. 873, 36 S. E. 947; *Kirkland v. Pitman*, 122 Ga. 256, 50 S. E. 117.

If we assume, however, that this method of procedure is applicable both to prevent the closing up of the road used as a private way for more than one year without written notice, and also to remove obstructions from private ways in constant and uninterrupted use for seven years or more, the petitioner cannot proceed on the ground alone that she has a perfect prescriptive right of way, and, failing to establish that, obtain a judgment on the ground that there was no written notice given by the owner of his intention to close up the road. She alleged that the private way in question had been in constant and uninterrupted use for seven years or more. This was denied. She must recover on the case which she made, if at all. If she desires to rely upon the closing of the road used as a private way by the owner thereof without written notice, she should have made proper allegations to invoke the law on that subject. If one alleges the existence of a prescriptive right of way, which is denied, and on this issue alone the case is tried, a judgment ordering the removal of obstructions from such way adjudicates its existence as a permanent, prescriptive way, and is binding as a judgment. If, on the other hand, the allegation is that a road has been used as a private way for as much as one year, and that the owner of the land over which it passes has closed it up without first giving the common users of the way 30 days' notice in writing, in order that they may take steps to have it made permanent, a judgment requiring the obstructions to be removed will not fix the character of the way as a permanent, prescriptive way, but will only prevent the closing up of the road by the owner until he has given the notice. He would still be at liberty to give the written notice and then close up the road, unless, in the meantime, it had been duly established as a permanent way. The results of the proceeding on the one ground or the other are quite different. If it is desired to invoke one law or the other, or both (if both can be joined), the pleadings should be shaped accordingly; and the proper practice would be for the judgment to show upon what it rested. Otherwise, proof of a mere failure to give written notice, under an issue as to the existence of a permanent way by prescription, might result in a judgment in effect declaring a permanent way where none in fact existed. *Gardner v. Swann*, 114 Ga. 304, 40 S. E. 271.

4, 5. A general assignment of error, "that said ordinary erred in rendering said judgment of March 15, 1906, denying your petitioner the relief by her prayed," is too general to raise any specific point for adjudication as to why the ordinary erred in rendering the judgment, in addition to the reasons already specially assigned. If the certiorari as a whole should be treated as raising the question whether the judgment was supported by the evidence, we think it was without merit. The evidence was conflicting. The defendant, among other things, testified that "this lane never has been open for seven years at a time." If there was no such way as the petitioner alleged, putting a second obstruction in it did not create a right where none existed. The ordinary has passed upon the evidence, the judge of the superior court has approved his judgment, and we will not interfere.

Judgment affirmed. All the Justices concur.

(129 Ga. 393)

**ATHENS TERMINAL CO. et al. v. ATHENS FOUNDRY & MACHINE WORKS.**

**ATHENS FOUNDRY & MACHINE WORKS v. ATHENS TERMINAL CO. et al.**

(Supreme Court of Georgia. Oct. 8, 1907.)

**1. MUNICIPAL CORPORATIONS—RAILROADS—USE OF STREETS—RIGHT TO LAY TRACKS.**

A commercial steam railroad company cannot lay a railroad track longitudinally along the streets of a city without the sanction of the General Assembly. This sanction may be given either in the charter of the city or of the railroad company.

(a) Legislative sanction is not contained in the charter of the city of Athens.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1465.]

**2. SAME—CONSENT OF AUTHORITIES.**

Civ. Code 1895, § 2167, par. 5, confers upon a railroad company incorporated under the general railroad law the power to construct its track longitudinally in the streets of a city for lawful use with the written consent of the municipal authorities.

**8. EMINENT DOMAIN—TRACKS IN CITY STREETS—COMPENSATION TO ABUTTING OWNER.**

Although the General Assembly may empower a commercial railroad company to occupy the streets of a town or city with the consent of the municipal authorities, yet such permission is subject to the constitutional restraint that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." If the property of an abutting landowner will be damaged by the laying and use of a track in the street, the railroad company must first pay or tender to such property owner just and adequate compensation for the damages consequential upon the construction of the track and the uses to which it will be put. Upon failure to pay or tender the amount of such damages, equity will enjoin the construction of the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 257.]

**4. SAME—REMEDY OF ABUTTING OWNER—LACHES.**

The facts developed before the judge on the interlocutory hearing were sufficient to support his finding that the plaintiff was not guilty of

laches in applying for the equitable remedy of injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 783.]

**5. MUNICIPAL CORPORATIONS—LAYING OUT OF STREETS.**

The provision in the charter of the city of Athens that the municipality "shall have full power and authority to open, lay out, widen, straighten or otherwise change the streets, lanes and alleys in said city, whenever the said mayor and council shall see proper to exercise said power," is sufficiently comprehensive to authorize a slight deflection of a street near one of its termini.

(Syllabus by the Court.)

Error from Superior Court, Clark County; C. H. Brand, Judge.

Action by the Athens Foundry & Machine Works against the Athens Terminal Company. From the judgment, both parties bring error. Affirmed on both bills of exceptions.

This is an injunction suit, brought by the Athens Foundry & Machine Works against the Athens Terminal Company to restrain the latter from laying its track longitudinally in Foundry street, and from changing the course of Washington and Clayton streets, in the city of Athens. The Athens Terminal Company is chartered under the general railroad law, and owns in the city of Athens three blocks of property on the western side of Foundry street, lying between Broad street and Hancock avenue. The Athens Foundry & Machine Works owns property on the other side of Foundry street. The property of the Athens Terminal Company is intersected by Washington and Clayton streets. Washington street connects with Foundry street at a point opposite the gate which opens into the property of the Athens Foundry & Machine Works. Foundry street is about 40 feet wide. On January 3, 1906, the city of Athens passed an ordinance granting to George J. Baldwin and William W. Mackall, or their assigns, the right to construct a railroad track in Foundry street, to deflect Clayton and Washington streets, and to build warehouses and a freight depot, in accordance with certain plans submitted to the city. Work was begun in accordance with the ordinance within six months from the date thereof, and the property was excavated and graded, and at the time when the injunction suit was brought a large sum of money had been expended on the project. The Athens Terminal Company was chartered under the general railroad law on the 14th day of October, 1906. On January 14, 1907, Baldwin and Mackall transferred to the Athens Terminal Company all of their interests in the franchises granted by the city of Athens, and on April 19, 1907, the city of Athens ratified and confirmed the transfer, and passed an ordinance granting directly to the Athens Terminal Company all of the franchises which had been previously granted to Baldwin and Mackall, upon the same terms and

conditions, with one exception, which is not material to this case.

The ordinance of the city of Athens required the paving of a portion of Foundry street, between Broad street and Hancock avenue, 16 feet in width, so as to leave a 6-foot sidewalk on the side of the street adjacent to the foundry works, and the street being opposite the Athens Foundry & Machine Works property, about 40 feet wide, leaving about 13 feet between the curb of the paved way and the property line of the Athens Terminal Company. The track in Foundry street is to be laid between the property line of the terminal company and the curb of the paved way. The foundry company claims to own a fee in Foundry street only to the center thereof, and the Athens Terminal Company claims to own the fee in the other half of the street adjacent to its property, so that the track, when laid in Foundry street opposite the Foundry Works, will be laid entirely on the fee of the street owned by the terminal company. Both Washington and Clayton streets will be deflected near their intersection with Foundry street, which is the terminus of each street. The ordinance provides that the city will do the necessary grading of Washington and Clayton streets. The Athens Terminal Company will pave those portions of Washington and Clayton streets which run through its property, and will open a new thoroughfare between Broad street and Hancock avenue, on the back of its property, and will pave the same. None of the tracks which lead off from Foundry street into the terminal property will rest on any part of either Washington or Clayton street as deflected, but will be entirely upon the property of the terminal company. The Athens Foundry & Machine Works maintain that the city of Athens has no power to change and deflect Clayton and Washington streets; that it had no power to grant to Baldwin and Mackall the right to lay tracks in the streets; that the city of Athens has no power to grant either to private persons or to a railroad company the right to use the streets; and that the construction of the track in Foundry street and the deflection of Washington street will cause the plaintiff to suffer special damages different in degree and kind from those suffered by the general public.

On the interlocutory hearing the court enjoined the terminal company from constructing and laying its tracks in Foundry street, opposite the foundry company's property, until the terminal company instituted condemnation proceedings and ascertained to what extent the foundry company had been injured, and pay or offer to pay whatever damages may be assessed, and refused to enjoin the deflection of Washington and Clayton streets, and the laying of the track in Foundry street not contiguous to plaintiff's property. Both the plaintiff and defendant

Lawton & Cunningham, H. S. West, and Erwin & Erwin, for plaintiff in error. E. S. Price and Jno. J. Strickland, for defendant in error.

EVANS, J. (after stating the facts as above). 1-2. A commercial steam railroad cannot lay its tracks longitudinally along the streets of a city without the sanction of the General Assembly. This sanction must appear by express grant or necessary implication. *Daly v. Ga. So. R. Co.*, 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286. Legislative sanction to devote a part of a street to railroad use is not given to a city by the grant of a general power to establish, change, and maintain its streets and alleys to a city. Nor is this sanction given by section 17 of the act approved August 24, 1872, amending the charter of Athens (Acts 1872, p. 127): "That in all cases of encroachments on the streets, lanes, or alleys of said city, the mayor and council shall have power to remove the same upon reasonable notice or permit, and sanction same for a fair and reasonable compensation in money, to be paid into the city treasury; said mayor and council having due regard to the interests of property holders who may be affected thereby." *Daly v. Ga. So. R. Co.*, supra. As the city of Athens had no charter authority to consent to the laying of a track longitudinally along its streets, the grant of such power to Messrs. Baldwin and Mackall was an ultra vires act, and void. But after the filing of the petition the mayor and council re-enacted the same ordinance specifically granting to the Athens Terminal Company the same powers, slightly modified, which by ordinance the city had previously attempted to give to Messrs. Baldwin and Mackall. Objection was made to the court considering either ordinance, on the ground that the first ordinance was void, and that the ordinance conferring on the Athens Terminal Company the same powers previously given to Baldwin and Mackall in a void ordinance was passed by the council of the city of Athens after the inception of the litigation, and was neither curative of the void ordinance, nor available in this suit as an independent municipal act. The court properly considered both ordinances as evidence. The last ordinance by express terms incorporated the provisions of the former, and it thus became a part thereof. The plaintiff was seeking to enjoin the Athens Terminal Company from doing the things authorized by the municipal authorities of the city of Athens. Although, at the time the petition was filed, the Athens Terminal Company may have had no right to do any of the acts complained of, for lack of municipal consent, the terminal company could urge, on the interlocutory hearing, the municipal consent procured subsequently to the filing of the petition. It is in the nature of a plea puis darrein continuance.

So we come to the question whether the

city of Athens could confer upon the terminal company the power to lay its railroad track longitudinally in Foundry street. As we have previously adverted, before a commercial railroad company can lay its track along a street in a city, it must have the authority, express or by necessary implication, of the General Assembly. This legislative sanction need not appear from the city's charter. It may be found in the general law, or in the charter of the railroad company applying for the use of the city's streets. *Almand v. Atlanta Con. St. Ry. Co.*, 108 Ga. 417, 34 S. E. 6. The Athens Terminal Company is incorporated under the general railroad law, and has all the powers therein conferred on a railroad corporation. *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624. By Civ. Code 1895, § 2167, par. 5, a railroad company incorporated thereunder is permitted "to construct its road across, along or upon, or to use any stream of water, water course, street, highway or canal which the route of its road shall intersect or touch: provided, no railroad shall be constructed along and upon any street or highway without the written consent of the municipal or county authorities, and whenever the track of any such road shall touch, intersect or cross any road, highway or street, it may be carried over or under, or across at a grade level or otherwise, as may be found most expedient for the public good," etc. This Code section permits the longitudinal use of the street by the railroad company in a proper and lawful manner. *Almand v. Atlanta Con. St. Ry. Co.*, supra. It cannot maintain a nuisance thereon, nor unreasonably obstruct the street, nor use the street as a yard, or for switching and drilling purposes. *Atlantic Ry. Co. v. Montezuma*, 122 Ga. 1, 49 S. E. 738. The terminal company disclaim in its answer any intention to improperly use Foundry street, and the question of improper use will arise only when it makes or attempts to make a use of the track not authorized by law.

3. Although the General Assembly may empower a railroad company to occupy the streets of a town or city with the consent of the municipal authorities, yet such permission is subject to the constitutional restraint that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." While denying that the plaintiff will suffer any pecuniary injury to its property by the proposed improvements, counsel for the terminal company concede the plaintiff's right to recover, in an action of damages, loss or injury, if any, consequential upon the construction of the track and its contemplated use. But they insist that this is the sole remedy, and that the plaintiff has no right to enjoin the prosecution of the work until the damages are ascertained, and compensation therefor paid or tendered. In *City of Atlanta v. Green*, 67 Ga. 386, it was held that prior to the Constitution of 1877, which con-

tains the declaration that "private property shall not be taken, or damaged, for public purposes without just and adequate compensation being first paid," municipal corporations were not liable for consequential damages resulting to property owners from raising or lowering the grade of streets, but were made so by the constitutional provision. Following this case is a multitude of decisions by this court to the effect that consequential damages caused to the property of a citizen by the construction of a public work may be recovered, though no part of his property be actually taken. The meaning of the words "without just and adequate compensation being first paid" came up in *Chambers v. Clin. & Ga. R.*, 69 Ga. 320, very soon after the adoption of the Constitution of 1877. That was the case of a landowner seeking to enjoin a railroad company from proceeding to build its road through his land pending an appeal from the award of the assessors as to the damages; and it was held that the railroad company's effort to take property should be enjoined until it either paid or tendered the just value of the property taken. The fundamental law makes no distinction between damages resulting from the actual taking of the property and damages consequential from the construction of a public work where the property was not actually taken. In either event payment or tender must generally precede construction of work. Shortly after the pronouncement, in the *Green Case*, that if any owner of property be damaged by the grading of a street he may recover for such injury to his freehold, the question arose whether the grading of streets should be suspended by injunction because consequential damages would result to an abutting landowner. In this case (*Moore v. Atlanta*, 70 Ga. 611) it was held that an injunction ought not to be granted to stop the operation of the municipal government and clog its wheels, and that the remedy of the abutting landowner was an action for damages. The reasoning of the court was that, if improvements in the highway were within the constitutional provision as to first paying damages, the power of municipalities to improve its streets would be destroyed, if, before even repairing a street, it must try with every property owner the question whether the improvements would help or hurt him; hence, *ex necessitate rei*, this provision of the Constitution did not apply in the case of consequential damages to an abutting landowner where the city graded its streets to make them more accessible or safer for passageway.

Upon the theory that a street railway is a public convenience for passing along a city's streets, the principle of the *Moore Case* has been extended to street railways. *Brown v. Atlanta Railway Co.*, 113 Ga. 462, 39 S. E. 71. But a commercial steam railroad receives legislative sanction to use a city's streets from altogether different considerations than

those which apply to street railways. The former constitute the great arteries of commerce, and of necessity must have continuous trackage, that they may expeditiously serve the general public in the transportation of passengers and freight. They traverse commercial centers, and are allowed to occupy with their tracks the city's streets, in order that the flow of commerce may not be impeded by breaks in trackage. It would perhaps be less burdensome on the streets of a city to permit their longitudinal use by the railroad company in pulling a train of cars thereover than to transfer the entire railroad traffic, both through and local, over the street in horse-drawn vehicles. Yet the service is not primarily intended to relieve the streets of the burden of travel. On the other hand, by hauling freight and passengers from distant points, commercial railroads subject the streets to additional burdens. Because of this and for other reasons it has been held that the laying of a track upon a street in a municipality for the purpose of operating a commercial steam railroad imposes on the streets an additional servitude. *A. & W. P. Ry. Co. v. A., B. & A. Ry. Co.*, 125 Ga. 530, 54 S. E. 736. One of the purposes of a street railway is to relieve the streets from congestion, by affording more rapid passage. The necessity for the operation of a street railway is largely a municipal problem, to be mainly solved by the municipal authorities. This is recognized by the Constitution (article 3, sec. 7, par. 20), which forbids the General Assembly from authorizing the construction of a street passenger railway without the consent of the municipal authorities. The construction and operation of a street railway was therefore included by the Brown Case in the category of a municipal improvement. Not so, however, with the commercial railroad. It is in no sense a local or municipal affair. The General Assembly has sanctioned its occupancy of a city's streets with the city's consent. The only effect of this legislative sanction is to allow it to pass through a city along a street where the city consents thereto. If it will injure or damage property in its operation, the amount of such damage must be paid or tendered before the work can progress, just as if the question had arisen outside of a city.

It is contended that, as the terminal company and the foundry company own the fee in the street fronting their respective properties, their property lines touch in the middle of the street, and, as the track is to be laid on the half of the street contiguous to the terminal company's property, its construction should not be enjoined, because no part of the Foundry's property will be taken. We have placed our decision on the ground that, with the exception of instances like those in the Moore and Brown Cases, *supra*, the constitutional provision that "private property shall not be taken, or damaged, for public purposes, without just and adequate

compensation being first paid," applies alike to cases where property is taken and where property is not actually taken, but is consequentially damaged by the construction of a public work. It would not require specious argument, however, to support the proposition that to the extent of maintaining the integrity of Foundry street the abutting landowners had such an interest in the whole street that the street cannot be destroyed, or seriously impaired, or subjected to an additional servitude, without adequate compensation is first paid. See *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224. The court found from the evidence that "the construction of the railroad track in Foundry street affects and interferes with the right of egress and ingress to the lot owned in fee simple by the foundry company, which is calculated thereby to inflict an injury to the lot itself." There was evidence to support this finding. "The construction and operation of a railway in a public street is a physical invasion of the easement of access of abutting landowners, and is a damage to the property, within the meaning of the constitutional provision which declares that private property shall not be taken or damaged for public use without just compensation being first paid." *A. & B. Ry. Co. v. McKnight*, 125 Ga. 329, 54 S. E. 148. Hence it was not erroneous to enjoin the laying of the railroad track along Foundry street until the foundry company had been paid or tendered payment for any damages it might have sustained. *A. & W. P. Ry. Co. v. A., B. & A. Ry. Co.*, *supra*.

4. The plaintiff in error further insists that the foundry company was well aware of the plan and purpose of the projectors of the enterprise; that its officers knew the railroad track would be laid in Foundry street; that large sums of money had been expended in the work of the general plan of improvement, with the knowledge of the foundry company and without objection on their part; that for these reasons the foundry company is in laches, and had forfeited its right to invoke the equitable remedy of injunction. "*Vigilantibus non dormientibus jura subveniunt*" is a most salutary maxim of equity. Its inapplicability to the case in hand will be manifest by a reference to the facts appearing in the record. The city of Athens, by an ordinance passed January 3, 1906, granted the privileges now claimed by the terminal company to Messrs. Baldwin and Mackall. This ordinance was void. Work was begun by them about July 1, 1906. The terminal company was chartered October 4, 1906. Baldwin and Mackall did not transfer their rights under the ordinance until about two months before the filing of the petition; and it was a month after the petition was filed before the ordinance was passed which conferred on the terminal company the same rights attempted to be conferred on



Messrs. Baldwin and Mackall. Nothing was done by the foundry company to encourage these operations. On the other hand, the superintendent of the foundry company deposed he did not know the terminal company contemplated a line of railroad track along Foundry street until a few days before the application for injunction. Under these circumstances the judge could well conclude that the foundry company had not waived, by delay, its constitutional right to protect its property by demanding compensation for damages before the construction of the work from which the injury will result. A motion was made to reopen the case because of an alleged misapprehension of fact by the court in announcing its decision on the interlocutory hearing. The court refused to reopen the case, and rendered a written judgment covering the various issues involved in the case. We have discussed these issues, and are in accord with the conclusions of the trial court. There was no error in refusing to reopen the case.

5. It is complained in the cross-bill of exceptions that the court erred in not enjoining the terminal company from interfering with Clayton and Washington streets. These streets afforded communication between Thomas and Foundry streets, which are parallel streets. There are other cross streets connecting Thomas and Foundry streets. The terminal company own the property on both sides of Washington and Clayton streets, where these streets are proposed to be deflected. When application was made for injunction, these two streets had been so graded that they could not be used as connecting Thomas and Foundry streets. The plan of improvements, as outlined in the ordinance of the city council of Athens, did not contemplate the closing of either Clayton or Washington streets, but that the course of the streets should be deflected near their entrance into Foundry street. The charter of Athens provides that "the mayor and council of the city of Athens shall have full power and authority to open, lay out, widen, straighten, or otherwise change the streets, lanes and alleys in said city, whenever the said mayor and council shall see proper to exercise such power." Acts 1887, p. 583. This grant is sufficiently comprehensive to authorize the deflection of a street near one of its termini. *Trustees Atlanta Un. v. Atlanta*, 93 Ga. 468, 21 S. E. 74; *Patton v. Rome*, 124 Ga. 525, 52 S. E. 742. There was evidence before the court that these streets were not intended to be permanently closed, and that the plan of improvement outlined in the ordinance authorizing the improvement was intended to be carried out in good faith; and, as the municipal authorities were empowered by the city's charter to change the course of the street, we see no error in the court's refusal to enjoin the terminal company in this respect.

Judgment affirmed on both bills of exceptions. All the Justices concur, except COBB, P. J., disqualified.

(129 Ga. 363)

## EADY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. Oct. 8, 1907.)

### 1. NEW TRIAL—BRIEF OF EVIDENCE—FILING—APPROVAL.

When a motion for new trial was duly filed during the term at which the verdict was rendered, and at that term the judge passes an order continuing the motion to an indefinite and unnamed day in vacation, but providing that, if the motion was not previously heard in vacation, it should stand on the docket to be heard during the next term of court, and no brief of evidence was filed with the motion, but in the order above referred to it was provided "that movant have until the hearing, whenever it may be," to prepare and present the brief of evidence, and the brief of evidence was not filed until the next term after the order was passed, the court had jurisdiction at that term to approve the brief of evidence and to decide the motion on its merits.

(a) The rulings in *Napier v. Heilker*, 115 Ga. 168, 41 S. E. 689, *Mutual Life Ins. Co. v. Hamilton*, 119 Ga. 340, 46 S. E. 434, and *Broadway National Bank v. Kendrick*, 124 Ga. 1053, 53 S. E. 576, holding that the judge had jurisdiction to approve the brief of evidence and entertain the motion for new trial, are, upon review, adhered to and reaffirmed.

### 2. SAME.

There is nothing in the rulings in the cases referred to in the preceding note which conflicts with the ruling made in *Blackburn v. Alabama Midland Ry. Co.*, 116 Ga. 936, 43 S. E. 366. In that case the original order was granted at the term when the motion for new trial was filed, and fixed a stated day in vacation for the presentation of the brief and a subsequent day in vacation for the hearing of the motion. If the day for the presentation of the brief and the day for the hearing had been the same, or if the motion had been called during term, and not in vacation, the ruling in that case might have been different.

### 3. COURTS—QUESTIONS CERTIFIED FROM COURT OF APPEALS—DETERMINATION.

When the Court of Appeals certifies to the Supreme Court a question asking for instructions as to the validity of a rule nisi in a motion for new trial, the question will be considered and answered in the light of the rule nisi accompanying the certificate.

### 4. NEW TRIAL—HEARING—ACCELERATION.

A motion for new trial being presented to the judge within due time during the term at which the trial was had, and the judge having passed an order providing that "the motion be heard and determined in vacation at such time and place as the court in vacation may fix, upon giving both sides five days' notice of such time and place." \* \* \* If for any reason said motion is not heard and determined at the time and place fixed by the court as above provided, it is ordered that the same shall stand continued and be heard and determined thereafter at such time and place as counsel may agree upon and the court approve of, and, upon failure of counsel to agree, then at such time and place as the judge may in vacation fix upon his own motion or upon the application of either party, of which said time and place both sides or parties shall have five days' notice. It is further ordered that, if for any reason this motion is not heard and determined in vacation before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at the said term thereafter"—*held*, that

the effect of this order was to make the motion for new trial returnable at the next term of the court, but the hearing of the same might be accelerated under the provisions thereof, and such rule nisi was valid.

(Syllabus by the Court.)

Action by S. A. Eady against the Atlantic Coast Line Railroad Company. Verdict for plaintiff. Motion for new trial granted, and plaintiff brings error. Questions certified by Court of Appeals. Questions answered.

Jos. H. Hall, Warren Roberts, and Polhill & Williamson, for plaintiff in error. W. E. Kay, Bennet & Conyers, T. R. Perry, and J. H. Tipton, for defendant in error.

ATKINSON, J. This case was transmitted to the Supreme Court with the following certificate:

"The Court of Appeals desires the instruction of the Supreme Court as to the following questions of law for the proper decision of the above-stated case, to wit:

"(1) At the September term of a city court a motion for a new trial was filed in a case tried at that term of the court. The judge passed an order continuing the motion to an indefinite and unnamed day in vacation, but providing that, if it was not previously heard in vacation, it should stand on the docket to be heard and determined during the next (the December) term of the court. No brief of the evidence was filed with the motion, but in the order above mentioned it was provided 'that the movant have until the hearing, whenever it may be,' to prepare and present the brief of evidence. The brief of the evidence was filed during the December term of the court. The motion for new trial was called to be heard at the following June term of the court. Respondent moved to dismiss the motion for a new trial on the ground that the brief of the evidence was not filed during the term at which the trial was had, nor at any other time when it could lawfully be filed. The judge refused to dismiss the motion, and over respondent's objection approved the brief of the evidence and granted a new trial. Upon the facts above stated, did the trial judge, at the June term of the court, have the jurisdiction, discretion, or power to approve the brief of evidence? Counsel for respondent in the motion, now plaintiff in error, has filed in this court a request to review, modify, and overrule, so far as they interfere with the answering of the foregoing question in the negative, the following decisions of the Supreme Court, to wit: *Napier v. Heilker*, 115 Ga. 168, 41 S. E. 689; *Mutual Life Ins. Co. v. Hamilton*, 119 Ga. 340, 46 S. E. 434; *Broadway National Bank v. Kendrick*, 124 Ga. 1053, 53 S. E. 576. And pursuant to the rule of this court this request is transmitted to the Supreme Court for its action thereon.

"(2) This court requests the Supreme Court to distinguish the decision of the Supreme Court in *Blackburn v. Alabama Midland*

*Railway Co.*, 116 Ga. 936, 43 S. E. 366, from the decisions in the three cases named, and to answer whether that decision is applicable to the facts set out above.

"(3) Is the following a valid rule nisi upon a motion for a new trial: 'It is ordered that the respondent [naming him] show cause before me, at the time and place hereafter fixed in vacation [no time in vacation in fact being fixed], why the foregoing motion for a new trial should not be granted?'

"(4) If the third question be answered in the negative, can the respondent, who during the same term signed the following acknowledgment of service: 'Due and legal service acknowledged on the above and foregoing motion for a new trial, and the rule nisi and order of the court on said motion, and all further service and notice waived'—successfully demand a dismissal of the motion, when finally called for a hearing, on account of the lack of a sufficient rule nisi?'

The order referred to in question No. 3 in its entirety was as follows: "City Court of Sylvester, Worth County, Georgia, Sept. Adjourned Term, 1905. *S. A. Eady v. Atlantic Coast Line Railroad Company*. Suit for damages in the city court of Sylvester, Worth County, Trial Sept. Adj. term, 1905. Verdict and judgment at said term, and on the 13th day of October, 1905, for plaintiff for \$2,500.00. Having read and considered the foregoing motion for new trial in the above-stated case, the grounds of the same are approved and certified as true. It appearing to the court that it is impossible to make out and complete a brief of the testimony in said case before adjournment of this term of court, it is ordered, considered, and adjudged by the court that said motion be heard and determined in vacation, at such time and place as the court in vacation may fix, upon giving both sides five days' notice of such time and place, and the movant may amend said motion at any time before or at the final hearing. If for any reason said motion is not heard and determined at the time and place fixed by the court, as above provided, it is ordered that the same shall stand continued and be heard and determined thereafter at such time and place as the counsel may agree upon and the court approve of, and, upon failure of counsel to agree, then at such time and place as the judge may in vacation fix upon his own motion, or upon the application of either party, and of which said time and place both sides or parties shall have five days' notice. It is further ordered that, if for any reason this motion is not heard and determined during vacation before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term thereafter. It is expressly ordered that, if for any reason the said motion is not heard and determined at the time and place fixed by the court in vacation, the same shall stand continued by direction or consent of the court, without

written order, to such other time and place as the court may direct in vacation, both sides to be given five days' notice of such time and place of the hearing. It is further ordered that the movants have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the judge may enter his approval thereon at any time in term or vacation, and if the hearing be in vacation, and the brief of evidence has not been filed in the office of the clerk of said city court before the date of the hearing and determining by the court of the motion for new trial, said brief of evidence may be filed in the office of said court at any time within ten days after the motion for new trial is heard and determined. It is further ordered that the plaintiff, S. A. Eady, show cause before me, at the time and place hereafter fixed in vacation, why the said foregoing motion for new trial should not be granted. It is further ordered that the plaintiff, S. A. Eady, or his counsel, be served with a copy of the said motion for new trial and this order and rule nisi at least five days before the time fixed for the hearing of said motion for new trial, and that this order shall act as a supersedeas until the further order of the court. Witness my hand and official signature in open court this the 14th day of October, 1905, at 2:45 o'clock p. m. [Signed] Frank Park, Judge City Court of Sylvester, Worth County, Ga."

(2 Ga. App. 475)

**A. G. RHODES & SON FURNITURE CO.  
v. JENKINS. (No. 412.)**

(Court of Appeals of Georgia. Oct. 3, 1907.)

**1. MONEY RECEIVED—WHEN ACTION LIES.**

An action for money had and received lies in behalf of the plaintiff to recover his money in the hands of a defendant who in equity and good conscience has no right to retain the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 1.]

**2. ACTION—CONTRACT OR TORT—WAIVER.**

If one sells the property of another without authority, the owner may waive the tort and sue him for the money. Likewise, if one wrongfully obtains the money of another, he may waive his damages and sue for money had and received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 202.]

**3. EXECUTION—SALE BY CONSTABLE—VALIDITY.**

A constable's sale, not held at the time and place and in the manner provided by law, is void. Civ. Code 1895, § 4166. Where an attachment for purchase money is levied on property to which the plaintiff in attachment has reserved title, the sale is void, unless prior thereto section 5432, Civ. Code 1895, be complied with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 622.]

**4. SALE—CONDITIONAL SALE—SEIZURE BY VENDOR.**

A seizure and illegal sale, and purchase at such sale, of the property by the vendor, who had theretofore sold such property under a conditional contract of sale, effects a rescission of the contract, and the purchaser is entitled to

recover the amount of the purchase price paid by him, less the reasonable value of its use while in his possession.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action by Christopher Jenkins against the A. G. Rhodes & Son Furniture Company. Judgment for plaintiff before a justice was affirmed in the superior court, and defendant brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, C. A. Picquet, and Walter Pearce, for plaintiff in error. Austin Branch, for defendant in error.

RUSSELL, J. The defendant in error, Christopher Jenkins, brought suit in the justice's court against the Rhodes & Son Furniture Company for money had and received, and obtained a judgment in his favor. The furniture company carried the case to the superior court by certiorari, averring that the verdict of the jury in the justice's court was error, because: "(a) It was contrary to the law and the evidence. (b) The action declared upon was for an open account, while, if defendant had any remedy whatever, it was a suit in tort for damages. (c) That under the evidence the suit attached to the summons set forth no cause of action. (d) That the evidence disclosed that an attachment for the purchase money had been brought by petitioner against plaintiff, in the notary public (ex officio justice of the peace) court, 120th district, G. M., of Richmond county, and judgment rendered and property sold under said judgment, and the suit in question was a collateral attack upon said judgment, upon the ground that the property had not been properly sold. (e) That the evidence disclosed that \$33.25 sued for had been voluntarily paid petitioner, without fraud or duress, and therefore could not be recovered." The certiorari, coming on to be heard on February 2, 1907, was overruled and dismissed by his honor, Judge Hammond, of the superior court.

It appears from the evidence in the justice's court that the plaintiff, Christopher Jenkins, purchased from the A. G. Rhodes & Son Furniture Company a lot of furniture on the installment plan. The payments were to be \$1 a week, and the plaintiff had paid \$33. He was behind two weeks in his payments. Defendant's agent demanded the balance. Plaintiff's wife was sick, and he informed the company of this fact. The furniture company refused to wait, and swore out an attachment for the purchase money, under which the property was seized. The plaintiff was absent from his home at the time of the levy, and his wife was sick in bed in confinement and unable to object. Under the attachment the property was sold, part at the court ground, and part at the Rhodes Furniture Company's store. The plaintiff demanded the amount he had paid

of the furniture company, and they refused to pay his money back. Judgment by default was rendered against the defendant on the attachment on June 27, 1906, and the property was sold by the constable, as above stated, and purchased by the A. G. Rhodes & Son Furniture Company themselves on July 25, 1906. The attachment was levied May 18, 1906, and the plaintiff began his suit June 18, 1906. To the suit filed by Jenkins to recover the money paid by him, the defendant set up the attachment proceedings and pleaded it was not indebted to the plaintiff. In other words, it insisted that it was entitled to have both the furniture and the money that had been paid for it. The jury in the justice's court and the judge in the superior court thought otherwise, and we concur in their judgment.

The learned counsel for plaintiff in error argues that "Jenkins admitted that he was in default on the payments—admitted that the property had been seized by a constable. He did not allege or set up any fraud, and his sole excuse for not promptly meeting his payments was that he had had sickness in his family which had interfered with his payments." Counsel in his brief insists that the certiorari should be sustained upon all its grounds, and that the verdict was contrary to law and the evidence. It is insisted that the suit should have been "one in deceit or fraud," and was one improperly brought for money had and received, because the evidence did not disclose any contractual relation by which the furniture company was to refund any of the money. The main contention of the plaintiff in error, however, is that Jenkins' rights, if any, are precluded by the judgment in the attachment proceeding. The action was properly brought for money had and received. This action lies in all cases for the plaintiff's money in the hand of defendant, which in equity and good conscience he has no right to obtain, and it is necessary for the plaintiff to prove only two things—his right to the money, and the defendant's possession. "Whenever the plaintiff could recover in a court of equity, he can recover in an action for money had and received. Chitty on Contracts, 474; 2 Tr. 163; 1 Cowper, Rep. 372; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322. This is also ruled in Culbreath v. Culbreath, 7 Ga. 68, 69, 50 Am. Dec. 375." Phillips v. Crews, 65 Ga. 277. The \$33.25 which the plaintiff had paid the defendant was in the defendant's possession.

The only question, then, was the right of the plaintiff to this money. If the plaintiff showed that he paid the money, he would have the right to require the defendant to account for it and would be entitled to recover, unless the defendant showed cause why he should not refund it. This the defendant attempted to do by evidence of the attachment, judgment, and sale thereunder. If the defendant had shown a proper judgment and

legal sale thereunder, the plaintiff's action would have been defeated; but the sale for two reasons, as shown by evidence, was utterly void. According to the testimony of the constable himself, part of the property was sold at the place of holding justice's court and the remainder at the furniture company's place of business. There was no evidence that the sale took place within the legal hours of sale, or that the advertisement was posted at three public places, as required by law. Civ. Code 1895, §§ 4165, 4166.

The judgment set up by the defendant as a defense was not collaterally attacked, as insisted, but the sale thereunder properly disregarded as void. The contract evidencing the purchase of the furniture by Jenkins is called, throughout, a "rent contract," and all the payments to be made are designated as "rent"; but under the decision in Hays v. Jordan, 85 Ga. 742, 11 S. E. 833, 9 L. R. A. 373, followed in Ross v. McDuffie & Armstrong, 91 Ga. 121, 16 S. E. 648, Blitch et al. v. Edwards, 96 Ga. 610, 24 S. E. 147, National Bank v. Goodyear, 90 Ga. 723, 16 S. E. 962, Halliday v. Bank of Stewart County, 112 Ga. 464, 37 S. E. 721, Glisson v. Heggie, 105 Ga. 33, 31 S. E. 118, Snelling v. Arbuckle, 104 Ga. 366, 30 S. E. 863, and Cottrell v. Merchants' Bank, 89 Ga. 519, 15 S. E. 944, it is not a lease, but a contract of conditional sale, with the title reserved in the vendor; and, no quitclaim conveyance being shown to have been filed and recorded prior to the levy and sale, the sale was for that reason, also, void. Civ. Code 1895, § 5432; Cooper v. Smith, 125 Ga. 167, 53 S. E. 1013; Cade v. Jenkins, 88 Ga. 791, 15 S. E. 292; Glisson v. Heggie, 105 Ga. 33, 31 S. E. 118.

The furniture company elected to rescind the contract and retake the property. The contract was at an end. Having made their election, they could not keep plaintiff's money. He was entitled to recover what he had paid, less a reasonable amount for the use of the property during the time which he had it in possession. The amount to be thus deducted was to be fixed by the jury, and, as the defendant introduced no evidence as to the value of the use, it cannot complain that the jury only made a deduction of 25 cents. It could not complain, in the absence of such evidence, if the jury had made no deduction at all. We agree with learned counsel for plaintiff in error that it is immaterial why the defendant in error defaulted in his payments, and the furniture company had the right to retake the property, regardless of Jenkins' misfortunes; but when it retook the furniture, and at a void sale itself became the purchaser, it became liable, under the uniform current of authority, to account to Jenkins for the money received by it from him on a contract which itself preferred to abandon. The point is, not whether the plaintiff below had a good reason for his

default (in law he had none), but whether the vendor, who had reserved title, elected to stand on his title or proceed without regard to the contract. It elected the latter, and must abide the consequences.

Judgment affirmed.

(2 Ga. App. 490)

**WOLFE v. GEORGIA RY. & ELECTRIC CO.**  
(No. 35.)

(Court of Appeals of Georgia. Oct. 3, 1907.)

**1. CARRIERS—CARRIAGE OF PASSENGERS—DUTY OF CARRIER—PROTECTION FROM INSULTS.**

(a) A common carrier is responsible for the proper treatment of its passengers, and is bound to protect them from insult as well as from physical injury. Where the insult is offered by one of the carrier's servants, the duty of protection is even stronger and more binding than where the offending party is a fellow passenger, and for humiliation or wounded feelings caused by such insult a passenger is entitled to recover.

(b) It is immaterial whether the insult is caused by malice or is the result of negligence on the part of the carrier's servant. Injury caused by omission to protect is none the less actionable than that caused by commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121.]

**2. SAME—SEPARATION OF RACES—LIABILITY FOR MISTAKE.**

(a) In enforcing section 527, Pen. Code 1896, requiring the separation of races, the conductor is still the agent and servant of the corporation, and the liability of the corporation for his acts as such is not diminished by the delegation of police power. The police power is granted to better enable the corporation to discharge its duty of protecting its passengers, but the burden of exercising extraordinary diligence in the protection of the passenger is not lightened. (By Hill, C. J., and Powell, J., concurring specially.) If an honest mistake be made after extraordinary diligence has been exercised, the carrier would not be liable.

(b) Good faith, unaccompanied by freedom from fault (that degree of freedom from fault recognized by law as applicable between carrier and passenger), is no excuse for an insult offered by a servant of the carrier to a passenger who suffers injury. The good faith of the transaction can only be considered in mitigation of the damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121.]

**3. SAME—EVIDENCE—JUDICIAL NOTICE.**

(a) To call a white man a negro, or to intimate that a white man is of African descent, under certain circumstances, may be an insult, and, dependent upon the circumstances, may be actionable.

(b) An insult does not necessarily consist in the use of language imputing a crime. It more generally consists in the use of language affecting the social status and personal feelings or the business relations of the person insulted.

(c) The courts can take judicial notice of social status, and of the superiority and inferiority of races, without affecting the civil rights of the citizen. An existent fact, which is per se neither the subject of legislation nor adjudication, can be judicially known and recognized as a fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1121.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Nathan F. Wolfe against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.

Dorsey, Brewster, Howell & McDaniel and Arthur Heyman, for plaintiff in error. Rosser & Brandon, W. T. Colquitt, and Ben J. Conyers, for defendant in error.

**RUSSELL, J.** Nathan F. Wolfe, the plaintiff, brought a suit for damages against the Georgia Railway & Electric Company. The defendant filed a general demurrer, on the ground that no cause of action was alleged, and the court below sustained it. This judgment is brought to this court for review, and the question to be determined is: Does the plaintiff's petition set out a cause of action?

The plaintiff alleged: That on Monday night, June 27, 1904, he, accompanied by his sister, boarded a car of the defendant at the corner of Garnet and Whitehall streets for the purpose of being transported to a point on Highland avenue reached by one of the lines of defendant. That he paid to the conductor on the car the fare charged for the transportation of himself and sister, and asked for and received transfers to the Houston Street car. That he was duly transferred to this car, which had two long seats, one on each side of the car, with a broad aisle between. That he and his sister entered the car from the rear, and walked forward and took seats in the front part of the car. That there is a regulation of the defendant company that white passengers will seat from the front, and negro passengers will seat from the rear, of the car. That, when he and his sister had seated themselves, the conductor of said car came to him and took up the transfers for himself and sister. At the same time the conductor remarked to the petitioner: "You cannot sit there." That petitioner arose, thinking there was something the matter with the seat, and asked the conductor: "Where do you wish me to sit?" The conductor thereupon replied: "You must sit upon the rear portion of the car." Petitioner responded: "Where?" To which the conductor replied: "Beyond the white gentlemen." Petitioner thereupon responded: "Why do you wish me to sit there?" Whereupon the conductor replied: "It is all right. Sit down there"—indicating a space between the last white man and a negro. Whereupon the petitioner and his sister both asked: "What is this for?" The conductor replied: "Because white people seat from the front, and negroes from the rear, of the car." Petitioner asked: "What has that to do with me?" And the conductor responded: "Haven't I seen you in colored company?" Petitioner's sister then addressed the conductor as follows: "Do we look like colored people?" And that petitioner, for the first time understanding the import of the conductor's language, demanded an

explanation and apology. Whereupon the conductor stated that he might be mistaken, but that he thought he had seen the petitioner with some colored people. That this colloquy took place in the car, in the presence of all the passengers, and in a sufficiently loud tone to be heard all over the car. The petitioner further alleges negligence on the part of the company, and sets out grounds under which he claims a right of recovery.

The allegations of the petitioner in this case present to this court circumstances which have never heretofore been presented to the courts of this state, and in an extended search for authorities we have been unable to find a ruling by any court of last resort which deals with main question involved in this case. The central point in this case, the pivot on which the decision must turn, is whether it is insulting to publicly call a white man a negro. Two other questions, it is true, are presented in the record; but they are only incidental to the main question, which we have stated above. The two other issues relate to the liability of a carrier for insulting conduct towards its passengers on the part of its agents or servants, and involve a consideration of section 527, Pen. Code 1895, as affecting the liability of the carrier for the acts of its servants while exercising police power. There are, therefore, three questions in the case: (1) Is the defendant street car company liable for insulting conduct on the part of its servants? (2) In the enforcement of section 527, Pen. Code 1895, is the conductor an officer of the state in any such sense as to relieve the corporation from liability for the malperformance of his acts while exercising police power? (3) Is the language alleged to have been used by the conductor, reasonably construed, necessarily insulting, or so probably insulting and humiliating, when publicly used, as that the question as to whether it caused pain, humiliation, and disgrace should have been left to the jury?

1. There is no difficulty whatever in answering the first question. It is the duty of a common carrier to protect his passengers from insult, so long as they are passengers—not only from insult by fellow passengers, but from insult at the hands of the carrier's own agents. The principle is clearly laid down in our own state in the decision in *Cole v. Atlanta & West Point R. R. Co.*, 102 Ga. 474, 31 S. E. 107, and cases therein cited, and the court quotes with approval from *Goddard v. Grand Trunk Ry.*, 57 Me. 214, 2 Am. Rep. 39. See, also, *Railway Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85, and *A. & W. P. R. R. Co. v. Condon*, 75 Ga. 51. A carrier is as much bound to protect, and shield from attack the passenger's feelings as his person, and, if it subjects him to the pain and humiliation of being insulted or abused, it is liable for this negligent omission on the part

of its servants to perform towards the passengers the duty of protection imposed by law, and it is immaterial whether the injury be willful and wanton—whether it be intended or unintentional. From very numerous authorities, which we have examined, the following abundantly sustain the statement we have just made: *Hutchinson on Carriers*, §§ 595, 596; *Thompson on Negligence*, § 3186; *Traction Co. v. Crawford* (Tex. Civ. App.) 71 S. W. 306; *Texas Ry. Co. v. Tarlington*, 66 S. W. 137, 27 Tex. Civ. App. 353; *Booth on Street Railways*, § 372; 2 *Sedgwick on Damages*, 637. In *Chamberlain v. Chandler*, 3 Mason (U. S.) 242, 245, Fed. Cas. No. 2,575, Judge Story, delivering the opinion, in discussing the duties, relations, and responsibilities which arise between the carrier and passenger said: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere special room and personal existence. \* \* \* It is a stipulation, not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. \* \* \* It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed; that the law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings in the most tyrannical manner, and yet if he withholds a blow the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity."

2 (a). Upon the second proposition it is insisted by learned counsel for defendant in error that the street railway company is not responsible, or liable, even if insulting language were used, because Acts 1890-91, p. 157, make the conductor an officer of the state by delegating to him police power. This brings us clearly up to the question as to whether the conductor, in obeying sections 526 and 527, or ever in exercising police power, is an officer of the state in such sense as to give immunity to his employer, the common carrier, from liability for damage arising from the improper discharge of his duties. The exact question, so far as section 527, Pen. Code 1895, is concerned, has not been decided by the Supreme Court; for section 902 of the Penal Code of 1895, which was involved in the decision in *Seaboard Air Line Ry. Co. v. O'Quinn*, 124 Ga. 359, 52 S. E. 427, 2 L. R. A. (N. S.) 472, expressly provides that nothing therein contained shall affect the liability of the railroad company for the acts of its employés. We think that the omission of this provision from section

527, however, is immaterial. The reasonableness of the rule that agents, selected and discharged at the pleasure of the carrier, should not be the means of relieving it from proper liability, is apparent, and this court held in *Georgia Ry. & Electric Co. v. Baker*, 1 Ga. App. 833, 58 S. E. 88 (6), that, "while a conductor of a common carrier is clothed with police power, that fact affords no immunity to the carrier for damages resulting from his wrongful and illegal discharge of his duties, either as a servant of the company or under cover of police power delegated to him by law." In no case where a passenger is mistreated can the fact that the servant of the company was carrying out the provisions of the Penal Code be used as a defense, unless it appears that such servant was acting outside the scope of his authority. The conductor acts at the peril of his employer. The police power, the duty of executing the law requiring the separating of the races, is not placed upon the conductor as an individual, but upon a particular agent of the company, to enable the carrier to better perform its duty of protecting its passengers—of protecting them, not only from assault and physical injuries, but also from abuse and insult. The particular officer of the company who shall discharge this duty is selected and named only because the artificial body has no hands save those of its servants.

(b) Nor does good faith affect the primal question of liability, though proof of good faith may reduce the finding to one for mere nominal damages. Good faith, unaccompanied by that degree of freedom from fault recognized by law as applicable between servant and passenger, is no excuse for an insult offered by a servant of the carrier to a passenger who suffers injury.

3. We come, then to the third question of the case. If the language used was such as tended to cause pain and suffering by reason of humiliation and personal indignity offered by the company's servant, it would be immaterial whether he was acting as a police officer or not, and it would be immaterial whether the insult consisted of the commission of an overt act, wantonly and willfully done, or such an act done as would naturally cause pain thereby, whether intended or not. Either would constitute an omission of the duty to protect the passenger resting upon the carrier. We think the jury should have been allowed to pass upon the circumstances under which the language was used, and the manner of its use, and to say how much the plaintiff was damaged, if he was injured. The question has never heretofore been directly raised in this state as to whether it is an insult to seriously call a white man a negro, or to intimate that a person apparently white is of African descent. We have no hesitation, however, after the most mature consideration of every phase of the question,

in declaring our deliberate judgment to be that the willful assertion or intimation embodied in the declaration now before us constitutes an actionable wrong. We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen, either by legislation or by judicial decisions, is repugnant to every principle underlying our republican form of government. Nothing is further from our purpose. Under our benign institutions "every man is the architect of his own fortune." Every citizen, white and black, may gain, in every field of endeavor, the recognition his associates may award. That is his right, and his own concern. But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality. This fact was recognized by two of the leaders on opposite sides of the question of slavery, Abraham Lincoln and A. H. Stephens. The former on numerous occasions declared that it was no part of the proposition even of the Abolitionists to attempt to establish a condition of social equality between an inferior and superior race; and Alexander H. Stephens declared that the Southern Confederacy was based upon the acknowledged superiority of the Caucasian race over the negro. The distinction and inequality is recognized in Holy Writ.

We are not compelled to plant our decision on the ground of inequality or inferiority. We take judicial notice of an intrinsic difference between the two races. Certainly, if a court can take judicial notice of near a thousand things, some even of slight importance, which have been judicially recognized without proof, this court may be presumed to observe that there is a marked difference between a Caucasian and an African. Notice of this difference does not imply legal discrimination against either, and for that reason cannot, in any sense, impugn or oppose the fourteenth and fifteenth amendments to the Constitution of the United States or the Constitution of our own state. Our Constitution (article 1, § 1, par. 18) declares that the social status of the citizen shall never be the subject-matter of legislation. It has been said that this language was used for the express purpose of leaving the social status open to judicial determination. We, however, shall not take any such fanciful position; for it cannot properly be said that that which cannot be

the subject-matter of legislation can be judicially administered. This, however, does not affect the subject of judicial notice of matters of history, common knowledge, etc. The sounder view is that neither Legislatures nor courts shall grade the citizen according to his social status, and yet that the courts can and must know and notice the meaning of words of opprobrium, as well as the connection in which these words are used. For instance, shortly after the Revolution, no greater term of opprobrium could be applied to an American citizen than to be called a "Hessian" or a "Tory," while, of course, it would have been no insult to apply the term "Hessian" to a native of the duchy of Hesse, and the word "Tory" was deemed in Old England a synonym of loyalty and patriotism. We might greatly lengthen the list, by adding various terms, such as "carpet-bagger," "scalawag," etc., where words ordinarily innocent may be insulting, dependent upon the circumstances of their use.

An insult or a slander may consist in the imputing of crime. But an insult does not necessarily consist in the use of language imputing a crime. It more generally consists in the use of language affecting the social status and personal feelings or business relations of the person insulted. Courts and juries are bound to notice the intrinsic difference between whites and blacks, and the mixture of whites and blacks in this country. As said by Chief Justice Lumpkin, in *Bryan v. Walton*, 14 Ga. 200: "The effect of manumission by the civil law would have great influence in the determination of a similar question here, were it not for the difference in color between their slaves and ours—a difference deep and ineradicable." The difference in races to which we have adverted is recognized in this state by the laws against intermarriage, by the laws for the separation of passengers by common carriers, separate schools, etc. It is admitted by the Supreme Court of the United States in *Plessey v. Ferguson*, 163 U. S. 544, 16 Sup. Ct. 1138, 41 L. Ed. 256, where the constitutionality of a similar statute separating the races was upheld. On page 551 of 163 U. S., page 1143 of 16 Sup. Ct., 41 L. Ed. 256, the court says: "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences; and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." The same recognition of the great fact of distinction and difference between races is also accorded by the Supreme Court of Pennsylvania in the very forceful opinion in the case of *West Chester & Philadelphia R. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744. See, also, *State v. Gibson*, 36 Ind. 389, 10 Am. Dec. 42.

Taking into consideration, then, the difference in color, if nothing else, and bearing in mind that a little more than 40 years ago the black race were slaves, without civil standing or social or political rights, and keeping in view the further fact that a pure black man cannot be mistaken for a white man, and the fact that intermarriage between the races has been continuously forbidden in this state, to charge a white man, even though of dark skin, with being a colored man, or a colored man, even though of fair skin, with being a white man, is to impute the odium of illegitimacy. Under the decisions of this state it cannot be questioned that to make such a charge, either directly or by intimation easily understood by the bystanders, would be an aggravated insult; and if a servant, charged with the duty of separating the passengers, heedlessly, even though unintentionally, without the exercise of the proper degree of diligence, made a mistake, the company would be liable for his omission of that proper care for the protection of the passenger for which the carrier is bound. Furthermore, section 528, Pen. Code 1895, makes any passenger remaining in any car or compartment or seat other than that to which he may have been assigned, guilty of a misdemeanor, and where the assignment and seats are well known, to falsely charge a passenger with occupying a seat not assigned to his race, is to charge him either with attempting to commit a misdemeanor or of being actually guilty thereof. In any view this would be actionable. If the difference in race, referred to by Chief Justice Brown in *Scott v. State*, 39 Ga. 323, exists, as it undeniably does, then to wrongfully, though unintentionally, accuse a white man with being of negro descent, and of trying to put himself in that portion of the car where by law he is forbidden, thus illegally causing mortification and pain, creates an injury for which the law allows reparation. The good faith of the conductor—his lack of intention to wound—may lessen and greatly mitigate the amount of the damages; but it cannot altogether defeat a recovery, and for this reason we think the court erred in sustaining the general demurrer and dismissing the case.

In the case above cited, Chief Justice Brown, delivering the opinion of the court, says: "The Code of Georgia, as adopted by the new Constitution, forever prohibits the marriage relation between the two races and declares all such marriages null and void. With the policy of this law we have nothing to do. It is our duty to declare what the law is; not to make the law. For myself, however, I do not hesitate to say that it was dictated by wise statesmanship and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but it is also productive of deplorable results. Our daily



observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race to the position of the superior; but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good. But government has no power to regulate social status. Before the law, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of any state attempt to enforce, moral or social equality between different races or citizens of the United States. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no tribunal enforce it. \* \* \* While the great mass of the conquering people of the states which adhered to the Union during the late civil strife have claimed the right to dictate the terms of settlement, and have maintained in power those who demand that the people of the states lately in rebellion shall accord to the colored race equality of civil rights, they have neither required of us the practice of miscegenation, nor have they claimed for the colored people social equality with the white race. The fortunes of war have compelled us to yield to the freedman the legal rights above mentioned; but we have never authorized or legalized the marriage relation between the races, nor have we enacted laws regulating the social status, so as to compel our people to meet the colored people on terms of social equality. Such a state of things could never be desired by the thoughtful and reflecting portion of either race. It could never promote peace, quiet, or social order in any state or community. No such laws are of force in any Northern state, so far as I know, and it is supposed no considerable part of the people of any state desires to see them enacted."

We cannot shut our eyes to the fact that there is a universally recognized distinction between the races. The situation which confronts us in the present case is the relation occupied by three classes of people in this state—whites, blacks, and a mixed breed, resulting from unlawful relations between the two. The charge made by the conduct of the street car conductor cannot be construed as being that plaintiff was a full-blooded negro, but that he had enough negro blood to be classified with that race, or else that he was a white man degraded (as the conductor himself assumed) by having associated with negroes, or that, having negro blood in his veins, he was attempting to violate the law by putting himself in that portion of the car assigned to whites. In *Bryan v. Walton*, supra, Chief Justice Lumpkin says, on page 202: "Our ancestors settled this state as a prov-

ince as a community of white men \* \* \* possessing an equality of rights and privileges. The blacks were introduced into it, a race of slaves. The prejudice, if it can be called so, of caste, is unconquerable. It was so at the beginning. It has come down to our day. The suspicion of taint sinks the subject of it below the common level." And on page 205 he says: "In no part of this country, whether North or South, East or West, does the free negro stand erect and on a platform of equality with the white man." In *Flood v. News & Courier Company*, 71 S. C. 112, 50 S. E. 637, the Supreme Court of South Carolina held that to publish in a newspaper of a white man that he is colored is libelous per se, and cites numerous authorities to sustain its position. To the same effect was the decision of the Supreme Court of Louisiana in *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 South. 970; and in *Southern Ry. v. Thurman*, 28 Ky. Law Rep. 699, 90 S. W. 240, 2 L. R. A. (N. S.) 1108, the Court of Appeals of Kentucky held that a cause of action was set out.

If, as we hold, to call a white man a negro, or to intimate that he is of African descent, may be an insult—and we think that under the circumstances detailed in plaintiff's petition the jury might consider it insulting for either of three intimations which might arise—then the demurrer should have been overruled. This case is practically identical in principle with that of *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 208, 77 Pac. 209, 66 L. R. A. 802, and *Gillespie v. Brooklyn Heights Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503. In the latter case Judge Martin, delivering the opinion of the court, says: "The relation between the carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort, and recovery may be had in an action of tort, as well as for the breach of the contract." And, quoting from *Booth on Street Railways*, § 372, the court proceeds: "No matter what the motive is which incites the servant to commit an improper act towards the passenger during the existence of the relation, the master is liable for the act and its natural and legitimate consequences." Hence it is responsible for the insulting conduct of its servants which stops short of actual violence." In the *Gillespie Case* are very numerous citations, exhaustively treating the subject and establishing beyond any controversy that a common carrier is liable for any injury resulting from the use of language insulting, abusive, or defamatory by one of its servants towards a passenger while in the exercise of his duty.

Judgment reversed.

HILL, C. J., and POWELL, J. (concurring). As stated in the third headnote, we think (while Judge RUSSELL does not) that if the conductor, in the exercise of his duties in the dual capacity of police officer and agent of the company, in attempting to enforce section 527 of the Penal Code of 1895, used extraordinary diligence—that is to say, extreme care and caution—to prevent mistaking a white man for a negro, or vice versa, and such a mistake nevertheless results, the carrier would not be liable. We concede that in taking this position we are somewhat at variance with what was said by the Supreme Court in the second division of the opinion in the case of *Seaboard Air Line Railway v. O'Quinn*, 124 Ga. 359, 52 S. E. 427, 2 L. R. A. (N. S.) 472, where a charge substantially embodying this proposition in a case standing upon a somewhat similar basis was disapproved. Still it will be seen that so much of the decision as asserts that this charge was error was obiter, since the court held that such a charge was more favorable to the complaining party than otherwise, and that the exception, therefore, could not be considered. Our idea of the matter is this: The carrier is charged by the statute with the absolute duty of separating the races, and is likewise charged with the duty to use extreme care and caution to protect its passengers from insult. In performing the first duty, he must necessarily use his judgment to determine whether the passenger is a white man or a negro; and, to the end that no mistake shall be made to the insult of the passenger, he must perform this duty with extreme care and caution, and if still, after all, a mistake is made, and a passenger is insulted, and consequently injured, the injury is *damnum absque injuria*.

(2 Ga. App. 511)

**CENTRAL OF GEORGIA RY. CO. v. AUGUSTA BROKERAGE CO. (No. 58.)**

(Court of Appeals of Georgia. Oct. 3, 1907.)

**1. WRIT OF ERROR—HARMLESS ERROR.**

A verdict will not be set aside for an error in the admission of evidence, when the same result should have been reached, had such evidence been repelled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

**2. NEW TRIAL—REMARKS OF COURT.**

An intimation of opinion by a trial judge that an issuable fact has been proved requires the grant of a new trial.

**3. WRIT OF ERROR—LAW OF CASE.**

The decision of the Supreme Court in *Central of Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119, is controlling as to the principles therein announced, and is the final law of this case. The charge of the trial judge, in several portions, being in conflict therewith, a new trial necessarily results.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4661.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Augusta Brokerage Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham and J. C. C. Black, for plaintiff in error. Wm. H. Fleming, for defendant in error.

RUSSELL, J. After a very painstaking consideration of the record and of the very exhaustive briefs of the counsel in this case, we feel obliged to reverse the judgment of the lower court refusing a new trial. Viewing the countenance of the case as delineated by the evidence, we were inclined to the opinion that the plaintiff was entitled to the recovery awarded by the jury, for the record presented such an instance of discriminatory partiality on the part of the Central of Georgia Railway Company as, in our individual opinion, calls justly for the application of punitive and exemplary damages; but the controlling questions of law have already been decided adversely to the contentions of the defendant in error, and that decision is the law of the case. *Central of Ga. Ry. Co. v. Augusta Brokerage Company*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119. The decision in that case relieves us of great responsibility and leaves but little for our decision.

The errors complained of in the numerous grounds in the motion for new trial may be divided into three classes: (1) Exceptions taken to certain portions of the charge and refusals to charge. (2) Complaints of violation of section 4334 of the Civil Code of 1895. (3) Error in the admission of certain evidence. We shall consider these in reverse order.

In the light of the evidence adduced, were the complaint as to the admission of Mr. Daniel's evidence the only error, we would have no hesitation in ruling that the verdict of the jury was right, and that the error in the admission of testimony was immaterial.

Though the grant of a new trial because of the expression of an opinion on the part of a judge is mandatory, the exceptions taken to the charge upon this ground, with one exception, are eliminated when the charge is considered as a whole. As well argued by counsel for defendant in error, the evil to be avoided was the danger of the judge influencing the jury; and, while in some portions of the charge it may at first sight appear that the judge intimated an opinion, a second reading dispels the impression by showing that the opposite contention was immediately presented to the jury, and that they were told that they were the exclusive judges of the facts.

In the eighth ground of the motion for new trial it is insisted that the court erred

in charging the jury as follows: "If you find it was willful, they would be entitled to exemplary damages; and in considering that you consider all the aggravating circumstances surrounding the violation of the rule, and connected with and incident to it, and the intent and purpose of the parties in violating the rule, as shown by the evidence." This was error, because it assumed that the rule had been violated and that aggravating circumstances had been shown. The very able counsel for defendant in error insists that the complaint of error is not well founded, because the language used by the judge was no invasion of the province of the jury, and also because other portions of the charge clearly and distinctly left it for the jury to decide whether there were aggravating circumstances or not. We have such high regard for the legal ability of our brother, and he has pressed the point with such earnestness, that we have only reached a decision after full investigation and mature deliberation.

Under the provisions of the Code of 1895 embodied in section 4334, as construed by our Supreme Court, the error arising from the expression of opinion as to the evidence on the part of the trial judge can hardly be cured by subsequent proper instructions upon the same subject, and it is doubtful if the injurious effect can be removed even by explicit reference to the intimation or expression of opinion and unequivocal and public withdrawal thereof. In *Robinson v. Schly*, 6 Ga. 525, it was said that "the books abound with authority to show that, if the instructions of the court assume or presuppose a fact proper for the decision of the jury, it is error, and a new trial will therefore be granted." And in *Headman v. Rose*, 63 Ga. 466, it was held that the court has no discretion, but is bound to reverse the judgment in case of such error. It has been held that whether the expression or intimation of an opinion was supported by the evidence or not, and whether in fact it was injurious to the party or not, and even though it was wholly unintended, and though the verdict be what it ought to be, the result is the same. *Phillips v. Williams*, 89 Ga. 603; *Bohler v. Owens*, 60 Ga. 186; *Sanders v. Nicolson*, 101 Ga. 739, 28 S. E. 976; *Disharoon v. State*, 95 Ga. 352, 353, 22 S. E. 698.

In our opinion the language excepted to in the eighth ground of the motion conveys an intimation that there had been both a violation of the rule and that it was attended with circumstances of aggravation. So that whatever may have been the charge of the court thereafter, and even though the jury may have been correctly instructed, the effect was to confuse the jury. Under such conditions it would be impossible for them to regard the instructions of the court and at the same time render an intelligent verdict. *Ga. R. R. Co. v. Hicks*, 95 Ga. 305, 22 S. E. 618. See, also, *Whitley v. State*, 38

Ga. 50-73; *Savannah, Florida & Western Ry. Co. v. Hatcher*, 118 Ga. 273, 45 S. E. 239; *Morrison v. Dickey*, 119 Ga. 698 (2), 701, 46 S. E. 863; *Jenkins v. State*, 123 Ga. 530, 51 S. E. 598, et seq. We might personally agree with the reasoning of the court in *Davis v. State*, 51 Neb. 301, 70 N. W. 984, cited by counsel for defendant in error, or concur in counsel's argument as to a proper construction of section 4334; but we are bound by the prior adjudication in this state.

As to the errors assigned as to the charge, regardless of our personal view, we are not permitted to hold but one opinion. The constitutional amendment creating this court bound us by the decisions of the Supreme Court. This case has twice appeared in that tribunal, and the law of the case has been fully expounded by what is to us binding authority. In *Central of Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119, the essential principles which control the legal aspect of the case are decided. The charge of the learned trial judge in several of the extracts to which exception is taken is diametrically opposed to the adjudication of the Supreme Court. The theory of the charge and of the decision of the Supreme Court are wholly in conflict.

In the case of *Central of Ga. Ry. Co. v. Augusta Brokerage Company*, supra, the Supreme Court held that "as to issuing through bills of lading or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike. \* \* \* That such discrimination is dictated by the business interests of the carrier, and really affects but a single shipper, because he is the only person at a terminal point who is engaged in shipping cotton seed out of the state, cannot alter the matter." The plaintiff proved the discrimination, but he did not prove that any commodity was discriminated against except cotton seed. He proved that the discrimination was dictated alone by the selfish interest of the carrier; but, as the evidence shows no one else who was affected save itself, the discrimination, no matter how injurious to the plaintiff, in the language of the Supreme Court, "cannot alter the matter."

To quote from the decision of the Supreme Court, for the evidence on both trials appears to have been practically the same: "The situation may thus be summarized: The oil mills at Augusta depended largely for a supply of cotton seed upon the territory through which ran the defendant railway company's line. They delivered to it their manufactured products for shipment. So the railway company got a short haul on the raw cotton seed, and also a long haul on the reshipments made over its line of the manufactured products. It was not to the business interest of the railroad company that cotton seed grown

at local stations on its Augusta & Savannah branch should be shipped to oil mills located in South Carolina; for none of the manufactured products could then be secured for reshipment at a high rate over its road. Its interest dictated that the cotton seed should stop at Augusta, and be manufactured into oil and by-products by the mills located at that point. The railway company, therefore, determined that it would not, by voluntarily granting facilities to shippers which it was under no legal duty to afford, supply the means of diverting from its road profitable shipments which it otherwise would receive. On the other hand, the material business interest of the brokerage company demanded that it should be granted such facilities. It was a free lance, in open competition with the oil mills of Augusta in the buying of cotton seed at the lowest price possible, and all the seed purchased by it were shipped from Augusta over the Southern Railway to South Carolina mills. To reload shipments at Augusta for the South Carolina trip was expensive. To get through bills of lading, or to secure the consent of the defendant company that its loaded cars be delivered to the Southern Railway at Augusta, so that the seed might be carried to its ultimate destination without reloading, would render the business of the brokerage company profitable, and the business of the Augusta oil mills less remunerative. Their interest and those of the defendant railroad company were coincident. Its interest and those of the brokerage company conflicted. The railway company acted as the average business man would have done. That is all. In declining to grant the privileges which the brokerage company wished to enjoy, the railway company merely adopted a policy which was within its legal rights as a carrier. *State v. Railroad Co.*, 104 Ga. 437, 30 S. E. 891. That the brokerage company may have been the only broker in Augusta or elsewhere affected by the policy cannot alter the case. As a shipper it was not discriminated against, though one of the commodities it handled was incidentally." It appears to us that the only effective way to discriminate against a shipper is to discriminate against the things he ships; but we are nevertheless bound by the decision of the Supreme Court on the subject.

The request to charge set forth in the ninth ground of the motion should have been granted. The railroad company denied that there was discrimination against the plaintiff by withholding from it privileges accorded to other patrons. It was, therefore, proper for the court to have instructed the jury that the plaintiff could not recover damages upon the ground of discrimination because of the refusal of certain privileges, unless it appeared that such privileges were granted to other patrons.

The instruction complained of in the second ground of the motion for new trial is in

the identical language held to be error when delivered on the former trial of this case. *Central of Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 652, 50 S. E. 473, 69 L. R. A. 119.

The remaining exceptions are fully treated in the former decision in this case (*Central of Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119), and any further discussion of the principles involved would be profitless.

Judgment reversed.

POWELL, J., disqualified.

(145 N. C. 114)

#### EAST CAROLINA RY. CO. v. MARYLAND CASUALTY CO.

(Supreme Court of North Carolina. Oct. 3, 1907.)

#### INSURANCE — INDEMNITY — CONSTRUCTION OF CONTRACT — SCOPE OF LIABILITY.

Under a contract to indemnify an employer against liability for accidents to employes, provided "this policy does not cover loss for liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages named in the schedule," the wages of the employe causing the injury, as well as those of the employe injured, must be so included, to make the indemnity company liable.

Appeal from Superior Court, Edgecombe County; Biggs, Judge.

Action by the East Carolina Railway Company against the Maryland Casualty Company. Judgment for defendant. Plaintiff appeals. Affirmed.

This action was brought by the plaintiff to recover \$1,999, alleged to be due on a contract to indemnify it against liability to its employes, which was the amount theretofore adjudged to one J. G. Andrews, an employe of the plaintiff, on account of injuries received by the negligence of Henry Clark Bridgers, another of its employes, in a suit brought by him against the plaintiff. The policy of the defendant indemnifies "against loss from common-law or statutory liability; for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employe or employes of the assured, while on duty at the places and in the occupations mentioned in this application, in and during the continuance of the work described in this application." But the liability is limited by the following clause: "This policy does not cover loss for liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages named in the schedule, and he is on duty at the time of the accident in an occupation hereinafter described at the place or places mentioned in the schedule." It appeared that Andrews' compensation as an employe of the plaintiff was included in the estimated wages named in the schedule which is a part of the policy, while Bridgers' were not so included. Issues

were submitted to the jury and answered by consent, as follows: "(1) Was J. G. Andrews, at the time of the injuries for which he obtained the judgment in controversy, an employé of the plaintiff, and was he on the pay roll and his wages included in the estimated wages named in the schedule? Yes. (2) Were the injuries to J. G. Andrews for which the judgment was obtained caused by an employé of the plaintiff, and, if so, who? Yes, Henry Clark Bridgers, who was at the time running as engineman, and who held the office of president and general manager. (3) Were the wages of such employé included in the estimated wages named in the schedule? No." The court was of the opinion that, upon the verdict, the defendant was not liable to the plaintiff upon the contract, and so adjudged. The plaintiff thereupon appealed.

John L. Bridgers, for appellant. Jacob Battle, for appellee.

WALKER, J. (after stating the facts as above). The policy upon which this suit was brought is most clearly restricted to cases where the injury results to an employé of the insured from the negligence of some other employé, whose wages were on the pay roll of the company and included or considered in the estimate upon which the premium was computed. Parties who are *sui juris* must be permitted to make contracts for themselves, and the court, in the absence of any equitable element invoking its protection in favor of one or the other of the parties, must take the contract as it finds it and so construe it. It is true that, in passing upon contracts of insurance or indemnity like the one now in hand, the courts have adopted certain canons of interpretation, one of which is that the contract will be liberally construed in favor of the assured, so as not to defeat, without a clear necessity, his claim for indemnity. When doubt arises by reason of the language employed to express the agreement, so that it admits of two interpretations, the courts, as a general rule, adopt that one which, without any violence to the words selected by the parties, will sanction the claim and cover the loss. *Goodwin v. Assur. Society*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Kendrick v. Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592. The leading idea which controls in such cases was well stated by Judge Douglas in *Grabbs v. Ins. Co.*, 125 N. C. 399, 34 S. E. 506: "The extraordinary development of insurance and its necessary adaptation to the varying and complicated business relations of a progressive age tax the utmost ability of the courts. But, while different conditions may require the application of different rules, one great principle must always be kept in view, and that is the ultimate object of all insurance. While we should protect the companies against all unjust claims, and enforce all reasonable regula-

tions necessary for their protection, we must not forget that the primary object of all insurance is to insure. We cannot permit insurance companies by unreasonable stipulations to evade the payment of such indemnity when justly due, and thus defeat the very object of their existence." And so, in *Bank v. Fid. & Dep. Co.*, 128 N. C. 371, 38 S. E. 909, the same learned judge tersely restated the rule: "The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one." The Supreme Court of the United States is equally explicit: "If, looking at its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank, and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument, which the court is invited to interpret, was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance." *Am. & Surety Co. v. Pauly*, 170 U. S. 144, 18 Sup. Ct. 556, 42 L. Ed. 977. In *Bray v. Ins. Co.*, 139 N. C. 893, in considering the same principle of construction, where the meaning of any provision or of the entire policy is uncertain, we held that the interpretation should be such as to favor the plaintiff, or party insured or indemnified, assigning, as one all-sufficient reason for this view of the matter, "that the company has had the time and the opportunity, with a view to its own interest, to make clear its meaning, by selecting with care and precision language fit to convey it, and if it has failed to do so the consequences of failure should not even be shared by the assured, so as to deprive him of the benefit of the contract, as one of indemnity for his loss." Probably the most important general rule guiding courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured. *Vance on Insurance*, p. 592. The latter author also says: "This rule, it is well settled, applies in full force to those contracts of special insurance which, unfortunately for both insurers and insured, are often filled with numerous conditions, the legal significance and economic purpose of which are alike uncertain." *Jones v. Casualty Co.*, 140 N. C. 264, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843; *Bank v. Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Lumber Co. v. Fid. & Cas. Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 691; *Fenton v. Fid. & Cas. Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770. This court has distinctly declared that, if a contract of insurance is reasonably susceptible of two constructions, the uniform rule in all courts is to adopt that which is most favorable to

stated facts, and found, as a conclusion of law, that the bank had a lien for the balance of the notes held by it on the dry kiln and consequently on the fund in court. The court, upon exceptions by the receiver, confirmed the report, and gave judgment for the amount due on the notes, and the receiver appealed.

Meares & Ruark, for appellant. Aycock & Daniels, for appellees.

WALKER, J. (after stating the facts as above). It cannot be well denied that, under the prior decisions of this court, the transaction between the Acme Machine Works and the Auburn Lumber Company constitutes a conditional sale of the property described in their contract. The agreement was that the former should sell, and the latter should buy, the machinery and other property, to be delivered at once for the stipulated price. A part of the purchase money was paid in cash, and for the remainder the lumber company executed its notes, by which it absolutely and unconditionally promised to pay the sums therein specified. All of the property named would have been delivered immediately to the lumber company but for the request that the dry kiln be retained by the Acme Company until the lumber company should be ready to receive it. The receiver of the latter company contends, upon the facts found by the referee, that he is entitled to a credit of \$750, which was the value of the dry kiln, upon the notes given for the purchase money of the property bought by the lumber company from the Acme Company, and which are now owned and held by the Bank of Wayne.

We do not perceive upon what ground, legal or equitable, any such claim can be successfully maintained. The lumber company has made an absolute promise to pay a certain sum of money, the consideration of which was the purchase of the property described in the contract. Why, then, should it not be compelled to perform its promise? It is a mistake to suppose that its liability depends upon whether the title did or did not pass unconditionally to it from the Acme Company. Its obligation arises out of the fact that it has promised to pay the money upon a sufficient consideration, and the said obligation is in no way affected by the state of the title to the property, as between the parties; that is, whether vested conditionally or unconditionally. The case is not distinguishable from that of *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863, in which is stated by Judge Shepherd, in his usually clear and vigorous style, the principle governing such cases. Quoted from *Burnley v. Tufts*, 66 Miss. 49, 5 South. 627, 14 Am. St. Rep. 540 (in which will be found an able and well-considered opinion adopted by this court as a clear exposition of the law which obtains with us), he says:

"The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase price. The purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do. As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to a conditional sale, to be defeated upon the nonperformance of the condition. The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which would be ripened into an absolute title by the performance of the condition"—citing 1 Wharton on Contracts, 617; *Vincent v. Cornell*, 18 Pick. (Mass.) 296, 23 Am. Dec. 683; *Newhall v. Kingsbury*, 131 Mass. 445.

We regard it as too late, at this time, to deny that the contract between these two companies was, in contemplation of law, a conditional sale. *Ellison v. Jones*, 26 N. C. 48; *Ballew v. Sudderth*, 32 N. C. 176; *Parris v. Roberts*, 34 N. C. 268, 55 Am. Dec. 415. The same is the law in other jurisdictions. *Ridgeway v. Kennedy*, 52 Mo. 24; *Hanway v. Wallace*, 18 Ind. 377; *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311; *White v. Garden*, 10 C. B. 919; *Coggill v. Railroad*, 3 Gray (Mass.) 545. The subject is discussed, and the later authorities cited, in the recent case of *Hamilton v. Highlands*, 144 N. C. 279, 58 S. E. 929. It was not necessary to effectuate the intention and purpose of the parties, in making the contract, that there should have been an actual delivery of the dry kiln, as there was of the other property. The kiln was held by the Acme Company, subject to the order of the lumber company, and was therefore constructively in its possession. *Allman v. Davis*, 24 N. C. 12; *Morgan v. Perkins*, 46 N. C. 171; *Cohen v. Stewart*, 98 N. C. 97, 3 S. E. 716; *Lumber Co. v. Wilcox*, 105 N. C. 34, 10 S. E. 871; and especially *Winberry v. Koonce*, 83 N. C. 351. The parties stood towards each other, and in regard to their relative interests in the dry kiln, and in respect to any risk of its destruction by fire or other accidental cause, precisely as they would have stood if the kiln had actually been delivered.

It is familiar learning, and such an elementary and just principle as to have become axiomatic, that one party will not be permitted to plead his own act or fault which

has prevented the performance of a contract by the other party, in order to defeat the latter's recovery thereon. It is just a simple application of the maxim that no man will be allowed to take advantage of his own wrong, and the doctrine has been strikingly illustrated in its application to cases analogous to this one. *Buffkin v. Baird*, 73 N. C. 283; *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751; *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616. Judge Pearson said: "One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance." *Navigation Co. v. Wilcox*, 52 N. C. 481, 78 Am. Dec. 260. So in *Harwood v. Shoe*, supra, it was said: "It would be against good morals, as well as law, to allow plaintiffs to profit by their wrongful acts, although they were not parties to the contract. 'Nemo ex suo delicto meliorem suam conditionem facere potest.'" Here it appears that the lumber company, by its own request, prevented the delivery of the kiln. Will it now be heard to say that the resulting loss should fall upon the Acme Company, who was ready and willing, at all times, even up to the very moment of the fire, to deliver it, when, if the delivery had been made as originally contemplated and agreed, no loss would have occurred? Such a proposition cannot be entertained for a moment. It would be grossly inequitable if we should so hold. The lumber company must abide by the consequences of its deliberate act which has entailed loss upon it, and not be permitted to shift the responsibility for the loss to the Acme Company, which was absolutely without any fault. The correct principle is stated and elucidated in 1 *Parsons on Contracts* (9th Ed.) p. 581, as follows: "If the contract be to deliver the thing ordered at the residence or place of business of the buyer, the seller is liable, although such delivery becomes impossible, unless it becomes so through the act of the buyer. If the seller refuses to deliver it at a time and place agreed on, and it perish afterwards without his fault, he is liable for it; but if he be ready, and the vendee wrongfully refuse or neglect to receive it, the seller is not liable, unless the thing perish through his gross and wanton negligence." As we have shown, there was no neglect or fault on the part of the Acme Company.

This being the situation with reference to the title of the kiln, the principle of *Tufts v. Griffin*, supra, most clearly applies. That case is cited with approval in *Tufts v. Wynne*, 45 Mo. App. 42, in which the same question as we have here was presented, and an analogy is there drawn between a conditional sale of personal property and a contract to sell land, it having been held by many courts, in accordance with a well-settled principle of equity, that in the latter case the loss, if any of the property is destroyed or diminished in value by ac-

cidental causes, falls upon the vendee; citing *Snyder v. Murdock*, 51 Mo. 175; *Walker v. Owen*, 79 Mo. 563; *Martin v. Carver's Adm'r* (Ky.) 1 S. W. 199. We have lately announced and applied the same principle as to land in *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844, where the leading authorities will be found carefully collected and lucidly considered by Justice Hoke, at page 484 of 143 N. C., at page 846 of 55 S. E. The general principle of liability on notes given for the purchase money of personal property, where title is retained as a security for payment, is clearly stated in *Barrows v. Anderson*, 3 Cent. Law J. 418, as follows: "But the question here is: At whose risk was the property? And who must bear the loss? The purchaser by his note obligated himself to pay the price at a given time. There is no condition or contingency expressed in the note upon which he can avoid payment, and the question is whether the law will supply such a condition. There is no doubt but that the title and right of property, by the terms of the note, remained in the seller, while the possession and right of possession were with the defendant, and the seller could not assert any claim to it until the buyer made default. The seller held the naked title, subject to the interest of the buyer; i. e., the contingent right to a title which would vest absolutely, on payment of the price, without any further act on the part of the seller. The right to the use of the machine for two years, with the contingent right to a perfect title upon the payment of the price, constituted the consideration of the note."

The real and substantial nature of the transaction, for the purpose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and donee. The contract, it is true, creates technically a conditional sale, but the vendor, in fact, only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named. *Hamilton v. Highlands*, 144 N. C. 279, 56 S. E. 929. The intention of the law, as embodied in the recent statutes of registration, but emphasizes this view of the relation of the parties (*Brem v. Lockhart*, 98 N. C. 191) when we come to determine their legal and equitable rights. It is not our purpose to diminish in the least degree the rights of either party in the property as fixed by the former decisions of this court, but only to look at the transaction, as regards the question before us, according to its true and essential character and to administer justice under the fundamental maxims of the law. If we should decide that the Acme Company was holding the kiln for the lumber company as its bailee, our conclusion would not be affected or changed, as even in that case, there being no negligence shown on the part of the former company, but it being found that it was without any fault whatever, it could not be adjudged liable for the loss.

Some of the cases cited by the learned counsel for the receiver, in their well-prepared brief, can easily be distinguished from the one at bar, and the other authorities they rely on, which apparently support their position, are in direct conflict with our decisions and the best-considered cases on the subject decided in other courts. They are, in our opinion, contrary to both reason and a proper conception of what should, in accordance with good conscience and sound morality, be considered as the relative rights of the parties. The equity of the case is clearly with the Acme Company, and the law, we believe, is in harmony with the right.

There may be another ground upon which the bank can succeed, as suggested by its counsel, but we need not and do not consider it, as the point already decided is sufficient to dispose of the case in its favor.

The learned referee, who so intelligently tried the case and who has stated his findings of fact, and the law arising thereon, with such remarkable clearness, was right in his conclusion, as was the able presiding judge who confirmed his report and gave judgment accordingly.

We find no error in the record. Affirmed.

(145 N. C. 106)

#### KINSEY v. CITY OF KINSTON et al.

(Supreme Court of North Carolina. Oct. 3, 1907.)

#### 1. MUNICIPAL CORPORATIONS—STREETS—DUTY TO KEEP IN SAFE CONDITION.

The positive duty of a municipality to keep the public streets in a reasonably safe condition is applicable, though an excavation is made across a street by a contractor who is doing the work for a citizen to establish connection with the city sewer.

#### 2. SAME.

That a contractor, opening a street to establish connection with the city sewer, may be himself liable for negligence, will not relieve the municipality if it was in law fixed with knowledge of his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1655.]

#### B. SAME—ACTIONS AGAINST—QUESTION FOR JURY.

The question of knowledge by a municipality of defects in public streets is usually one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1750.]

#### 4. SAME—NOTICE OF DEFECTS.

A grant of a permit by a municipality to a contractor to open a ditch across a street is notice to the municipality that the work is in progress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1645.]

Appeal from Superior Court, Lenoir County; Webb, Judge.

Action by Agnes H. Kinsey against the city of Kinston and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff sued to recover damages received from falling in a ditch at night, which ditch had been dug during the day of May

4, 1905, across defendant's street. The usual issues as to negligence, contributory negligence, and damage were submitted. The jury found for the plaintiff on all issues. The court refused motion for new trial, and rendered judgment for plaintiff, and defendants appealed.

Loftin & Varser, for appellants. E. B. Wooten and Geo. V. Cowper, for appellee.

BROWN, J. We have considered the 15 exceptions presented in the record in this case, and are of opinion that all of them are without merit. At the close of the evidence, the defendant moved to nonsuit, and excepted to the ruling of the court denying the motion. Plaintiff's evidence tends to prove: That about 8 o'clock at night on the 4th of May, 1905, the plaintiff was returning from her work, on her way home, and was walking on the sidewalk on King street, in the city of Kinston, when she suddenly fell headforemost into an open ditch 4½ feet deep, and 2½ feet wide, extending from the middle of the street across the said sidewalk, from which she was rendered unconscious. That there were no lights, warnings, signals, or signs at or near or upon the ditch. This was the usual way which plaintiff returned from her work at night going home. That she passed the place of injury the morning before she was hurt on the night of May 4th, and there was no ditch or excavation there. The ditch was dug in order to make a sewer connection from the city's main sewer to certain residences on King street. A permit was granted and issued on May 4, 1905, to cut the ditch across King street for that purpose. The work was performed by S. H. Isler, a contractor, who finished digging the ditch and making the connection by 4 p. m. of the same day, and at once, before closing the ditch, verbally notified city inspector Brown to inspect the connections with the city sewer. No written notice was given the inspector, who at the time of the verbal notice was temporarily ill. The inspector did not inspect the ditch that day, and it was left open all night without lights or other protection. We do not deem it necessary to notice any matters embraced in the exceptions other than the ruling of his honor denying the motion to nonsuit, and the seventh exception to that portion of his honor's charge, as follows: "That the grant of a permit to Isler to make the ditch is notice to the city that the work is in progress, and that thereafter it would be liable for the injuries arising from the negligence of the person doing the work, which is dangerous in itself."

1. The contention of the defendant that it is not liable because the excavation was made across its public street by a contractor who was doing the work for a citizen in order to establish water connection with the city sewer, and that, therefore, the motion to nonsuit should have been allowed, is wholly un-



tenable. To allow such contention would be to relieve the city authorities of one of their most important duties. It is the positive duty of municipal authorities to keep the public streets in a reasonably safe condition, so that the people may pass along them with comparative safety. This duty is not suspended because a private contractor is permitted to open the streets in order to establish water connections with the public sewers. The fact that the contractor may be liable for negligence will not relieve the authorities of the municipality, if they are in law fixed with knowledge of such negligence. This is plainly deducible from our own decisions. *Bunch v. Edenton*, 90 N. C. 431; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823; *Fitzgerald v. Concord*, 140 N. C. 113, 52 S. E. 309. In other jurisdictions it has been expressly held that the city is liable for damages to pedestrians for the negligent performance of work in a city for private purposes under special permission of the city council, where there is ordinarily a certain city officer to supervise it, and the city has knowledge that it is in progress on the day in question. *City Council of Augusta v. Cone*, 91 Ga. 714, 17 S. E. 1005; *Wendell v. City of Troy*, 39 Barb. (N. Y.) 329. The city is not relieved even if the work is in the hands of an independent contractor. *Southbend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; 16 A. & E. Encyclopedia (2d Ed.) p. 197, "Cases cited." We think, therefore, upon the facts in evidence, that the court committed no error in overruling the motion to nonsuit.

2. It is further contended that in the part of the charge hereinbefore recited his honor substantially instructed the jury, as matter of law, that the defendant was fixed with notice of the obstruction or excavation which caused the plaintiff's injury, and that such instruction is erroneous. We concur with appellant in the construction placed upon the charge excepted to, but we cannot concur in regarding it as erroneous. The question of knowledge upon the part of municipal authorities of defects in the public streets is usually one to be determined by the jury upon the principles so clearly stated by Mr. Justice Hoke in *Fitzgerald v. Concord*, supra. But in the case at bar there was nothing in dispute respecting notice for the jury to determine. It is admitted that on the day the excavation was made the defendant issued its permit authorizing it to be done. The defendant's authorities were therefore expressly charged with knowledge of the character of the work and its possible dangers to those of the citizens who should use the street especially after nightfall, as the plaintiff happened to do. A ditch cut across a much used street in a city is necessarily dangerous, and it is the duty of the person doing the work to protect it against accident to those using the street. The duty of a private person is very much the same as that of the city

itself when it is prosecuting an improvement. If a private individual fails to protect an excavation in the street, then it is the duty of the city authorities to see that it is protected, and they are held responsible that he should do so, for they were notified that he is going on with the work when he obtains the permit. The city is liable for negligence in failing to exercise supervision and inspection if injury results by such excavation made by an individual under such permit or license issued by it. *City of Southbend et al. v. Bennie Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *District of Columbia v. Henry E. Woodbery*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 477; *Bauer v. City of Rochester*, 59 Hun (N. Y.) 616, 12 N. Y. Supp. 418; *Hoyer v. Village of North Tana-wanda*, 79 Hun (N. Y.) 39, 29 N. Y. Supp. 650; *City of Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395; *City of Chicago v. Johnson*, 53 Ill. 91; *City of Denver v. Aaron*, 6 Colo. App. 232, 40 Pac. 587; *Bowen v. City of Huntington*, 35 W. Va. 682, 14 S. E. 217.

Upon a review of the whole record, we find no error.

(145 N. C. 152)

MANGUM v. NORTH CAROLINA R. CO.  
et al.

(Supreme Court of North Carolina. Oct. 10, 1907.)

CARRIERS—STATION PLATFORM—INJURY TO PASSENGER—LIABILITY.

A railway company must keep its station premises in a reasonably safe condition for passengers, the duty extending to the manner in which a platform is allowed to be used, and a carrier is liable for injury to a passenger by the negligence of a newspaper porter while moving a truck along a platform with the carrier's consent; that the newspaper company may also be liable not relieving the carrier from its duty to furnish the passenger a safe passage to its train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1142.]

Appeal from Superior Court, Wake County; E. B. Jones, Judge.

Personal injury action by C. E. Mangum against the North Carolina Railroad Company and another. From a judgment for plaintiff, defendants appeal. No error.

Civil action tried at February term, 1907, of Wake superior court; his honor E. B. Jones, judge, presiding. These issues were submitted: (1) Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Ans.: Yes. (2) Did plaintiff by his own negligence contribute to the injury complained of? Ans.: No. (3) What damage, if any, is plaintiff entitled to recover? Ans.: \$7,500. From the judgment rendered, defendants appealed.

F. H. Busbee and A. B. Andrews, Jr., for appellants. Ohas. U. Harris, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff, on the night of July 4, 1903, was a passenger on defendants' train en route

from Raleigh to Danville, Va. He passed through the gates of the defendants' station at Raleigh, and as he was walking along the platform used by passengers to reach the cars he was run into and seriously injured by a truck loaded with newspapers. It was in evidence that the man in charge of the truck was not employed by the railroad, but was employed by a newspaper, and it was his business to handle the newspaper mail. When the newspaper mail reaches the station in time, it is the custom for the railroad truck hands to take the mail from the gate down to the train. When the newspapers arrive too late to be taken at the gate by the truck hands, the man who brings the newspapers down from the office takes it down to the cars and delivers it to the mail agents at the mail car. Witness R. E. Lumsden testified that the newspaper mail was handled by the railroad porters when it got to the gate before the transfer clerk and the porters went down with the regular mail. If it arrived in time, the railroad porters took the mail down to the mail car; but, if the newspaper mail got to the gate after the porters had gone down with the mail, the person who brought the newspaper mail took it down to the mail car and unloaded it. When he went down with the mail on the night of July 4, 1903, the newspaper mail had not come. A colored boy named Lunsford Davis handled the newspaper mail to the depot for the newspaper at that time. The witness heard of the accident either that night or the next day.

The only question presented for our consideration is the liability of defendants to plaintiff for the negligence of the newspaper porter upon the above facts. It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry passengers is to keep its station premises in a reasonably safe condition so that those who patronize it may pass safely to and from the cars. *Pineus v. Railroad*, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856; *Wood on Railways*, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Weston v. Railroad Co.*, 73 N. Y. 595; *Wood*, supra. The defendants owed a duty to plaintiff and to all other passengers to keep its depot platforms used by them as means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars. *Pineus v. Railroad*, supra; *Railroad v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

The fact that the injury to plaintiff was inflicted by the negligence of the newspaper porter, who, with defendants' consent, was on his way from the gates to the mail car with the truck loaded with papers, does not

relieve the defendants from their contractual obligation to plaintiff, and we find no authority which sustains the contention that it does. The liability does not arise because defendants might reasonably have anticipated just what happened, but grows out of their duty to plaintiff to furnish him reasonably safe passage to the train. The defendants are not bound to accept newspapers and deliver them to the mail car unless the newspaper company delivers its papers at the gates in reasonable time for the defendants, through their own agents and employees to take them at the gates and transport them to the mail car. If the defendants customarily permitted the newspaper porter, when late in his delivery, to push the truck along the platform inside the gates when passengers are hurrying to and fro, the defendants must be liable for the porter's negligent conduct while using the station platform, upon the principle that they have temporarily accepted him as their servant. *Railroad v. Gustafson*, 21 Colo. 393, 41 Pac. 505; *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 523; *Hill v. Morey*, 26 Vt. 178; *Oil Creek v. Kneighton*, 74 Pa. 316; *Dimmitt v. Railroad*, 40 Mo. App. 654.

The fact that the newspaper company may also be liable for the negligence of its servant as a tort does not relieve the defendants from their contract obligations to furnish plaintiff a safe passage to its train. The case of *Fritz v. Railroad*, 132 N. C. 829, 44 S. E. 613, pressed upon our attention, has no relation, we think, to the case at bar. In that case the plaintiff, while alighting from the train, was injured by another passenger who was attempting to make his way into the car and accidentally struck plaintiff on the knee with his valise. The court held in that case that such conduct on the part of the passenger could not reasonably have been anticipated by the company's agents. For the same reason, the case of *Muster v. Railway*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141, cited by defendants, is no authority, in our opinion, to sustain their contention. In that case a postal clerk negligently threw out a mail bag at an unusual place, where he had never before thrown it. The court held that the company could not anticipate such conduct, and therefore was not called upon to take precautionary measures to prevent injury. On the contrary, it is held, in *Snow v. Railway*, 136 Mass. 552, 49 Am. Rep. 40, that a passenger, waiting on a platform at the railroad station for a train and injured by a mail bag being thrown from a passing train, such throwing being customary and well known to the company, may recover of the railroad company therefor. The decision is put upon the ground that, although the postal clerk is not the agent of the railroad company, but is the agent of the national government exclusively, the custom being known to the company, it must take precautions to protect its passengers from injurious consequences.

It is true, as contended by counsel, that there is no proof whatever that defendants are under any contractual obligation or duty to receive the mail intended for the mail car at the station gates, when the newspaper is late in reaching the train. But if, nevertheless, they do receive the papers on such occasions, and customarily permit the newspaper porter to discharge the duty their hired employes otherwise discharge, they must be held to liability to passengers if they are injured by such porter's negligence while on the platform.

The only exception to the evidence was abandoned by appellants upon the argument. We have examined the charge carefully, and find it fair, free from error, and in line with the views expressed in this opinion.

No error.

(62 W. Va. 167)

### TOOTHMAN v. COURTNEY.

(Supreme Court of Appeals of West Virginia.  
April 25, 1907. Rehearing Denied  
Oct. 17, 1907.)

#### 1. MINES AND MINERALS—CONVEYANCES—OIL AND GAS LEASE.

A deed, granting, by the use of appropriate technical terms, all the oil and gas under a tract of land, together with the exclusive right to enter thereon at all times for the purposes of drilling and operating for oil and gas, but limiting the estate to a term of seven years and as much longer as oil or gas may be found thereon in paying quantities, stipulating for the payment of commutation money for delay in drilling, denominating it rental, and providing for the delivery into pipe lines, for the grantor, of one-eighth of all the oil produced and saved from the premises, and also for payment of a yearly rental for every gas well from which gas is transported and used off of the premises, does not pass the title to the oil and gas in place. In legal effect it is a mining lease and the title to the oil and gas in place remains in the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 154, 160.]

#### 2. CONTRACTS — CONSTRUCTION — DEEDS — GENERAL RULES—INTENTION OF PARTIES.

Technical words in a deed, contract, or other instrument will be limited and controlled in their effect by the intention of the parties, gathered from the instrument, considered, as a whole, in the light of the nature of its subject-matter and the purpose for which it was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 732-734.]

#### 3. TAXATION — ASSESSMENT — MODE — UNDIVIDED INTEREST IN LAND.

An undivided interest in land or mineral underlying land cannot properly be entered and taxed on the land book; and a deed founded upon a sale of such undivided interest for non-payment of taxes is irregular, and will be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 577, 1352, 1353.]

#### 4. SAME—CURATIVE STATUTES.

Such defect in the assessment, sale, and deed is not cured by any provision of section 25 of chapter 81 of the Code of 1899 [Code 1906, § 884].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 770.]

#### 5. SAME—TAX TITLE—ACTION TO SET ASIDE DEED—CONDITIONS PRECEDENT.

A bill to set aside a tax deed in such case must tender the purchase money and taxes subsequently paid as a condition precedent to the setting aside of the deed, or aver the willingness and readiness of the plaintiff to pay the same. A decree which fails to secure to the purchaser such reimbursement is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1586.]

#### 6. APPEAL—DISPOSITION OF CAUSE—REMAND TO TRIAL COURT—LEAVE TO AMEND.

On reversing a decree for insufficiency of the bill, in a cause in which a good case is disclosed by the evidence, this court will remand the cause with leave to the plaintiff to amend his bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4606, 4616-4619.]

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County.

Action by Daniel L. Toothman against David H. Courtney and others. From a decree in favor of plaintiff, defendant Courtney appeals. Reversed and remanded.

Cox & Baker, for appellant. W. S. Meredith and W. S. Conaway, for appellee.

POFFENBARGER, J. Daniel L. Toothman obtained, by a decree of the circuit court of Monongalia county, the setting aside of a deed, made by the clerk of the county court of said county, conveying to David H. Courtney an undivided one-sixteenth of the oil and gas in a tract of 143 acres of land, lying in said county, pursuant to a sale thereof, as delinquent land, made by the sheriff. The land seems to be rich in oil production, carried on by the South Penn Oil Company, and the decree, in addition to setting aside said deed, requires said company to pay one-sixteenth of the oil produced by it to Toothman instead of Courtney. Believing the tax deed valid and his title to the royalty good, Courtney has appealed.

As the decree stands upon the theory of invalidity in the assessment, nontaxability, and nonsalableness of the Toothman interest as land, it is necessary to disclose here the transactions relating to the title. Owning the tract of land in fee, Toothman on the 6th day of August, 1889, executed to one C. J. Ford an instrument, the true character of which is a matter of controversy between counsel for the respective parties, but which designates itself "oil lease." In express terms, it grants to Ford "all the oil and gas in and under" the land, "to have and to hold for the term of seven years" from the date thereof "and as much longer as oil or gas is found in paying quantities thereon." Further provisions, bearing upon the question to be determined, read as follows: "The above grant is made upon the following terms: 1st. Second party agrees to drill a well upon said premises within ten months from this date, or thereafter pay to first party a yearly rental of \$144.00 dollars for further delay until such well is drilled, such

parted conditionally with his entire interest in the oil and gas, and for all time, not for a mere term of years. It was agreed, among other things, that, if any royalty should be produced under the lease then on the land, it should go to the grantee.

Our conclusion is that the instrument under consideration is a lease, vesting in Ford a right of exploration and production on the usual terms of one-eighth of the oil to the lessor as royalty, and seven-eighths to the lessee as a "working interest," which passed by assignment to the South Penn Oil Company, leaving the fee-simple title to all the oil and gas in the lessor. Of this he conveyed to Joseph H. McDermott one-sixteenth, retaining the title to fifteen-sixteenths. By the deed to Willson he conveyed the land in fee, reserving to himself "all the oil rental." What right or title remained in him by virtue of this reservation is a question not free from difficulty. We all agree that he still had a fee-simple estate in the oil and gas, but we differ as to the extent of that interest. My associates, except Judge MILLER, are inclined to the view that he retained an undivided one-sixteenth. I am unable to reach the conclusion that he retained that otherwise than by holding that he retained all the oil and gas, less what he had conveyed to McDermott. I do not see how it can be said that he retained any interest in the gas and oil *in nomine*. A rental issuing out of the land is not the land itself, nor is it any part of the land. Rents and profits are the mere usufruct of the land. There may be an estate in them, an unlimited right of enjoyment; but it is an incorporeal hereditament. A reservation in a deed or lease of a rent for a term of years is none the less an intangible incorporeal right. In the deed to Willson Toothman reserved no land, no oil, no gas, by name, but only the oil rental, which means the royalty. He reserved all the oil rental, thereby retaining in himself the beneficial use of all the oil in the land less what he had conveyed to McDermott. The only provision of the deed in favor of Willson relating to the oil is the grant of one sixty-fourth thereof, to become effective after the drilling of more than 12 wells on the land. Though he did not reserve by name the oil in place, or any part of it, his reservation of all the rental or royalty to be derived from it compels the court to hold, by construction of the instrument, that it vests in him the title to that thing, the beneficial use whereof has been reserved, namely, the oil in place. Jarman on Wills, marg. p. 741, says: "A devise of the rents and profits or of the income of land passes the land itself both at law and in equity—a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since St. 1 Vict. c. 26, such a devise carries the fee simple; but before that act it carried no more than an estate for life,

unless words of inheritance were added. But where a testator, seized or possessed of a reversion in fee or for years, to which rent was incident, devised or bequeathed his 'ground rent,' not only the rent, but the reversion, would pass; as he was considered, when speaking of the ground rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit." This principle was applied by the Supreme Court of Pennsylvania in *Weakland v. Cunningham* (Pa.) 7 Atl. 148, in which it was held as follows: "The following reservation in a deed: 'Excepting the profits of one-half of all the stone coal, and of all other kinds of mineral, which may be discovered at any time hereafter'—is a reservation of the corpus of all such coal and mineral in place."

Not doubting the soundness of this legal proposition or its applicability in the construction of deeds, as well as wills, I unhesitatingly make use of it here, because it will operate justly, fully effectuating the intention of the parties. The oil was already under lease, and the royalty, or oil rental, is all it can ever yield to its owner. That reserved to Toothman, he has the entire beneficial use of the oil, the equivalent of the ownership of it in place. Willson can never derive a dollar from it, unless the conditional grant of a one sixty-fourth interest should take effect. If there had been no lease on the land, I would be of the same opinion, for a reservation of all possible benefit of the oil is tantamount to a reservation of the corpus thereof. It matters not that, in such case, there would be a presumption that one-eighth is the royalty contemplated, it being the usual royalty, for that presumption is inseparable from the further one that the remaining seven-eighths goes with the royalty as a means of making it available, or realizing it; for, where one-eighth is the royalty, the residue never benefits the landowner otherwise than by enabling him to get the one-eighth. It is given to the lessee as compensation for producing and delivering the royalty. The two presumptions are locked in indissoluble companionship. They unite in pressing the view that a grant, exception, or reservation of the one-eighth royalty carries with it, as a satellite of the royalty, the seven-eighths "working interest." That afterwards it happens that a larger royalty may be obtained by the grantee signifies nothing. He is at perfect liberty to make a better bargain for operation of the territory than it was supposed he could make. After events and mere surmises are not to be considered. The intention at the time of the execution of the deed is the test. Judge MILLER concurs in the views I have here expressed. But whether these conclusions be sound or not, we agree that Toothman had title to at least one-sixteenth of the oil in place, and that he did not have title to the whole of it; for he had, by his deed, conveyed one-sixteenth to McDermott.

The tax deed stands upon the assessment of an undivided interest in land. Will such an assessment sustain a sale and conveyance of land for nonpayment of taxes? Our statute does not contemplate such an assessment. Section 36 of chapter 29 of the Code of 1899 [Code 1906, § 821-36], reading as follows, requires land to be assessed either as tracts or town lots, according to the fact: "The clerk of the county court shall make out the land book, including all extensions, in such form as the auditor may prescribe, showing for each magisterial district in one table the tracts of land and in a separate table the town lots, arranged in the alphabetical order of the names of their owners." Accordant with said provision, and rendering proper departure therefrom impossible, section 37 of said chapter [Code 1906, § 821-37] imposes the following duties: "In the table of the tracts of land the clerk shall enter each tract separately, and shall set forth, in as many separate columns as may be necessary, the name of the person who, by himself or his tenant, has the freehold in his possession; the nature of his estate, whether in fee or for life; the number of acres as near as may be in the tract; the name of the tract, if it has a name; a description of it, as far as practicable, with reference to the water-courses, mountains or other places on or near which it lies; the distance and bearing, as near as may be, from the court house; the value of the land per acre, including buildings; the value of the whole tract and buildings; the sum included in the value on account of buildings; the amount of taxes assessed on each tract for state, state school, county, free school, building and other district purposes, in separate columns, at the rate assessed for each of such purposes." The person in whose name real estate shall be taxed is prescribed in section 40 [Code 1906, § 821-43] of said chapter, as follows: "As to real property the person who, by himself or his tenant, has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation. A person who has made a mortgage or deed of trust to secure a debt or liability shall be deemed the owner until the mortgagee or trustee takes possession, after which such mortgagee or trustee shall be deemed the owner." That undivided interests are not to be separately assessed is made apparent by the provision relating to taxation of lands of decedents, reading, in part, as follows: "When the owner dies intestate, his undivided real estate may be listed to his heirs without designating any of them by name until they shall have given notice to the clerk of the county court of the division of the same, the names of the several heirs, and the parcels allotted to each; and each heir shall be liable for the whole tax assessed upon such land while it is so listed; but when he pays the same he may recover of the others their proper

proportion of the amount so paid and the proportion thereof for which such other or others are liable shall be a lien on the interests owned by him or them in such lands; and such liens, when the amount so paid exceeds twenty dollars in all, may be enforced in a court of equity." Section 26, c. 29, Code 1899 [Code 1906, § 821-26]. Separate assessment of certain interests is authorized by section 25 of said chapter [Code 1906, § 821-25], but they are not undivided interests. It says: "When a tract or lot of land becomes the property of different owners, in several parcels, or one person becomes the owner of the surface, and another of the minerals under the same, or of the timber alone on said land, the assessor shall divide the value at which the whole had before been assessed, among the different owners, having regard to the value of each interest compared with that of the whole, and enter the same on the copy of the land book in his possession, or upon a statement appended thereto." This applies where the freehold estate in the minerals or timber has been severed, in ownership, by deed or otherwise, from the freehold in the land. Under it, coal is assessable by the acre, oil or gas as the oil or gas in so many acres, and timber as the timber on so many acres; each as an entire thing, or stratum of the land. Nothing in it suggests a shadow of authority for assessing an undivided interest in one of these things, nor can there be any reason for doing so which would not be equally applicable to such interests in other portions of the land. However potent such reasons may be, the Legislature has refused to be governed by them, and the mode of assessment is a subject of its discretionary power, with which courts cannot interfere.

It has been suggested that section 4, c. 21, p. 83, Acts 1899, providing for the reassessment of the value of all the real estate in this state, authorizes and will sustain the assessment of undivided interests in minerals. How far that act may be deemed to have amended the general law, it having been a special act, providing for a single valuation, might be an interesting question, if it were necessary to make the inquiry. It contains no repealing clause, and appears not to have been designed to work any radical or fundamental alteration of the general laws relating to taxation, and its character and purpose must not be overlooked in seeking its meaning. The clause therein relied upon as authorizing this assessment reads as follows: "And when mineral, mineral water, oil, gas or coal privileges or interests, are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately, to such party or parties, company or association." That mere licenses or leases for coal, oil, or gas never were, and are not now, taxable as land under this or any other statute, has been solemnly decided by this court in Har-

vey Coal Co. v. Dillon, 53 S. E. 928, 59 W. Va. 605, notwithstanding the very general terms used. The word "interest" is still more indefinite, and a qualified meaning is necessarily given to it by the context. That limits it to an interest held exclusive of the surface, thereby impliedly requiring separation in title of something from the surface. Separation from the surface can only apply to something which had connection therewith. Surface is a tangible thing. The "interest" to be held separately necessarily means, therefore, the coal, oil, gas, and mineral water; not an undivided interest in that interest. Under this act partial separation from the surface is not enough. The thing to be separately assessed must be held exclusive of the surface. That means total separation of something from the surface. Acts in pari materia must be construed together. This act and section 25 of chapter 29 of the Code of 1899 [Code 1906, § 821-25] were operative at the same time and related to the same thing. Said section 25 had already authorized separate assessments of minerals and timber when separately owned. As there was some confusion in the minds of assessors as to what were minerals, the reassessment act of 1899 descended into an enumeration of several species thereof, naming such as were frequently owned separately from the surface. These things the act called mineral "interests," plainly meaning the minerals themselves, not estates in them, interests in the titles thereto, or shares therein. It is not pretended that section 25 of the general law contemplates separate assessment of undivided interests in minerals, and there is a presumption against any intent to modify it by the special reassessment act, which must be overcome with plain language. The reassessment act related to valuation only. Nothing else is included in its title. Anything in the act, not fairly within its title, is a nullity. Who should pay tax on land is wholly foreign to the matter of valuing land for taxation. Acts should be so construed as to make them valid and effective, not unconstitutional and void. In merely enumerating the species of minerals, separate taxation of which had been authorized by the general statute, the valuation act added nothing, changed nothing. It merely interpreted the general statute and made it plain and clear for the guidance of the assessors acting under the valuing act. "Interests" in the clause of the statute, above quoted, necessarily means mineral water, oil, gas, and coal. It is qualified by the terms "mineral, mineral water, oil, gas or coal," used as adjectives. "Privileges and interests" are the assessable subjects, and they are mineral subjects. The complete owner of the coal in a tract of land is the owner of an interest in it, and it is a mineral interest. Such description does not fit ownership of an undivided half or other fraction of the coal. In describing such ownership, using

interest for coal, it would be necessary to say an undivided interest in a mineral interest. My construction makes interest stand for mineral. The other construction would make it stand for mineral also, and then go further and qualify mineral by the word "undivided." This, in my opinion, is unwarranted by the letter of the clause, and is certainly in the very teeth of the general law, and therefore violative of another rule of construction.

If the terms in which the lawmaking body has expressed itself were, in any sense, doubtful respecting this matter, which I do not admit, there would be very strong reasons for resolving that doubt against taxation of undivided interests, and their potency on the question, whether the departure is material, is apparent. It would often bring almost infinitesimal interests in land under clouds of title and into litigation, thereby clogging and obstructing alienation, withholding land from the markets, impeding its improvement, and retarding the development and prosperity of the state. Such a system of taxation would be burdensome to the owner and unwise as a matter of state policy, viewed in this light alone. The observations of Mr. Justice Sawyer of the Supreme Court of California in *Bidleman v. Brooks*, 28 Cal. 72, on setting aside a tax deed, predicated on the assessment of a part of a tract of land, held in undivided ownership as the supposed equivalent, in acreage, of the undivided interest of one of the cotenants, apply here with almost equal force. He said: "The assessor is nowhere authorized to arbitrarily divide up lots in strips to suit his caprice, and assess such several portions separately. If he may divide up a lot of well-known boundaries into strips 20 feet wide, he may divide it into strips of 1 foot in width, or even smaller dimensions, and assess each separately, and thus render it not only greatly inconvenient and oppressive to the owner, but almost impossible for him to ascertain whether his taxes have all been paid or not. The law undoubtedly contemplates that each lot of well-known dimensions and boundaries shall be assessed as one lot. In this instance there was a lot of the ordinary dimensions—the smallest of the lots as originally officially surveyed and platted in that part of the city—which had not been subdivided by the owner. It was inclosed by a single fence, separating it distinctly from all other lands, and had a dwelling-house and outbuildings upon it, the whole openly and notoriously occupied as a single lot or messuage by the defendant's tenant and his family. Yet it was arbitrarily sliced up into at least three parts, and each separately assessed as a distinct lot; the larger portion—more than half—being assessed to the real owner, the defendant, and the other two parcels to unknown owners. Such an assessment of a tract of land constituting one well-known lot, and actually occupied as

such, if it would necessarily have such an effect, would be very likely to mislead the owner, and result, as in this instance, in a sale of his property. The owner calls to pay his taxes. A list of all the taxes against him is furnished. Upon looking it over, he finds a lot in a certain locality taxed to him, and, without scrutinizing the boundaries very closely, he naturally concludes that the whole lot is assessed to him, as it should be, pays his taxes, and rests in security, till several years afterward he finds that a small strip has been, in fact, assessed to unknown owners, and, without his knowledge or fault, sold."

Under our system of taxation, land itself, and not a mere estate or interest in it, is a primary subject of taxation, and the remedy for enforcement of payment is directly against the land as well as its owners. The statute creates a lien upon all land for the taxes thereon, which may be enforced by a suit in equity. It also provides for sale of the land for nonpayment of the taxes thereon, and, for failure to cause land to be charged with the taxes it ought to pay for a period of five years, the title is forfeited and becomes vested in the state by constitutional and statutory provisions. These provisions deal with the corpus and complete title to the land. In so far as they are constitutional, they are of great dignity, and may be considered as founded upon most weighty reasons of public policy. Such of them as are statutory must be deemed to be in execution of the constitutional plan of taxation, and highly impregnated with its spirit. Good reason for adopting the plan is found in the consequences which would flow from general use of the departure now under consideration. If 50 persons, owning equal undivided shares of a tract of land, were separately charged with their respective interests on the land book, the state's lien for taxes would be severed into 50 parts, and 50 suits might be maintained, and possibly would be necessary for the collection of the taxes on the tract. It would require 50 separate and distinct sheriff's sales for delinquency, and, if made to the state for want of private bidders, she would be compelled to make 50 purchases, instead of 1, undergoing multiplied risks of complication, delay, and loss, and the state would find herself, in thousands of instances, in a relation of co-tenancy with private persons in the ownership of land, not only as the results of such sales, but also of forfeiture for nonentry. It would not only bring upon the state embarrassment in the enforcement of her constitutional rights and powers, but upon the people interminable confusion of land titles, contrary to the spirit of the Constitution, which, by its system of forfeiture and transfer, endeavors to prevent and eradicate uncertainty of such titles.

It may well be assumed that taxation of land by undivided interests would be fraught with inconvenience and injury to the land-

owner as well as to the public, though the nature and extent thereof is not so apparent. First. The law prescribes a different mode, and so impliedly forbids it, all of which is presumed to rest upon sound reason, and, as the state's ability to sustain such burdens in the forms of expense and delay as are necessary to just, equitable, and fair dealing with the taxpayer is ample, the Legislature may be deemed to have considered his best interests, as well as those of the public, in adopting the scheme of assessment and collection of taxes. Secondly. The assessment of the entire tract or lot against some person or persons indicated by statute is almost universal among the states of this country. In some states the assessment is made against the owner or occupant, in others against the owner, and in others against the person or persons having the freehold in possession. In very few instances have assessments been prescribed otherwise than by tracts and lots. Blackwell, Tax Titles, § 256 et seq.; Black, Tax Titles, §§ 104, 105; Cooley, Tax. 730-733. "In a majority of the states the rule prescribed by the statutes is that lands and other real estate shall be assessed as such, irrespective of the separate estates that individuals may have in them." Cooley, Tax. 739.

However, inasmuch as every foot and particle of any given tract of land is made liable, by the Constitution and statutes, for all the taxes charged and chargeable thereon, and it is beyond the power of the assessor, collector, or owner to evade the claim and remedies of the state by the assessment or collection of only part of such taxes, it is not difficult to perceive that the owner of an undivided interest in it is subjected to great peril by the attempt to assess it by undivided interests. In such case, if one undivided interest should become delinquent, it would be the duty of the auditor to certify either the entire tract for sale or none of it; and, if any undivided interest should be omitted for a period of five successive years, the title to the entire tract would become forfeited and vest in the state. Forfeiture and sale can be prevented only by payment of all the taxes. Smith, Trustee, v. Tharp et al., 17 W. Va. 221; Frum v. Fox, 58 W. Va. 334, 338, 52 S. E. 178. This must be so, else the state may be deprived of part of her security by the mere ignorance, negligence, or malfeasances of her officers; for, in so dividing up an assessable subject, they release liens and split up remedies into mere shreds without warrant of law, and, if it be so, a landowner will ordinarily have great difficulty in determining when and how the taxes on his land have been discharged. Instead of one assessment and payment to look after, he may have 12 or 50. Again, he is presumed to know the law, and to have assumed, in this case, either that the taxes on his interest were included in some other legal assessment, or that it had not been charged at

all; for, this assessment being invalid, he is presumed to have had knowledge of its invalidity and to have refrained from paying under the assessment for that reason. The departure from the requirement of the statute is therefore plainly manifest, and, as it appears in the record of the proceedings, it must be assumed that, but for it, the interest sold would have been redeemed. *McCallister v. Cottrelle*, 24 W. Va. 178; *Williamson v. Russell*, 18 W. Va. 612; *Simpson v. Edmiston*, 23 W. Va. 675; *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509.

A great many defects and irregularities in tax sales and tax deeds are cured by section 25 of chapter 31 of the Code of 1899 [Code 1906, § 884], but this seems clearly not to be one of them. It is not an irregularity, error, or mistake in the delinquent list, the return thereof, the affidavit thereto, the recordation of such list or affidavit, the manner of laying off any real estate sold, the plat, the description, or report. It is not an instance of the failure of any officer to do or perform any act or duty required to be done or performed by him after sale is made, or of his illegal or defective performance, or attempt at performance, of any such act or duty. Nor is it within any of the other defects or irregularities specifically cured by said section.

Affirmance of the decree would be the inevitable result of these conclusions, but for a fatal defect in the bill, which can be cured by amendment. It does not tender the tax sale purchase money and taxes subsequently paid in obedience to the statutory requirement in such case, nor does it aver the plaintiff's readiness and willingness to reimburse the purchaser, nor does the decree in any way secure to the defendant his right of reimbursement. For this reason the decree will have to be reversed and the cause remanded with leave to the plaintiff to amend his bill in this respect. See *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509; *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537. The court below, deeming the assessment, sale, and deed fraudulent and void, held reimbursement not necessary. We do not concur in this view. It was an irregular and defective assessment and sale, not cured by the statute.

Agreeably to the conclusions above stated, the decree will be reversed, the demurrer sustained and the cause remanded, with leave to the plaintiff to amend his bill.

(78 S. C. 269)

**EHRLICH v. JENNINGS, Treasurer.**

(Supreme Court of South Carolina. Sept. 27, 1907.)

**1. BILLS AND NOTES—BONA FIDE PURCHASERS.**

The holder of a negotiable instrument for value before maturity and without notice has a good title as against the true owner, though the same may have been stolen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 955.]

**2. STATES—BONDS—NEGOTIABILITY.**

A coupon bond of a state is a negotiable instrument, and the state issuing the same incurs the same responsibilities as an individual.

**3. SAME.**

Laws 1892, pp. 24, 25, §§ 1, 2, provide for the redemption of certain bonds and stocks of the state by the issuance of other bonds and stocks to be exchanged therefor. Section 3, p. 26, requires all bonds and stocks surrendered to be immediately canceled. A coupon bond, having been exchanged for a certificate of stock under sections 1 and 2, but not canceled as required by section 3, was thereafter stolen and again restored to circulation. *Held*, that a holder for value before maturity and without notice was entitled to again exchange the same for a certificate of stock.

**4. SAME.**

Const. art. 10, § 11, forbidding the General Assembly from creating any further debt or obligation without first submitting the question to the electors, does not bar a bona fide holder of a coupon bond of the state from the right to exchange the same for a certificate of stock under the express provisions of Laws 1892, pp. 24, 25, §§ 1, 2, though such bond has theretofore been redeemed by exchange of a certificate of stock, but again restored to circulation by theft.

**5. MANDAMUS—TO STATE TREASURER—REDEMPTION OF BONDS.**

Mandamus will lie to compel the State Treasurer to exchange a certificate of stock for a coupon bond, as authorized by the express provisions of Laws 1892, pp. 24, 25, §§ 1, 2, under the rule that mandamus lies to compel a public officer to perform a ministerial duty imposed by law to the performance of which relator has a right and to enforce which he has no other adequate remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 220.]

**6. STATES—ACTIONS AGAINST STATE—STATE OFFICER AS DEFENDANT.**

Mandamus to compel the State Treasurer to exchange a certificate of stock for a coupon bond, as authorized by the express provisions of Laws 1892, pp. 24, 25, §§ 1, 2, is in no sense a suit against the state without its consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, States, § 181.]

Pope, O. J., Gary, A. J., and Gary, Klugh, Prince, and Hydrick, Circuit Judges, dissenting.

*En banc*. Mandamus by Edward Ehrlich against R. H. Jennings, as State Treasurer, to compel him to issue a certificate of stock in exchange for a coupon bond, under Laws 1892, p. 24. Writ granted.

W. T. Aycock, for Relator. Attorney General J. Fraser Lyon, for State Treasurer.

JONES, J. The relator as holder of a coupon bond No. 2525, for \$1,000, payable to bearer, issued by the state in June, 1893, presented the same to the State Treasurer, and demanded a certificate of stock in exchange therefor under the act of 1892 (Laws 1892, p. 24), entitled "An act to provide for the redemption of that part of the state debt known as the Brown consul bonds and stocks by issuing other bonds and stocks." The State Treasurer refused to make the exchange, on the ground that said bond had been previously redeemed, having been surrendered to the State Treasurer by a holder in exchange for stock, and thereafter had



been stolen from the treasury vault by a clerk in the office. Mandamus is now sought to compel the State Treasurer to issue stock in exchange for said bonds.

No marks to indicate cancellation were ever placed upon said bond, although the statute expressly declared that such surrendered bond "shall immediately upon such surrender be canceled and filed by the State Treasurer with the permanent records of his office." It is admitted that relator is a bona fide holder for value before maturity and without notice. The general rule of law is that a thief of personal property cannot convey to a purchaser, however innocent, any title to the stolen property as against the real owner; but from the highest considerations of public policy the law excepts from the rule negotiable instruments acquired in good faith before maturity and without notice, and makes the title of such holder good against the world. Bond Debt Cases, 12 S. C. 200; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Evertson v. Nat. Bank of Newport, 68 N. Y. 14, 23 Am. Rep. 9; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857; Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237. The Bond Debt Cases, 12 S. C. 201, show that a coupon bond of the state, valid in its inception, is a negotiable security, and the state issuing such negotiable paper incurs the same responsibilities which attach to individuals or corporations in like cases. There is no suggestion that the bond in question was not valid when originally put in circulation, and, it being admitted that relator is a bona fide holder thereof at this time, his title can in no wise be affected by the surrender of the bond to the Treasurer by some antecedent holder and the subsequent theft, by means of which it was again put in circulation. The method which the state had adopted to take such bond out of circulation—cancellation—was not complied with by those intrusted by the state with that duty. The direction to cancel surrendered bonds was designed to prevent the very possibility which has happened, and the failure of the state officers to comply cannot be treated as a circumstance of no consequence, for the absence of marks of cancellation make it possible for the thief to put the bond in circulation.

The respondent relies upon the case of Branch v. Commissioners of the Sinking Fund, 80 Va. 427, 56 Am. Rep. 596. The syllabus of that case is as follows: "Coupon bonds issued by the state of Virginia had been redeemed, and others had been issued in their stead. The bonds so redeemed were stolen from the state, and came into possession of a bona fide holder for value, who presented them to be refunded in other state bonds. Held, that mandamus would not lie to compel the funding." This result is based upon three reasons: (1) The bonds could not be funded because they were not legal outstanding obligations of the state, having been

redeemed and extinguished. (2) That, if the bonds were legal obligations of the state to be paid at maturity, the contract of the state was to pay money, not to give other bonds for them. (3) That the bondholders were under the circumstances guilty of negligence in failing to inform themselves, as they could and ought to have done by a breath, as to the genuineness of the bonds. It will be observed that the third reason given is contradictory of the view that the holder was a bona fide holder for value before maturity without notice, as that language is understood in this state and now generally in this country and England. At one time in England, under the case of Gill v. Cubitt, 3 Barn. & C. 466, it was held that the holder, to have good title, must not have taken the negotiable paper under circumstances which ought to have excited the suspicion of a prudent man, and this view has received some support in this country, but in Goodman v. Harvey, 4 Ad. & E. 870, the doctrine of Gill v. Cubitt was completely discarded, and the rule declared that negligence which is not so great as to warrant an inference of fraud or bad faith will not affect the title of the holder. Such is now generally the rule in this country. Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 984; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294. We refer to this to show that, in so far as the Virginia case rests upon the negligence of the holder as affecting his title, it cannot receive any sanction in this state, for, if the holder was merely negligent, his title should have been held unaffected; whereas, if his negligence was so gross as to warrant an imputation of bad faith, that made a case wholly different from the case at bar, where there is not a suspicion of bad faith. With respect to the second reason given in the Virginia case, if it be conceded that the bond in question is a valid obligation of the state in the hands of a bona fide holder, it would seem clear that such bona fide holder is clothed by law with every right given to holders of the bonds by the statutes which authorized their issuance, exchange, or redemption. The main reason upon which the doctrine of the Virginia case rests is that which treats the bonds when once surrendered to the Treasurer in exchange for other bonds as dead matter, whose vitality could never be restored without voluntary redelivery by the state, and, there being no such redelivery, the bonds should be held to be in the category of commercial paper stolen from the maker before it had legal inception. Although there is conflict, much authority exists for the view that an innocent holder for value of paper commercial and negotiable in form, but which had never been completed by delivery, cannot acquire rights thereto against the alleged maker. Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Salley v. Terrill, 95

Me. 553, 50 Atl. 896, 55 L. R. A. 730, 85 Am. St. Rep. 433.

This rule, however, cannot properly apply in a case where the negotiable paper has once become operative by a valid delivery. The real point of inquiry is, admitting a valid and strictly negotiable paper in the hands of a bona fide holder before maturity: How far can intervening circumstances affect the title of the holder? The general rule is that payment before maturity is no defense against a subsequent bona fide holder for value before maturity. 3 Randolph, Com. Paper, § 1470; 2 Dan. Neg. Inst. § 1233; Haug v. Riley, 101 Ga. 372, 29 S. E. 44, 40 L. R. A. 249; Rockville Nat. Bank v. Citizens' Gaslight Co., 72 Conn. 581, 45 Atl. 361. It is the duty of the maker paying commercial paper before maturity to take reasonable precaution to prevent its restoration to circulation by accident or fraud. In Ingham v. Primrose, 7 C. B. N. S. 82, the acceptor of a bill after paying it, and intending to cancel it, tore it in halves and threw it into the street, but the drawer, having picked up the pieces and pasted them together, put the bill again into circulation. The acceptor was compelled to pay a second time. In California v. Wells Fargo & Co., 15 Cal. 336, certain warrants issued by the state of California were paid and deposited in the office of the Treasurer, were afterwards stolen from the office and passed into the hands of a bona fide holder, who presented them to the Treasurer to be exchanged for bonds under a statute of that state. The Treasurer, not aware of the theft, exchanged bonds for warrants. On discovering the theft afterwards, he brought suit to recover the bonds, but the court held that the bonds were valid debts of the state in hands of the innocent holder. In Rockville Nat. Bank v. Citizens' Gaslight Co., 72 Conn. 576, 45 Atl. 361, coupon bonds of the defendant had been paid before maturity and surrendered, but not marked "Canceled," and left in the hands of the defendant's treasurer, who, with no power to reissue, fraudulently pledged same with plaintiff bank, which took them before maturity, bona fide, and without notice. The court held that plaintiff was entitled to recover upon the bonds. The case of District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. 694, 32 L. Ed. 1041, is distinguishable from this case in at least two important particulars: (1) The certificates involved in that case were held not to be strictly commercial paper. (2) When paid, they were, in fact, marked "Canceled," although the marks of cancellation were removed by the thief, a clerk in the office.

The principle that a bona fide holder cannot acquire title where there is absolute want of power in the state or its officers to issue negotiable paper has no application in this case; the bond in question having been originally issued by due authority. The holder is not claiming by virtue of any re-

issue of the bond after its redemption, but by virtue of the original issue and relation to it as a bona fide holder unaffected by intervening facts. The claim is not that the Treasurer, or any one in his office, had power to reissue the bond, but that he was charged by the state with the duty to keep it out of circulation by cancellation, and that his failure to do so was the state's failure. It is true the doctrine of estoppel in pais does not apply to a sovereign state, and that the state can only act under its Constitution and through its legislative enactments, and that, therefore, contracts cannot be created against the state except under such sanctions. Bank v. State, 60 S. C. 475, 38 S. E. 629. But here we have a bond of the state issued by due authority of the Legislature, which the representative of the state failed to cancel as directed by statute, and which is now under the law merchant the property of the relator. As stated by Chief Justice Waite in *Cooke v. United States*, 91 U. S. 589, 23 L. Ed. 243: "A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required by individuals; and, if it fails in this, its claim upon the parties is lost. *U. S. v. Barker*, 12 Wheat. (U. S.) 559, 6 L. Ed. 728. Generally in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty authorized to represent the government in that behalf neglects that duty, and loss ensues, the government must bear the consequences of his neglect." It may be further said that the right of a bona fide holder of commercial paper under circumstances like these does not wholly rest upon the law of estoppel, but is grounded upon high public policy which is subserved by making him secure in his title.

It is urged in behalf of the respondent that the recognition of the bond in question as a valid debt of the state, when it has already been redeemed by the issue of stock in exchange would result in increasing the debt of the state, in violation of Const. § 11, art. 10, which forbids the General Assembly from creating any further debt or obligation without first submitting the question to the qualified electors, etc. As declared in *Whaley v. Galliard*, 21 S. C. 581, with reference to a similar provision in the Constitution of 1868, the object of the provision was to place restrictions upon the power of the Legislature to contract debts. It has no application to a case like this. We are not concerned now with the validity of the stock issued in exchange for the bond, but the principle announced touching the rights of a bona fide holder would surely protect the holder of such stock in his title. The bond in ques-

tion in the hands of the relator is no new debt attempted to be created by the unauthorized act of some officer, or even by the judgment of a court, but represents the old debt provided for in the statute authorizing the issue of that series of bonds.

Having thus established the status of relator's title to the bond in question, we proceed to consider whether mandamus should issue to compel the exchange demanded. Mandamus lies to compel a public officer to perform a plain ministerial duty imposed by law, involving no discretionary power to the performance of which the relator has a right, and to enforce which he has no other adequate and specific legal remedy. Every condition of this law governing mandamus is met in this case. There is no other adequate legal remedy. We have shown the relator's title to the bond in question to be impregnable. As owner of the bond, he is unquestionably entitled to every right conferred upon the holder by the statute authorizing its issuance, exchange, or redemption. He has presented to the proper public officer the actual bond for exchange, and his demand has been refused. The officer has no discretion to refuse such a demand by a bona fide holder, and the statute imposes upon him the plain ministerial duty to make the exchange upon demand and surrender of the bond. In *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213, the court refused mandamus because the statute required the funding of certain bonds upon their actual surrender, a condition which the holder had not met. In this case the bond is actually tendered; hence there is nothing in the case of *Lord v. Bates* antagonistic to the issuance of the writ in this case.

The Attorney General, however, waives all questions as to the remedy. The right of a bona fide holder of negotiable paper is not merely equitable. It is a legal right under the law merchant, and mandamus should not be denied upon the ground that relator's right is a mere equity. This is in no sense a suit against the state without its consent; for, whenever mandamus lies, it compels the performance of official duty imposed by the state.

The writ should be issued as prayed.

WOODS, J., and WATTS, GAGE, DANTZLER, MEMMINGER, and WILSON, Circuit Judges, concur with JONES, J.

GARY, A. J. (dissenting). This is an application to the court, in the exercise of its original jurisdiction, for a writ of mandamus, requiring the State Treasurer to issue a certificate of stock in exchange for a bond, which was heretofore surrendered to the Treasurer, and a certificate of stock issued in exchange for it, under the provisions of the act of 1892 (Laws 1892, p. 24) entitled "An act to provide for the redemption of that part of the state debt, known as the Brown consul bonds and

stocks, by issue of other bonds and stocks," which, among others, contains the following provisions:

"Section 1. That the State Treasurer shall cause to be prepared, a sufficiency of blanks of coupon bonds and certificates of stock of uniform design and appearance, to be colored brown, as will provide for a total issue of an amount (face value) in the aggregate of such bonds and certificates of stock, not to exceed the aggregate amount of bonds and stocks that have been or may be issued, under an act entitled 'An act to reduce the volume of the public debt and provide for the payment of the same,' approved December, A. D. 1873, and acts amendatory thereto. \* \* \*

"Sec. 2. That the said coupon bonds shall be exchangeable for certificates of stock, and said certificates of stock shall be exchangeable for coupon bonds.

"Sec. 3. That all bonds and certificates of stock surrendered, as hereafter provided for, shall immediately upon such surrender be canceled, and filed by the State Treasurer with the permanent records of his office, and a correct registry shall be kept by the State Treasurer, of all exchanges made under the provisions of this act, so as to exhibit in a separate account and convenient form, the names of the holders thereof, and the number and amounts of all such bonds and stocks, received into the Treasurer's office, together with the numbers and denominations of all bonds and stocks, issued in exchange therefor, or sold by him under the provisions of this act. And the Secretary of State is hereby required to keep at all times a correct registry of all the bonds sealed by him under the provisions of this act. And the Governor is in like manner hereby required to keep a similar registry of all bonds signed by him, each registry to be accessible to public inspection at all times."

The said bond was not canceled, but was stolen and placed in circulation, and came into the hands of the petitioner, who alleges that he is a bona fide holder thereof. There is not even the slightest suspicion of wrong, on the part of the petitioner, attaching to his possession of the bond.

The first question that will be considered is whether mandamus is the appropriate proceeding. There is no difference in principle between this case and that of *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213, which was an action instituted, in the original jurisdiction of this court, for a writ of mandamus requiring the State Treasurer to fund certain bonds which were lost. The application was refused on the ground that the duty of the Treasurer was not plainly defined, peremptory and ministerial. In that case the court quoted with approval the following language from the case of *United States ex rel. International Cont. Co. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160. "It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty

which is only discretionary. \* \* \* Moreover, the obligation must be both peremptory and plainly defined. The law must not only authorize the act (*Commonwealth v. Boutwell*, 13 Wall. [U. S.] 528, 20 L. Ed. 631), but it must require the act to be done. A mandamus will not lie against the Secretary of the Treasury, unless the laws require him to do what he is asked in the petition to be made to do. *Reeside v. Walker*, 11 How. (U. S.) 272, 13 L. Ed. 693. See, also, *Cox, Secretary, v. McGarrahan*, 9 Wall. (U. S.) 298, 19 L. Ed. 579. And the duty must be clear and indisputable. *Knox County Commissioners v. Aspinwall*, 24 How. (U. S.) 376, 16 L. Ed. 735." To the same effect is the case of *United States v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811, in which the court says: "The principle upon which persons holding public office may be compelled, by a writ of mandamus, to perform duties imposed by law, have been distinctly defined. \* \* \* That principle is that the writ of mandamus may issue where the duty which the court is asked to enforce is plainly ministerial, and the right of the party applying for it is clear, and he is without any other adequate remedy; and it cannot issue in a case where its effect is to direct or control the head of an executive department, in the discharge of an executive duty, involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well as those in which mandamus was granted, as those in which it was refused, especially from the two leading cases (*Kendall v. U. S.*, 12 Pet. [U. S.] 524, 9 L. Ed. 1181, and *Decatur v. Paulding*, 14 Pet. [U. S.] 497, 10 L. Ed. 559), is thus enunciated in *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354, by Mr. Justice Bradley, who delivered the opinion of the court: "The court will not interfere by mandamus with the executive officers of the government, in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but, when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them." It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (*U. S. v. Schurz*, 102 U. S. 378, 394, 395, 26 L. Ed. 167, 171), or where the case is one of doubtful right (*Insurance Co. v. Wilson*, 8 Pet. [U. S.] 291, 302, 8 L. Ed. 949), or in a case where, the relator having another adequate remedy, the granting

of the writ may in this summary proceeding affect the rights of persons who are not parties thereto." See, also, *Conant v. Fuller*, 18 S. C. 246; the concurring opinion of Mr. Chief Justice McIver in *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213; *State v. Morria*, 67 S. C. 153, 45 S. E. 178; *Pugh v. Moore*, 44 La. Ann. 209, 10 South. 710; *Herwig v. Richardson*, 44 La. Ann. 703, 11 South. 135; 19 Enc. of Law, 732-737, 733.

When the bond was surrendered and a certificate of stock issued in exchange, it lost its legal effect as a subsisting obligation of the state. Cancellation was not a condition precedent upon which the validity of the certificate of stock, which was issued in exchange therefor, depended; and such requirement was intended simply to prevent fraud after the transaction between the holder of the bond and the state had terminated by the exchange. The provision as to cancellation stood upon the same footing as that in regard to the registry of the bonds, as to which the court, in the *Bond Debt Cases*, 12 S. C. 200, used this language: "It is very manifest that this provision in regard to the registry of the bonds is a mere direction to the Treasurer, and was not designed to be a condition precedent, the performance of which should be necessary to the validity of the bonds. It does not provide that before any bond is issued it shall be registered by the Treasurer, but it is clear that the registration is to follow, not precede, the issue of the bonds, and could not therefore affect their validity. \* \* \* The Constitution was never designed to afford the means of setting a trap for the holders of the bonds of the state by making their rights dependent upon the performance or nonperformance of duty by one of the officers of the state, after the bonds had been issued." The rights of the petitioner are equitable, and mandamus is not the proper remedy for the assertion of a mere equity. "The remedy by mandamus rests upon the legal rights of the relator, on the one hand, and the obligations and duties of the respondent on the other, and cannot be predicated solely upon the equitable rights and obligations existing between the parties." 19 Enc. of Law, 731, 732.

The question whether the petitioner is a bona fide holder of the bond in question is not ministerial, but strictly judicial in its nature, and the action of the Treasurer in refusing to exchange the bond for a certificate of stock is not subject to control or review by this court. The Attorney General, however, stated upon the hearing of this case that he did not urge the objection that mandamus was not the proper remedy; and did not contend that the petitioner had actual notice of any facts which would tend to show that he was not a bona fide holder of the bond. Conceding that he had neither actual nor constructive notice of such facts as tended to show that he was not a bona fide holder of the bond, it does not by any

means follow necessarily that the writ should be granted requiring the Treasurer to make a second issue of a certificate in exchange for said bond. The right of the Treasurer to issue a second certificate of stock involves a question of power, and must be determined by the act of 1892 hereinbefore mentioned, under which petitioner contends he is entitled to relief. The sections of that act hereinbefore set out, and the absence of words conferring power upon the Treasurer to make a second issue of a certificate, clearly show that the Legislature had in contemplation but a single issue in exchange for a bond, and that the Treasurer is not authorized to make a second issue. In the Bond Debt Cases, 12 S. C. 200, the principle was announced that, after there had been one issue of bonds under the act therein mentioned, there was no power to make a second issue thereunder. In that case the court used this language: "These bonds, together with their coupons, must therefore, upon the foregoing principles, be regarded as valid debts in the hands of bona fide holders, if the acts so referred to be constitutional, and do, in fact, authorize their issue, even though it may now appear that all the conditions prescribed may not have been complied with, and even though there may have been the grossest frauds perpetrated by the officers and agents of the state in issuing them and putting them into circulation. It is not and cannot be denied that the acts so referred to do, in fact, purport to authorize the issue of bonds, except in the case of the second issue of bonds for the payment of the interest upon the public debt, for which there does not seem to have been the shadow of authority of any kind, and which, therefore, are absolutely void, no matter in whose hands they may be; for, if the act be construed as giving authority for a second issue, there is no conceivable reason why a third or fourth or an indefinite number of issues could not have been made upon the same construction; and certainly a construction leading to such a result cannot be a correct one." That case clearly shows that bonds issued without authority of law are void, even in the hands of a bona fide holder. To the same effect is the case of *Branch v. Com. of Sinking Fund*, 5 Hansbrough (Va.) 427, 36 Am. Rep. 596, in which there was an application for a writ of mandamus to compel the commissioners of the sinking fund to fund certain bonds of the state of Virginia, which had been redeemed, but were afterwards stolen from the treasury of the state, and purchased bona fide for value, and without notice on the part of the petitioner that they had been stolen. In refusing the writ of mandamus the court used this language: "We are of opinion that after these bonds with their appurtenances had been redeemed by the state, and taken into her possession and custody, they ceased to be her obliga-

tions; and could not again become such unless she voluntarily redelivered or reissued them. They had run their career, and fulfilled their mission, and had returned to the dusty depository of dead matter in the treasury, and they had been submitted by outstanding equivalents which represent the legal and moral obligations of the state, and they were and are as though they never had been." As the act of 1892 does not authorize the second issue of a certificate, the stock which the petitioner prays the Treasurer may be required to issue would be void, even in the hands of a bona fide holder, by reason of a lack of authority to perform such act.

Lastly, if the duty enjoined upon the Treasurer to issue a second certificate is not ministerial, this court (however willing it might be to grant the petitioner relief) has not the power in mandamus proceedings to do so; for, when it appears that rights of the state, other than those incidental to mandamus proceedings, are involved, the action becomes in effect a suit against the state, and its rights cannot be adjudicated unless it is made a party, which cannot be done except by an act of the Legislature. "When no provision has been made by law for the auditing and payments of claims against the state or when the claim has not been admitted or is disputed, mandamus will not lie, because it would be equivalent to an action against the state, and a state cannot be sued without its consent." 19 Enc. of Law, 804, 805. "That a state cannot be sued in any of its courts, without its express consent, which can only be given by the legislative authority, is a proposition so universally conceded as to render any argument or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has either been distinctly decided or expressly recognized; and we are not aware of any authority to the contrary." *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141. See, also, *Water Power Co. v. Electric Co.*, 43 S. C. 154, 20 S. E. 1002, in which the language from *Lowry v. Thompson*, supra, is quoted with approval.

For these reasons, I dissent.

POPE, C. J., and GARY, KLUGH, PRINCE, and HYDRICK, Circuit Judges, concur in this dissent.

(78 S. C. 36)

CHARLES v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 31, 1907.)

1. CARRIERS—CONNECTING CARRIERS—LOSS OF SHIPMENT—EVIDENCE.

For the purpose of showing that four bags out of a shipment of rice were lost while in the

possession of the terminal carrier, a freight bill for transporting 30 packages of rice presented by such carrier to, and paid by the consignee, and indorsed, "4 sacks short," is relevant.

**2. SAME.**

A prima facie showing of loss while in the hands of the terminal carrier is made out by testimony of the consignee that he ordered 30 bags of rice of W., and that such carrier presented to him, and he paid, a freight bill for carrying 30 packages of rice consigned by one having the same initials as W., and that it was indorsed, "4 sacks short."

**3. APPEAL—HARMLESS ERROR.**

There being sufficient undisputed evidence to support the judgment of a magistrate, error in admitting other evidence will be considered harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4181.]

**4. EVIDENCE—BEST AND SECONDARY—WRITINGS COLLATERAL TO ISSUES.**

Plaintiff, in an action by the consignee against a carrier for loss of 4 bags out of a shipment of 30 bags of rice, may testify that he had bought 30 bags of rice of W., without producing the written order and acceptance admitted to be in existence, defendant's liability being dependent not on such contract, but on its possession for transportation of goods consigned to plaintiff, and such contract being merely a collateral matter, as to which parol testimony is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1862.]

**5. COMMERCE—INTERSTATE COMMERCE—REGULATION.**

Act 1903 (24 St. at Large, p. 81), providing a penalty of \$50 to be paid the consignee by a carrier doing business in the state, for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, is not unconstitutional as an interference with interstate commerce, even in case of an interstate shipment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 77-86.]

Appeal from Common Pleas Circuit Court of Florence County; Geo. W. Gage, Judge.

Action by R. Keith Charles against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Willcox & Willcox, for appellant. Galletly & Ragsdale, for respondent.

**JONES, J.** This action was brought in a magistrate court to recover the value of four sacks of rice alleged to have been shipped from New Orleans, La., by Martin J. Wynne to the plaintiff at Timmons ville, S. C., and to have been lost while in the possession of the defendant carrier, and also to recover \$50 penalty for failure to adjust and pay the claim within 90 days, as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, \$68.48, which judgment on appeal was affirmed by the circuit court.

We notice first appellant's seventh and eighth exception, alleging error in finding that the rice sued for was lost while in the possession of the defendant, there being no testimony whatever tending to show such fact. The circuit court found that "the defendant presented to and collected from the

plaintiff a freight bill for 30 sacks of rice, and marked on the bill, '4 sacks short,'

\* \* \* that it was warrantable to conclude that the four sacks of rice did come into the possession of the defendant company, for it collected the freight on the four sacks, and declared that the rice was missing. Enough was proven to cast on the defendant company the burden of proving that, when the shipment reached its line, four sacks were then missing. The defendant alone knew the fact, and it did not prove it." The plaintiff was the only witness examined in the case and his testimony warranted the conclusion of the circuit court, if his testimony on this point was admissible. The fifth exception charges that it was error to admit in evidence the freight bill, Exhibit F, on the ground of irrelevancy. It appears from the exhibit that defendant collected from plaintiff \$13.50 freight for transporting "30 pkts. rice," and that the consignor was "M. J. W.," and that four sacks were short. Plaintiff testified that in August, 1905, he ordered Martin J. Wynne of New Orleans to ship 30 bags of rice, and paid him for the same, and that he paid the freight for 30 bags, and only received 26. There was no evidence of any other order by plaintiff for rice or shipment of rice to plaintiff during the period involved in the controversy. The freight bill and its payment with this statement indorsed thereon was clearly relevant. It tended to show a single shipment of 30 bags of rice to plaintiff by one whose initials were the same as those of the alleged shipper, and that charge was made by defendant for transporting that number of bags, coupled with an admission that four were missing. This was at least sufficient to make out a prima facie case of loss while in the possession of defendant, and to cast upon defendant the burden of showing that the loss did not occur on its line. Willett v. Railway, 66 S. C. 478, 45 S. E. 93; Walker v. Railway, 76 S. C. 309, 56 S. E. 952.

The foregoing conclusion renders it immaterial to consider the third and fourth exceptions to the admission of testimony by the magistrate, for it may be conceded that it was error to admit in evidence a bill of lading purporting to be issued by the Louisville & Nashville Railroad Company for 30 sacks of rice consigned by Martin J. Wynne to plaintiff, without some proof that it was in fact issued to the consignor by an authorized agent, and that it was also error to allow in evidence a bill for 30 packages of rice rendered to plaintiff by Martin J. Wynne, dated August 23, 1905, containing the words, "shipped via L. & N. Rd.," being the mere statement of Martin J. Wynne not examined in this case, still the error was harmless, as this testimony may be stricken from the record, and leave undisputed testimony sufficient to sustain a judgment for the loss of the goods while in defendant's possession. Section 368 of the Code of Civil Procedure

of 1902 requires that on appeals from magistrate's court judgment should be rendered according to the justice of the case, without regard to technical errors and defects, which do not affect the merits.

The first and second exceptions allege error in permitting plaintiff to testify that he had purchased 30 bags of rice from Martin J. Wynne without producing the written order and acceptance therefor admitted to be in existence. This not being a suit between plaintiff and Martin J. Wynne touching the purchase of the rice; and, defendant's liability being dependent not upon such contract of purchase, but upon its possession for transportation of goods consigned to plaintiff, the contract in question involved merely a collateral matter, as to which parol testimony was admissible. *Elrod v. Cochran*, 59 S. C. 470, 88 S. E. 122.

The ninth exception assigns error in not reversing the judgment of the magistrate for the statutory penalty, after having held that the claim in question arose out of an interstate shipment, and that the penalty statute was invalid as to interstate shipments. What the circuit court really held was that the terms of the proviso of the act of 1903 were invalid in so far as they refer to commerce between the states, under the authority of *Central of Georgia R. R. v. Murphy*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, but that defendant could not avail itself of the invalidity of this proviso, as the evidence showed that defendant was in possession of the goods lost; in other words, that the penalty statute of 1903 does not violate the interstate commerce law in so far as it applies to common carriers in this state in whose possession the goods are lost or damaged. The Georgia statute, which was condemned in the *Murphy Case* as an unlawful interference with interstate commerce, imposed upon the initial or connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper in writing when, where, and how, and by what carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established. The distinction between the Georgia statute and our statute (Civ. Code 1902, § 1710) is pointed out in *Skipper v. Seaboard Air Line*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, which sustained section 1710 as not violative of interstate commerce. We are, however, not now to consider the validity of section 1710, but we are to consider the validity of the act of 1903 (24 St. at Large, p. 81) as applied to interstate shipments. The statute, by its title, is "An act to regulate the manner in which a common carrier doing business in this state shall adjust freight charges and claims for loss of or damage to freight." Section 2 provides

"that every claim for loss of or damage to freight while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: provided, that no such claim shall be filed until the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902." The last proviso, as the circuit court correctly held, has no application to carriers into whose possession the goods have come. Construing the statute in *Seegers v. Railway*, 73 S. C. 71, 52 S. E. 797, the court said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end."

While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and, in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, of its legal equivalent—prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default of duty imposed by statute. The statute does

not attempt to regulate interstate commerce, and imposes no tax or burden thereon. It is supported by the general principle declared in *Sherlock v. Ailing*, 93 U. S. 99, 104, 23 L. Ed. 819, and enforced in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, and *Nashville, etc., R. R. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, that state legislation "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit." In the case of *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith, and diligence, under penalty of \$100 in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the state.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(78 S. C. 81)

**COOPER v. SEABOARD AIR LINE RY.**

(Supreme Court of South Carolina. Sept. 6, 1907.)

**CARRIERS—CONNECTING CARRIERS—INJURY TO SHIPMENT—PRESUMPTION.**

The presumption from the receipt by a consignee from the terminal carrier of a shipment of goods damaged by breakage is that the goods were damaged while in the possession of such carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 837.]

Appeal from Circuit Court, Richland County; D. E. Hydrick and R. Withers Memmingers, Judges.

Action by J. B. Cooper against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

E. L. Craig and Lyles & McMahan, for appellant. De Pass & De Pass, for respondent.

**JONES, J.** In this action brought in a magistrate court, plaintiff sought to recover of defendant \$8 damage by breakage while in its possession to a shipment of a box of crockery ware from Cincinnati, Ohio, to Blaney, S. C., and \$50 penalty for failure to adjust and pay the claim within 90 days after the filing thereof, as prescribed by the act of February 23, 1903 (24 St. at Large, p. 81). The first trial resulted in a verdict for plaintiff, which, on appeal to the circuit court, was set aside, and the case remanded to the magistrate court for new trial, because of error in the admission of testimony. On the second trial before the magistrate judgment was rendered in favor of plaintiff in the sum

of \$58, and, on appeal to the circuit court, this judgment was affirmed, from which defendant appealed to this court on one exception, assigning error to the circuit court in holding the act of February 23, 1903 (24 St. at Large, p. 81), not violative of article 1, § 8, cl. 3, Const. U. S., relating to interstate commerce.

On the trial before the magistrate court, defendant offered no testimony, and the only testimony offered by plaintiff was proof of damage by breakage to the goods received. There was a presumption, therefore, that the goods were damaged while in the possession of the defendant, the terminal carrier. *Willet v. Railway Co.*, 66 S. C. 478, 45 S. E. 93; *Walker v. Railway*, 76 S. C. 309, 56 S. E. 952. And the finding of fact on this point by the circuit court is conclusive. This case, therefore, falls within the principle stated in *Charles v. A. C. L. R. Co.* (recently filed), 58 S. E. 927, which sustained the constitutionality of this statute as applied to carriers doing business in this state in whose possession goods were lost or damaged.

The judgment of the circuit court is affirmed.

**McTEER v. SOUTHERN EXPRESS CO.**

(Supreme Court of South Carolina. Sept. 24, 1907.)

**STATUTES—TITLE—PLURALITY OF SUBJECTS.**

The act of 1903 (24 St. at Large, p. 81), entitled "An act to regulate the manner in which common carriers doing business in the state shall adjust freight rates and claims for loss or damage to freight," does not violate Const. art. 3, § 17, as relating to two separate subject-matters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 135.]

Appeal from Circuit Court, Hampton County; Geo. W. Gage, Judge.

Action by E. E. McTeer against the Southern Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. De Loach, for appellant. E. F. Warren, for respondent.

**JONES, J.** The circuit court in this case sustained the judgment of a magistrate in favor of plaintiff against defendant for \$1.20, the value of two bottles of whisky broken and lost while in the possession of defendant for transportation from Covington, Ky., to Early Branch, in this state, and for \$50 penalty for failure to adjust the loss within the time required by act of 1903 (24 St. at Large, p. 81).

The only exception discussed in this court was whether the penalty statute was violative of the interstate commerce clause of the federal Constitution. This question has been considered in several cases at this term of the court, and decided against appellant's contention. *Charles v. A. C. L. R. Co.*, 58 S. E. 927; *Cooper v. S. A. L. Ry. Co.*, supra. The exception that the statute is in



conflict with article 3, § 17, of the state Constitution, in that it relates to two separate subject-matters, must be overruled under the authority of Aycock, Little & Co. v. Southern Ry., 76 S. C. 331, 57 S. E. 27.

The judgment of the circuit court is affirmed.

### MAZURSKY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Sept. 24, 1907.)

Appeal from Circuit Court, Barnwell County; Geo. W. Gage, Judge.

Action by B. Mazursky against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robt. Aldrich, for appellant. Davis & Best, for respondent.

JONES, J. This appeal is from a judgment of the circuit court affirming a judgment of the magistrate in favor of plaintiff against defendant for \$1.10, the value of a box of collars lost while in the possession of defendant carrier for transportation from Albany, N. Y., to Barnwell, S. C., and for \$15 penalty for failure to adjust the loss within the time required by the act of 1903 (24 St. at Large, p. 81).

The exceptions assail the statute as in violation of the interstate commerce clause of the federal Constitution, but they must be overruled under the authority of Charles v. A. C. L. R. Co. and other cases decided at this term. 58 S. E. 927.

The judgment of the circuit court is affirmed.

(78 S. C. 302)

### PARK et ux. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 3, 1907.)

#### 1. CARRIERS—PASSENGERS' EFFECTS—LIABILITY FOR LOSS.

A railway company is not responsible for a passenger's baggage, which is shown never to have been delivered to it.

#### 2. SAME.

Where there was no joint contract between carriers to carry passengers and their baggage, but distinct tickets were bought, and the second carrier, to accommodate a passenger, gave its check for baggage before receiving it from the first carrier, the second carrier, on showing that the baggage was never received, or that it exercised due care in delivering the baggage received, is relieved from liability for its loss.

#### 3. SAME—BAGGAGE CHECK—NATURE.

A railroad baggage check is not a contract, but a receipt, and is prima facie evidence of a delivery of baggage to the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1504.]

#### 4. SAME—BAGGAGE—ACTION FOR LOSS—COMPLAINT—SUFFICIENCY.

A complaint in an action for loss of a passenger's baggage, which alleges that plaintiff holds the check of the carrier, only alleges evi-

dence of delivery, and is bad for failing to allege a delivery, of the baggage to the carrier.

#### 5. PLEADING—COMPLAINT—ALLEGATION OF PARTIES.

A complaint must set forth the material facts, and where it sets forth evidence, and omits a material allegation, it is bad.

#### 6. CARRIERS—LOSS OF BAGGAGE—PRIMA FACIE EVIDENCE.

Where a railway company issued to a passenger its check for baggage, without having received the same from another company, for the purpose of accommodating the passenger, the check was prima facie evidence of a delivery to it of the baggage, rebuttable only by direct proof that the baggage was never received.

#### 7. HUSBAND AND WIFE—ACTIONS—PARTIES.

Under Code Civ. Proc. 1902, § 138, providing that persons having an interest in the subject of the action may be joined as plaintiffs, a husband and wife may join in an action ex contractu for loss of baggage, consisting of articles belonging to each.

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

Action by A. K. Park and wife against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and remanded for new trial.

Cothran, Dean & Cothran, for appellant. Haynesworth & Patterson, for respondents.

POPE, C. J. This action was begun by the plaintiffs, A. K. Park and Lella G. Park, in February, 1904, to recover \$185, the value of a trunk alleged to have been lost by the defendant railway. It appears that early in September, 1903, the plaintiffs, being in New York and wishing to return home, about an hour and a half prior to their departure turned their trunk over to the McDonald Express Company for delivery at the Twenty-Third Street station of the Pennsylvania Railroad. The plaintiff A. K. Park testified that he saw the trunk at the station, identified it, and saw the agent of the railroad company strap a check thereon. The plaintiffs took passage to Baltimore, where they stopped over for about 24 hours, but, not needing the trunk, and therefore without finding out whether it had arrived or not, they exchanged checks with the agent at Baltimore and continued their journey to Washington, where they made a second stop. They arrived at Washington, according to the testimony, about dusk, and the next morning about 9 o'clock Mr. Park called for his trunk, but after careful search by both himself and the agent it could not be found. Nor was it found prior to the time the plaintiffs left Washington for Greenville, their home. The agent of the defendant company, however, according to the custom of the road, a custom alleged to be merely for the convenience of travelers, took up the check held from the Pennsylvania Railroad and issued a Southern check to the plaintiffs, agreeing to forward the trunk when it arrived. Some days afterwards the trunk arrived in Washington, bearing a check corresponding to that taken up by the Southern's agent from Mr. Park. It, according to the

testimony of the defendant, was immediately sent to him; but he refused to accept it, alleging it not to be his. The lost trunk not having been found, this suit was begun. The defendant, alleging that the trunk had never come into its possession, denied any liability on its part. The case came on for trial at the November, 1906, term of court for Greenville county, before Judge Watts and a jury. At the conclusion of plaintiffs' testimony a motion was made by the defendant for a nonsuit on the grounds: (1) That there was absolutely no proof going to show that the trunk had ever been delivered to the defendant; and, (2) that the complaint alleged the trunk to be the joint property of the plaintiffs, while the evidence showed that part of the articles belonged to one of the plaintiffs and part to the other. The motion was refused, and the jury rendered a verdict in favor of the plaintiffs for \$185. On motion for a new trial the verdict was cut down to \$176.50, the value placed upon the goods lost by the plaintiffs. The defendant appeals.

The question made is one of grave importance and much difficulty. The circuit judge, in overruling the first ground for the nonsuit, held that by taking up the check issued by the Pennsylvania Railway and issuing its check instead the Southern Railway became the agent of the Pennsylvania Railway, and was responsible for any neglect on the part of that road; that they took up the check at their peril, and left the plaintiffs in a worse fix than they found them. Such a doctrine, to say the least of it, is a hard one. When we bear in mind that there was no joint contract between these roads to carry plaintiffs and their baggage from Greenville to New York and return, and when we remember that there were two distinct tickets bought, namely, from Greenville to Washington and return, and from Washington to New York and return, we think it hardly going too far to say that such a doctrine would be unjust. There is no law in existence by which a railroad company can be held responsible for baggage which is shown never to have been delivered to it. Even in cases of through shipments of freight under joint contract a connecting carrier is allowed to relieve itself from liability by showing that the goods in question never reached its line, unless under contract it make itself absolutely liable. How much more, then, should the defendant in this case, where there were three distinct shipments, be allowed to show that the goods for which it issued its check as an accommodation never arrived, or that it exercised due care in delivering the baggage that did arrive bearing a check corresponding to that surrendered by the plaintiffs. Having shown either alternative, we think both reason and authority will sustain us in holding the defendant relieved of liability.

The evidence of delivery relied on in this

case is the check issued by the defendant company. Now it will doubtless be conceded that a check is a mere receipt for goods delivered. It can be no contract, for there are no words written thereon making a contract. The contract of carriage is either parol or is contained in the ticket held by the passenger. It has been held that even the ordinary ticket does not constitute a contract of carriage, but is merely prima facie evidence of the possessor's right to transportation. *Pier v. Finch*, 24 Barb. (N. Y.) 514. The general rule seems well settled that a receipt is merely prima facie evidence of the thing receipted for. *Hogg v. Brown*, 2 Brev. (S. C.) 223; *Gibson v. Peebles*, 2 McC. (S. C.) 418; *Daniels v. Moses*, 12 S. C. 130; *Brice v. Hamilton*, 12 S. O. 32; *Bowen v. Humphreys*, 24 S. C. 456. Now, unless, there is some matter of public policy making it advisable or necessary to make an exception in the case of receipts of common carriers, the rule will apply in the case now under consideration. That there cannot be such necessity for the exception seems settled by the number of authorities holding that such receipts are merely prima facie evidence, a few of which are 4 Elliott, § 1655; 3 Hutch. on Carriers (2d Ed.) §§ 1301, 1302; *Davis v. Railway*, 22 Ill. 278, 74 Am. Dec. 151; *Ahlbeck v. Railway*, 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661; *Zeigler Bros. v. Railway*, 87 Miss. 367, 39 So. 811; 7 Current Law, 603.

Plaintiffs, relying on *Dill v. Railway*, 7 Rich. (S. C.) 162, 62 Am. Dec. 407, and *Salley v. Seaboard, etc., Ry.*, 76 S. C. 173, 56 S. E. 782, seek to show that the law is settled to the contrary in this state. The case of *Dill v. Railway* holds only that a check is evidence of delivery. That there is a distinction between the ordinary check and bill of lading seems evident. True, the responsibility of carriers of baggage is that of common carriers. The check issued by them, however, is merely a receipt for the baggage received, while a bill of lading, in addition to being a receipt, contains the contract under which the goods are to be carried. This conception distinguishes this and the case of *Salley v. Railway*, supra. In that case there was a joint contract of carriage, the railroad company issuing the bill of lading expressly making itself liable for the property, while here a receipt merely was issued, and according to the evidence a parol contract was made by which the defendant was to forward such goods as arrived over the Pennsylvania Railway bearing a check corresponding to the one surrendered by the plaintiffs. As was said above, there was no duty resting upon the defendant to issue its check to the plaintiffs. It could lawfully have refused such check until the baggage was actually delivered to it. In order, however, to save the expense and delay incident to passengers waiting on baggage, merely as an advantage to passengers, it is a custom

of the defendant to exchange checks and forward the baggage when it arrives. Certainly, in making such a contract, the plaintiff being aware that his baggage is not in the custody of the defendant, it could hardly be presumed that it was in the contemplation of the parties that the defendant meant to make itself absolutely liable. Rather the presumption in the mind of the passenger would be that the defendant could not be held liable unless it was made to appear that the goods were actually received by it. Hence, if the evidence in this case is susceptible only of the inference that the defendant never received the goods in question, then it cannot be held responsible for them. To hold otherwise would be to make a contract between the parties which it was clearly their intention not to make, and would impose a liability upon the defendant which it was not its purpose to undertake.

Should the nonsuit, then, have been granted on this ground? We think not. The check issued by the defendant and introduced in evidence by the plaintiffs was certainly some testimony going to show delivery of the baggage in question to the defendant. There is nothing in this view conflicting with the order of Judge Purdy on demurrer, requiring an allegation of delivery to be made in the complaint. An allegation that the plaintiffs hold the check of the defendant was only an allegation of evidence going to show the fact of delivery. One of the fundamental rules of pleading is that the material facts must be stated in the complaint, while matters of evidence going to sustain such facts are properly brought out at the trial. Where, then, evidence is set forth and a material allegation is omitted, then, of course, there is a defect in the pleading. Again we ask, is the prima facie showing made by the check rebutted by the testimony of the plaintiff? As to immediate delivery it can hardly be doubted, but one would hardly suppose that a railroad company would issue its check, unless there was a combination of circumstances making a delivery at one time or another practically certain. The check is issued in contemplation of these circumstances. The presumption of delivery arising therefrom is so strong that it can only be rebutted by direct proof on the part of the defendant that the baggage was never received by it. The check in such cases continues to be a prima facie showing, which showing the railroad company must overcome. Hence the nonsuit on this ground was properly refused.

The second ground of the nonsuit must also be overruled. Were the action one of tort, the appellant's contention would be correct. *Hellams v. Switzer*, 24 S. C. 39. The action here, however, is *ex contractu*, and, according to section 138 of the Code of Civil Procedure of 1902, all parties interested in the contract must be joined as parties. This was likewise the general rule prior to the

adoption of the Code. In *Ellis v. McLemore*, 1 Bailey (S. C.) 18, it is said the general rule is that all must join in the action who have an interest in the contract. The same rule is laid down in the *Ency. of P. & P.* vol. 15, p. 528, and many authorities are there collated sustaining the proposition.

What has been said, we think, entirely disposes of all the exceptions raised. In our view of the law it was error on the part of the circuit judge to hold the defendant responsible for the baggage, even though it was shown that it never came into its hands. Therefore the judgment below must be reversed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(78 S. C. 331)

STATE ex rel. REESE et al. v. ANSEL,  
Governor.

(Supreme Court of South Carolina. Oct. 5, 1907.)

# 1. CONSTITUTIONAL LAW—EXECUTIVE POWER—JUDICIAL REVIEW.

Whether a proposed new county embraces the same territory as was embraced in a proposed county voted on within four years is, under the Constitution, exclusively for the Governor.

# 2. COUNTIES—CREATION—PROCEEDINGS—STATUTES.

The Governor, by entertaining a petition for the creation of a new county and appointing a commission under Act Feb. 21, 1905 (24 St. at Large, p. 915), to investigate whether the requirements of the Constitution as to area, distance, wealth, population, etc., have been complied with, does not necessarily determine that the proposed new county does not embrace the same territory as was embraced in a proposed county voted on within four years; and the Governor may thereafter determine that question in the affirmative, and refuse to order an election on that ground.

# 3. SAME.

Until the Governor has made an order for an election on the question of the creation of a new county, the inquiry as to the compliance with the constitutional requirements relating to the creation of new counties is before him, and a decision made by him before that time may be revoked.

Original application for mandamus by the state, on the relation of Luther W. Reese and others, against M. F. Ansel, Governor, to require respondent to order an election on the question of the formation of a new county. Denied.

Geo. T. Jackson, for relators. J. Fraser Lyon, Atty. Gen., for respondent.

WOODS, J. This is an application for a writ of mandamus requiring his Excellency, Gov. Ansel, to order an election on the question of formation of a new county. We shall not enter into the inquiry whether this court has the power to issue a mandamus requiring the Governor of the state to perform a plain ministerial duty, because, in our opinion, the petition does not show any

duty which the Governor has failed to perform.

In January, 1907, relators filed a petition with his Excellency, Gov. Heyward, for the creation of a new county out of portions of Edgefield and Alken counties. The description of the territory to be included in the proposed new county was on its face general and approximate, and concluded with this statement: "The foregoing description and boundaries are intended to cut off and include not exceeding 135 square miles from Edgefield county, and not exceeding 235 square miles from Alken county, and to that end at any time before final survey and location may be varied, changed, or amended by the commissioners acting in behalf of the proposed new county, appointed pursuant to an act approved the 21st day of February, A. D. 1905, they being hereby constituted and appointed attorneys in fact of petitioners for that purpose; the power given them to amend or change the lines or description being ancillary and not exclusive of petitioners' right to amend this petition at any time." Gov. Heyward, under the act of February 21, 1905 (24 St. at Large, p. 915) appointed commissioners to investigate whether the requirements of the Constitution "as to area, distance, wealth, population, etc.," had been complied with. Subsequently the petitioners petitioned Gov. Ansel, who had succeeded Gov. Heyward, to be allowed to amend the petition by substituting for the general description an exact description of the territory to be included by courses, distances, and boundaries shown on the plat. When this application to amend was made, opponents of the new county scheme filed an answer to the petition, in which they alleged the proposed new county to be substantially the same as the proposed new county of Heyward, which had been defeated at an election held in December, 1906. Gov. Ansel, after hearing argument from both sides, allowed the amendment, but dismissed the petition, on the ground that, while there was a variation in territory of about 50 square miles, nevertheless the proposed new county was substantially the same as the proposed new county of Heyward, and therefore, under the Constitution, no election could be held in less than four years after the election at which the proposed new county of Heyward had been defeated.

In *Lamar v. Croft*, 73 S. C. 407, 53 S. E. 540, the decision of the question whether a proposed new county embraces the same territory as one voted on within four years before was held to be given by the Constitution exclusively to the Governor. The position taken by the relators is that, when Gov. Heyward entertained the original proposition and appointed a commission under the statute to investigate whether the requirement of the Constitution as to area, distance, wealth, population, etc., had been complied with, he necessarily adjudged and determin-

ed that the new county now proposed was not the same as the proposed and defeated new county of Heyward. This position is entirely unsound. It is important to observe the commission is nothing more than machinery provided by the General Assembly to aid the Governor in the performance of the duty, imposed on him by the Constitution, of determining whether the conditions precedent to ordering an election have been met. While the statute requires him, before ordering a new county election, to appoint the commission for investigation, the investigation and report are only for his information. It is not necessary for him to decide anything before appointing a commission of investigation. Indeed, his decision as to sameness, as well as to other constitutional questions, may well depend entirely on the information afforded by the investigation and report of the commission. The order of Gov. Heyward, appointing the commission, by no means implied even an opinion that the proposed new county was not substantially the same as the proposed new county of Heyward. The inference is much more reasonable that he intended to leave that question to be decided, along with the others as to compliance with the Constitution, after the general description of the territory had been verified and made more certain by the investigation and report of the commission.

We are not called on to decide whether the Governor's order for a new county election is irrevocable; but certainly, until the order for an election has been made, there is no warrant in the Constitution or the statutes for the courts to hold the Governor precluded from reviewing his own conclusions or those of his predecessors in the light of the information afforded by the commission provided by law to furnish it. At least until the election is ordered, in contemplation of law, the inquiry as to the compliance with all the constitutional requirements is pending before the Governor.

The judgment of this court is that the application for mandamus be refused.

(73 S. C. 5)

**BOOZER v. LOAN & EXCHANGE BANK.**  
(Supreme Court of South Carolina. Aug. 20, 1907.)

**LANDLORD AND TENANT—LEASE—USE OF BUILDING.**

Plaintiff leased to defendant a brick store-room for certain rent, with a provision that it was understood that the defendant desires the building for the purpose of conducting a general banking business, and the alterations to be made were such as would fit the building for this purpose, as may be determined on in the judgment and discretion of the defendant. *Held*, not to restrict the lessee to the use of the leased building for conducting only a banking business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 484.]

Appeal from Common Pleas Circuit Court of Greenwood County; Purdy, Judge.

Action by Eliza J. Boozer against the Loan & Exchange Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Nicholson Bros., for appellant. Grier & Park, for respondent.

GARY, A. J. This is an appeal from an order refusing to grant a temporary injunction to restrain the defendant from subletting the premises described in the complaint for other than banking purposes, on the ground that under the terms of the lease the building could only be used for such purposes. The following is a copy of the lease: "(1) State of South Carolina, County of Greenwood. This memorandum of agreement is to witness: That Mrs. Eliza J. Boozer, party of the first part, has granted, leased and rented, and by these presents does grant, lease and rent unto the Loan & Exchange Bank, party of the second part, all and singular that certain brick storeroom, situated in the state and county above written, in the town of Greenwood, fronting on the public square therein, and the premises on which the same is situate, and bounded on the north by the store of W. R. Bailey, and said lot extending back for a distance of two hundred and seventeen (217) feet, on the rear by lands of Mrs. T. F. Riley, and on the south by another store of Mrs. Eliza J. Boozer; the said lot being the lot on which is situate the said certain brick store formerly occupied by T. St. J. Goodwyn. (2) To have and to hold the said above mentioned and rented storeroom and premises, to the said Loan & Exchange Bank, its successors and assigns, for and during the full term of my natural life, at the sum of four hundred dollars per annum, payable monthly at the end of each and every month, during the lifetime of this agreement—that is to say, the sum of \$33⅓ per month, each and every month, during the term of this lease—rent to begin September 1, 1903. (3) And the said Loan & Exchange Bank agrees to pay to the said Mrs. Eliza J. Boozer or order the rent stipulated herein above, in the manner and at the times and in the sums above mentioned and stipulated. (4) If the said building is destroyed by fire or other casualties, and if said building is rebuilt by party of the first part with due expedition, and if the building so erected is of like size and kind as the building on said lot at the time of said fire or other casualties, this lease shall not terminate, but shall remain in full force, provided that during the time the building is unoccupied, the party of the second part, or its assigns, shall not be liable for rents. (5) The party of the first part herein gives and grants to the party of the second part, or its assigns, full permission and leave to make

any alterations in and upon said building, as it or its assigns may decide to make, provided that he pay the cost thereof without charge to the party of the first part. (6) The party of the first part further agrees to keep and maintain the said building at all times in good repair, and put in front of said building, at her expense, a cement sidewalk. It is understood and agreed that the party of the second part desires this building for the purpose of conducting therein a general banking business, and the alterations to be made are such as will fit the building for this purpose, as may be determined upon in the judgment and discretion of the said party of the second part. All fixtures and furniture placed in said building to be the property of the party of the second part, with the right to remove the same when the building is vacated, or upon the expiration of this lease."

The question whether the plaintiff made a prima facie showing depends upon the construction of said lease; the plaintiff contending that the use of the building is limited to banking purposes. Our interpretation of the lease is that section 7 was not intended to create a new right, nor to limit the previous provisions, but was merely explanatory of the power to make alterations, even to the extent of changes so great as to render the building suitable for banking purposes. The building prior to the lease had been used as a grocery store, and a question might have arisen as to the authority of the defendant to make alterations so drastic as to convert it temporarily into a building for banking purposes. It was to forestall any such question that section 7 was inserted. By this construction alone can force and effect be given to all the provisions of the lease. If the words, "It is understood and agreed that the party of the second part desires this building for the purpose of conducting therein a general banking business," should be construed as showing that the building could only be used for conducting a banking business therein, then they would limit the effect of section 2. And if the words, "the alterations to be made are such that will fit the building for this purpose," should be construed as intending that only such alterations can be made, then they would trench upon the provisions of section 5. If the words, "for the purpose of conducting a banking business," had been inserted in section 2, the principle announced in *Fire Co. v. Richland Lodge*, 70 S. C. 572, 50 S. E. 499, would be applicable; and, if the intention had been to limit the use to this extent, they would naturally have been inserted in that part of the lease, instead of the portion relating to alterations. The law favors a construction that will give effect to all the provisions of a contract.

It is the judgment of this court that the appeal be dismissed.

(78 S. C. 309)

**BATSON et al. v. SOUTH CAROLINA MUT. INS. CO.**

(Supreme Court of South Carolina. Oct. 5, 1907.)

**INSURANCE—MUTUAL INSURANCE—RIGHT TO SUE—FORM OF REMEDY.**

Where a mutual assessment insurance company denies liability on a policy providing that no suit shall be brought thereon until an assessment has been made, and refuses to make an assessment, the insured may sue at law for breach of contract and recover the amount he would have been entitled to if the company had made an assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1986.]

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge.

Action by L. T. Batson and another, partners under the firm name of Batson & Walsh, against the South Carolina Mutual Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jos. A. McCullough, for appellant. Morgan & Bonham, for respondents.

**JONES, J.** This was an action at law in a magistrate court to recover \$72.27 as the pro rata share due plaintiffs by the defendant company on a policy of fire insurance. The magistrate dismissed the action on the ground that plaintiff's remedy was to proceed in equity to compel an assessment so as to fix the amount payable under the policy, but on appeal the circuit court reversed the judgment of the magistrate and rendered judgment against defendant for the amount claimed.

The defendant is a mutual insurance company incorporated under the laws of this state and authorized to mutually insure the buildings of its members from loss by fire, wind, or lightning upon such terms and conditions as may be fixed by its by-laws. The policy insured the plaintiffs to the extent of \$350, and stipulated to make good the loss not to exceed that sum by pro rata assessments on policies liable. The policy, among other things, stipulates: "(7) Payment of any loss or damage shall be due within sixty days after the assessment is made to pay the same. \* \* \* (11) It is mutually agreed that no suit or action against this company for the collection of any claims against it shall be sustainable in any court of law until after an award shall have been obtained, fixing the amount of such claim in the manner provided, and not until after an assessment has been made against the policies then liable for their pro rata share due on each policy according to the sum fixed by said award; and in all cases the burden of proof shall be upon the assured to prove affirmatively as a part of his case in chief that the award has been obtained or duly waived by the company after the assured had made tender of such arbitration in writing, which writing shall be the only competent evidence

of such tender; and provided further that the assured shall assume the burden of proof and prove affirmatively that such assessment has been made by the company, or that the assured has taken such legal steps as may have been necessary to compel such assessment in case the company shall have refused to make the same. The amount received from such assessment shall fix the liability of the company for said loss."

The defendant denied all liability on the policy and refused to make the assessment. It is not disputed that a pro rata assessment, if it had been made, would have realized the amount for which judgment was rendered. The question presented is whether plaintiffs could maintain an action at law for the said sum as damages for breach of defendant's contract, or was their remedy in equity to compel an assessment? This question has been recently considered in *Thompson v. Piedmont Mutual Ins. Co.*, 58 S. E. 341, and the conclusion reached was that, when an insurance company denies all liability and refuses to make an assessment, an action at law is maintainable to recover the amount of damages to which the insured would be entitled if the company had performed its part of the contract. The court in that case cites *Bentz v. N. W. Aid Ass'n*, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784, *Jackson v. N. W. R. Ass'n*, 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 736, and *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113, to which may be added *Elkhart Mut. Aid, etc., Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. St. Rep. 514; *Earnshaw v. Sun Mut. Aid Society*, 63 Md. 465, 12 Atl. 884, 6 Am. St. Rep. 460; *O'Brien v. Home Ben. Soc.*, 117 N. Y. 310, 22 N. E. 954.

The judgment of the circuit court is affirmed.

(78 S. C. 108)

**YARBOROUGH v. SOUTHERN RY.**

(Supreme Court of South Carolina. Sept. 7, 1907.)

**1. CARRIERS—LOSS OF GOODS—FIRE—EVIDENCE—SUFFICIENCY.**

In an action against a railway company to recover for cotton placed on the platform at a station and destroyed by fire, evidence held to show consent on the part of the railway company to the cotton being placed on the platform before ready for shipment.

**2. TRIAL—INSTRUCTIONS—CHARGE ON FACTS.**

In an action to recover for cotton destroyed on a railroad platform before it was ready for shipment, where there was evidence that the company consented to have the cotton so placed, it was a charge on the facts to instruct the jury that they should infer such consent from the agent's being informed that the cotton was so placed, and making no objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-551.]

Appeal from Common Pleas Circuit Court of Fairfield County; Prince, Judge.

Action by Benjamin H. Yarbrough against the Southern Railway. Judgment for plaintiff, and defendant appeals. Reversed.

B. L. Abney, J. E. McDonald, and W. H. Townsend, for appellant. Ragsdale & Dixon, for respondent.

**WOODS, J.** This defendant appeals from a judgment for \$185.65 recovered, under section 2135, Civ. Code 1902, for the partial burning of four bales of cotton on the defendant's platform at Alston, S. C., by a fire set out by one of defendant's locomotives.

1. The issues of fact bearing on the appeal are: (1) Was the cotton placed on the platform without the defendant's consent? And (2) if with defendant's consent, was the consent accompanied by notice that the cotton would be at the owner's risk? The plaintiff testified he was hauling a lot of nine bales of cotton to the railroad for shipment to a purchaser, intending to take out a bill of lading as soon as the other five bales could be hauled; and when four of the nine bales were placed on the platform the fire occurred. He further testified to telling the agent of the four bales being on the platform and his intention to haul the remaining five before taking a receipt, and to the agent failing to object to his plan. The railroad agent testified that the following notice over the names of the general freight agents of the railroad had been posted on the depot a month before the fire; "Notice to the public: All persons are hereby forbidden to place cotton upon the premises of this company until the same shall have been tendered to and accepted by this company for shipment." The plaintiff and his witnesses denied having ever seen such a notice, though frequently at the depot on business. The agent further testified he had notified the plaintiff that cotton placed on the platform would be at his risk until tendered to the company and received by it, and he denied any positive knowledge of plaintiff's four bales being on the platform, and any recollection of the plaintiff telling him of it. He admitted his custom was to allow separate portions of a single shipment of cotton to be placed on the platform, and to delay giving the bill of lading until the whole had been hauled; his understanding being that the cotton was at the risk of the owner until delivery of the bill of lading. From this statement of the evidence, it is obvious there was some testimony from which the jury might infer consent of the railroad company to the cotton being placed on its premises, and the motion for nonsuit was properly refused.

2. The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts. According to the testimony adduced by the defendant, there was conspicuously posted a notice forbidding all persons to place cotton on the premises of the company until

tendered and accepted for shipment. It was for the jury to say whether the paper was so posted as to give notice to all shippers. If it did give such notice to the shipper, then evidently it cannot be laid down as a proposition of law—a rule of evidence—that the inference of consent could be fairly drawn from the failure of the railroad company to hunt up each individual known by its agents to have disregarded its public notice, and again notify him of its refusal to consent to his placing his property on the premises before he was ready to have it shipped. Whether such inference could be fairly drawn from failure to make specific objection in each case was entirely a question of fact for the jury, upon which the Constitution forbids a circuit judge to express an opinion.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

(73 S. C. 348)

STATE ex rel. WATTS v. CAIN, Chairman, et al.

(Supreme Court of South Carolina. Oct. 5, 1907.)

#### 1. MANDAMUS—NATURE OF REMEDY.

Mandamus is not a prerogative writ running in the name of the sovereign, but is an ordinary process, available to any private citizen, to protect a private right when it is an appropriate remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 1.]

#### 2. SAME—PROCEEDINGS—SURPLUSAGE.

The name of the state in mandamus by a private citizen to protect a private right is surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 287.]

#### 3. INTOXICATING LIQUORS—COUNTY DISPENSARIES—STATUTES—CONSTRUCTION.

Dispensary Act, §§ 6, 12, authorizing the county dispensary board to buy and retail liquors, and providing that the board, before permitting any dispensary to offer any liquor for sale, shall "cause" the same to be put into packages, authorizes the board to maintain an establishment for bottling beer for sale; the words, "to cause," meaning to act as a cause or agent in producing, to effect as an agent, to produce.

#### 4. STATUTES—CONSTRUCTION—IMPLIED POWER.

Where a power is conferred by statute, everything necessary to carry out the power and make it effectual is implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 264.]

#### 5. INTOXICATING LIQUORS—COUNTY DISPENSARIES.

The grant under Dispensary Act, § 36, to a licensee for the maintenance of an establishment for bottling malt liquors, is not exclusive, and he cannot complain of a loss sustained in consequence of a county dispensary board establishing works for bottling beer, as authorized by sections 6 and 12.

#### 6. CONSTITUTIONAL LAW—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.

A party deriving his authority under a statute cannot assail its constitutionality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 41.]

# 7. SAME—DETERMINATION OF CONSTITUTIONAL QUESTIONS—NECESSITY.

The Supreme Court will not pass on the constitutionality of a statute, unless it is necessary to a determination of the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 43.]

Mandamus by the state, on the relation of H. E. Watts, against John J. Cain and others, constituting the county dispensary board for Richland county, to enjoin respondents from maintaining an establishment for bottling beer for sale. Dismissed.

Bellinger & Welch, for plaintiff. Thomas & Thomas, for defendant.

JONES, J. The petitioner applied in the original jurisdiction of this court for a rule requiring respondents to show cause why they should not be perpetually enjoined from bottling beer for sale, and maintaining an establishment for such bottling. The respondents made answer to the rule issued, and also submitted a demurrer to the petition for insufficiency. By an order filed June 14, 1907, this court dismissed the petition, and the reasons therefor will now be briefly stated. The answer raised a preliminary question, that the name of the state was used by the petitioner without the consent of the Attorney General or other competent authority, and that the proceeding is by the petitioner in his private capacity for the protection of a private right. In modern practice, mandamus is not regarded as a prerogative writ running in the name of the sovereign, but as ordinary process of the court, available to any private citizen, to protect a private right when it is an appropriate remedy. Therefore the use of the name of the state in such cases is a mere form, and may be treated as surplusage. *Lord v. Bates*, 48 S. C. 103, 26 S. E. 213; *Milster v. Spartanburg*, 68 S. C. 30, 46 S. E. 539. The petitioner is maintaining a bottling establishment for all malt liquors in the county of Richland, having been licensed to do so under section 36 of the Carey-Cothran dispensary act, upon paying to the county dispensary board of said county the required license fee March 8, 1907. The respondents constitute the county dispensary board for Richland county under said act, and, conceiving they had authority to do so under sections 6 and 12 of said act, are now buying beer in bulk and causing the same to be bottled in a bottling plant which they have established for the purpose, and are retailing the same through the county dispensaries of Richland county, claiming that in this way they can secure better beer at a lower price than if they should buy exclusively from the licensed bottlers, and can prevent a monopoly of the beer business by said licensed bottlers, but that they stand ready to purchase from the licensed bottlers whenever the quality of their beer and the prices quoted are such as to make it to the interest of the public that they should make such purchases.

The main question is whether sections 6 and 12 of the said act authorize respondents to maintain the bottling establishment. Section 6 authorizes the members of the county dispensary board to buy in any market and retail within the state liquors and beverages as provided herein. Section 12 provides: "The county dispensary board before permitting any dispensary to offer any liquor for sale shall cause the same to be put into packages of not less than one-half pint nor more than five gallons, and seal the same. The dispenser shall sell by the package only and no person shall open the same or drink any of the contents on the premises." The power to purchase liquors in bulk and to retail liquors through the county dispensaries is undoubtedly given; and we think it also clear that the power to cause the liquors to be put into certain packages and sealed necessarily involves the power to bottle the same through such agencies as they may deem best, and that the establishment of a bottling plant of their own is not beyond the power granted in the act. If the Legislature had intended that the liquors purchased in bulk by the board should be turned over to licensed bottlers to be put into packages required by law, other language would have been used. "To cause," according to the Century Dictionary, means "(1) to act as a cause or agent in producing; effect; bring about, be the occasion of; (2) to make; force; compel"—and, according to Webster's International Dictionary, means "to effect as an agent; to produce; to be the occasion of; to bring about; to bring into existence; to make." The language is certainly broad enough to include the power to effect or bring about the bottling through appliances and instrumentalities under their direct supervision. If the power to establish a bottling plant is not expressly given, it is necessarily implied. "Where a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." 24 A. & E. Ency. Law, p. 614, and cases cited. "What is implied in a statute is as much a part of it as what is expressed." *Wilson v. National Bank of Nashville*, 103 U. S. 770, 26 L. Ed. 488. The fact that this construction would authorize the board to compete with petitioner in the matter of bottling is not a fatal objection, although to the extent of the loss of the patronage of the board of Richland county the value of petitioner's license to him would be impaired. While under section 36 of said act the petitioner became a licensee upon the payment of the annual license fee to the Richland county board, the license was not granted by the board but by the state under the statute, so that the same authority which licensed petitioner empowered the respondents to bottle. There being no exclusive grant to petitioner, such impairment of the value of his license as was incident to the exercise of the power conferred upon respondents is with-



out remedy. *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

The respondents have argued that petitioner has no interest to make this controversy because all the interest claimed arises under section 36 of said act, and that said section is not constitutional. Respondents, however, derive all their authority under said statute, have no interest to be subserved by overthrowing it, and cannot be heard to assail its constitutionality. *Ex parte Florence School*, 43 S. C. 16, 20 S. E. 794; *Moore v. Napier*, 64 S. C. 564, 42 S. E. 997; *State v. Morris*, 67 S. C. 153, 45 S. E. 178.

The petitioner argues against the constitutionality of section 12 of said act in so far as it authorizes the board to bottle liquors, but the petition raises no question as to the constitutionality of the statute, and any discussion of that subject is unnecessary. The court will not pass upon the constitutionality of a statute, unless it is necessary to the determination of the issues presented. *Ex parte Florence School*, 43 S. C. 15, 20 S. E. 794.

Rule discharged, and petition dismissed.

(73 S. C. 312)

**BISHOP v. VALLEY FALLS MFG. CO.**

**NOLEN v. SAME.**

(Supreme Court of South Carolina. Oct. 5, 1907.)

**1. MANDAMUS—CLERK OF COURTS—ARBITRATION AND AWARD—ENTRY OF JUDGMENT.**

Where there is a valid award under a statutory arbitration, it is the ministerial duty of the clerk of the court to enter judgment in accordance with the award, and such duty will be enforced by mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 70.]

**2. ARBITRATION AND AWARD—AGREEMENTS TO ARBITRATE—CONSTRUCTION.**

In the absence of express stipulations on the subject, the presumption is that an agreement is for a statutory, rather than a common-law arbitration.

**3. SAME—REMEDIAL STATUTES—CONSTRUCTION.**

Statutes providing for and regulating arbitration, and authorizing the entry of judgment on the award itself, are remedial, and should be liberally construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 7.]

**4. SAME—AGREEMENT—WHEN COMPLETE.**

Under the statute, an agreement for arbitration is complete when one party to a dispute proposes arbitration and the other party assents to it, and each party enters into bond in double the amount involved to faithfully abide the result.

**5. SAME—SELECTION OF ARBITRATORS.**

The selection of arbitrators is no part of the agreement for arbitration required by the statute, and the fact that the parties agree on the arbitrators, instead of requiring them to be selected in the manner indicated in the statute, does not preclude the arbitration from being referred to the statute.

**6. SAME.**

By a written agreement for arbitration the parties to an action followed the statute by bind-

ing themselves in double the amount indicated by the complaint to be involved to faithfully abide the result of the arbitration, defendant also agreeing to pay the costs of the arbitrators of the witnesses and of any court officers connected with the arbitration. *Held* that the arbitration should be regarded as statutory.

**7. SAME—REVOCATION.**

Where the parties to an action had agreed to arbitrate the service by defendant of a notice on plaintiff of a statement of defendant's position that the agreement contemplated a common-law and not a statutory arbitration was not a revocation of the agreement; defendant appearing and participating in the arbitration.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. Withen Memminger, Judge.

Actions by George C. Bishop against the Valley Falls Manufacturing Company, and by C. B. Nolen against the same defendant. From a decree awarding a writ of mandamus to compel the entry of judgment in favor of each plaintiff, defendant appeals. *Affirmed*.

Stanyarne Wilson, for appellant. Johnson & Nash, for respondents.

**WOODS, J.** This is an appeal from a decree of Judge Memminger awarding a writ of mandamus to compel the clerk of the court of common pleas to enter judgments in favor of each of the plaintiffs on awards of arbitrators. The important question is whether the agreement contemplated an arbitration under the statute or at common law; for, if there was valid award under a statutory arbitration, then, under the statute, it was the clear ministerial duty of the clerk to enter the judgment in accordance with the award.

The plaintiffs, George C. Bishop and Mrs. C. B. Nolan, had instituted separate actions against Valley Falls Manufacturing Company for damage to their lands alleged to be flooded by the defendant's dam. While the actions were pending, parties to the suits made the separate arbitration agreements now under consideration. The agreements were identical, and we first consider whether on their face without respect to the affidavits before the circuit judge, they show an intention of the parties to have an arbitration under the statute. In the absence of express stipulations on the subject, we think the presumption is in favor of a statutory arbitration. In early times the disposition of the courts was to look with jealousy on arbitrations, and give them as little force as possible, but later and more intelligent judicial sentiment is strongly in their favor. As said in *Greenville v. Spartanburg*, 62 S. C. 125, 40 S. E. 147, "courts favor awards, and will indulge every reasonable presumption to uphold them, and whoever assails them has the burden of clearly establishing their invalidity." An award under an arbitration at common law was not the end of the matter, for, unless the losing party chose to comply with it, the successful party was obliged to incur the delay and expense

of bringing his action to enforce compliance. To remedy this defect, many states have passed statutes providing for and regulating arbitration, and authorizing the entry of judgment on the award itself. The statutes are remedial, and should be liberally construed, so as to advance the legislative purpose of putting an end to litigation. When parties enter into an agreement designed to end litigation, their contract as far as its language will allow should be construed to be effectual and complete to that end. Hence, when on its face the contract may be regarded as providing for either a statutory arbitration or an arbitration at common law, it should be referred to the statute.

The defendant insists, however, the agreement cannot be referred to the statute because the arbitrators were agreed on, and not selected by the parties, as required by the statute. The views of other courts give us little aid on this point, because, for the most part, they relate to statutes quite different from ours. Our statute is somewhat peculiar in language, but very simple. The agreement for arbitration is complete when one party to a dispute proposes arbitration and the other assents to it, and each party enters into bond, in double the amount involved, to faithfully abide the result. The selection of arbitrators is no part of the agreement required by the statute. After the agreement has been made, the statute provides a method of selection, so that there may be no reason for difference between the parties on the point. But this is nothing more than conferring on each party the right to demand that the arbitrators be selected in the manner indicated by the statute. This right, like all others, may be waived by agreement of the parties to select the arbitrators in some other way. Hence it is illogical to say an arbitration cannot be referred to the statute merely because the parties agree on the arbitrators, instead of exercising the right to require them to be selected in the manner indicated in the statute. For these reasons alone, we think the arbitration should be regarded statutory. But the written agreement indicates on its face an intention to proceed under the statute. In it the parties followed the statute by binding themselves in double the amount indicated by the complaint, to be involved to faithfully abide the result of the arbitration. In addition to this, the Valley Falls Manufacturing Company agreed "to pay the costs of the arbitrators, of the witnesses, and of any court officers connected with said arbitration." Unless the arbitration was to result in a judgment as provided by the statute, court officers would have had no costs in connection with it, and, in using this language, the parties must have had in contemplation the costs of entering the judgment.

The defendant further contends, even if the agreement to arbitrate should be referred to the statute, it was revoked before action

under it, and therefore no judgment could be entered on the award. This claim of revocation rests on the service of a written notice on the plaintiffs before the arbitrators had acted. But this notice was nothing more than a statement of defendant's position that the agreement contemplated a common-law, and not a statutory, arbitration. So, far from repudiating the agreement the defendant appeared and participated in the arbitration. The defendant's expression of opinion as to the effect of its written agreement obviously was not a revocation.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 1)

**SALEM R. CO. v. D. W. ALDERMAN & SONS CO.**

(Supreme Court of South Carolina. Aug. 19, 1907.)

**EMINENT DOMAIN—PRIVATE BUSINESS CORPORATIONS—RAILROAD CROSSINGS.**

Under Civ. Code 1902, § 1895, providing that private business corporations organized under the article shall have power to operate railroads, tramways, turnpikes, or canals for their own use, and have the right to cross any existing railroad or public roads, as is provided by law for railroad corporations, but shall have no power to condemn lands, except for crossing any existing railroads, evidence held to show that it was essential for the business with which the private railroad in question was connected that it be extended in the direction sought, and that there is a reasonable necessity for it to condemn a crossing over an existing railroad, where it is doubtful that it could obtain a way from private individuals by purchase.

Appeal from Common Pleas Circuit Court of Clarendon County; Hydrick, Judge.

Action by the Salem Railroad Company against the D. W. Alderman & Sons Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jos. F. Rhame, J. H. Lesame, and Wilcox & Wilcox, for appellant. Wilson & Du Rant, for respondent.

**WOODS, J.** The Salem Railroad is a corporation organized under the laws of the state, operating a railroad in Williamsburg and Clarendon counties. The D. W. Alderman & Sons Company, is a private corporation organized under the laws of the state, engaged in the manufacture of lumber, and, in connection with its business, operating private railroads for the purpose of conveying timber to its mill at Alcolu, S. C. In February, 1906, the D. W. Alderman & Sons Company served notice on the Salem Railroad Company that it required a right of way 20 feet in width across the railroad at a certain point in Clarendon county. The Salem Railroad Company duly signified its refusal to allow such right of way to be taken. Thereafter, under the petition filed by the D. W. Alderman & Sons Company, the clerk of the court of common pleas, acting under the statute, was about to impanel a jury to

assess damages for the right of way, when the Salem Railroad Company, denying the right of condemnation, brought this action for injunction. The denial of the right of condemnation rests on the allegation of the complaint that the crossing will be dangerous, causing annoyance to the plaintiff and interruption of its business, and "that the defendant herein does not require the use of the right of way above described over and across the railroad of this plaintiff for the purpose of transporting timber and other articles to and from its mill, but, on the contrary, has or can procure a right of way for its railroad by which to reach its property without crossing the railroad of this plaintiff." A temporary injunction was granted by Judge Gage. The case was tried before Judge Hydrick, who dissolved the injunction and dismissed the complaint. The single exception charges error in the circuit court's finding of fact that a reasonable necessity for the crossing existed at the time this action was commenced.

The defendant, being a private business corporation, has no right of condemnation beyond that conferred by Civ. Code 1902, § 1895: "Corporations organized for any purpose under the provisions of this article shall have power to construct and operate a railroad, electric railway, tramway, turnpike or canal, for their own use and purposes, and shall have the right to effect a crossing with any existing railroad or public roads as is now provided by law for railroad corporations; but they shall have no power to condemn lands except for crossing any existing railroad or public road, as herein provided." It would require a lengthy analysis of the evidence to make plain the precise situation of the proposed crossing in relation to the timber the defendant finds it necessary to reach by its private railroad. The statement of these salient facts will be sufficient. The defendant's private railroad already crosses the plaintiff's railroad, and this would be a crossing back on a curve where it is desirable for many reasons not to have crossings, or any other obstacle to the continuous movement of trains. The plaintiff railroad runs only one train a day each way. While it hauls some guano and other freight for the public, its main business is the transportation of logs and lumber for its principal owner, Mr. Wilson. The defendant could reach its timber by a route, just as convenient, leading over the lands of private owners, without crossing the plaintiff railroad. But, as will be seen by reference to the statute above quoted, the law confers on the defendant no authority to condemn a right of way over the lands of individuals. W. D. McFadden is one of the private owners whose consent would be essential to the defendant taking the route suggested by the plaintiff over the lands of others; and the effort was made to prove his willingness to sell defendant a right of way at a reasonable price.

Had the plaintiff been able to show that the necessary rights of way over this land and that of other persons could be procured for a reasonable price, it would have had, under the circumstances, strong reason to ask for a permanent injunction against the crossing of its railroad. But, considering the refusal of McFadden to name any price for the right of way, in connection with his attitude to Wilson and Alderman, the persons mainly interested in the suit, it is highly improbable the defendant could have acquired a right from him for a reasonable price.

We think these are the correct conclusions to be drawn. The extension of the defendant's railroad is essential to the conduct of its business. It has no right to condemn the lands of private owners; and its ability to acquire by purchase, at a reasonable price, rights of way over the lands of private owners, was shown to be, at least, extremely doubtful. The condemnation of the crossing over the plaintiff's railroad is therefore necessary; the case falling well within the rule of reasonable necessity laid down in *South Carolina Railroad Company v. Blake*, 9 Rich. Law, 228, and *Riley v. Union Station Company*, 71 S. C. 489, 51 S. E. 485.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 294)

#### ARMOUR & CO. v. ROSS et al.\*

(Supreme Court of South Carolina. Oct. 2, 1907.)

#### 1. BAILMENT—RIGHTS OF THIRD PERSONS.

An agreement by a broker to sell the goods of another, title to remain in the latter until sold, creates a bailment within Civ. Code 1902, § 2655, providing that every agreement whereby the bailor reserves title to himself shall be void as to subsequent purchasers without notice, unless recorded, and the agreement must be recorded to be valid against subsequent purchasers of the broker.

#### 2. SAME.

Civ. Code 1902, § 2655, providing that every agreement whereby a bailor reserves title to himself shall be void as against subsequent creditors unless recorded, has no reference to simple or unsecured creditors, but applies only to those whose claims have been reduced to judgment, or to those holding liens on the property before receiving notice of the unrecorded agreement, notwithstanding section 2456, as amended in 1898 (22 Stat. at Large, p. 746), which provides that conveyances of land, etc., shall be void as against subsequent lien or simple contract creditors, unless recorded; the latter section being distinct from the former.

#### 3. SAME.

Where the transaction by which one became a creditor of a bailee was distinct from that in which he purchased the chattels in possession of the bailee, and he was not a creditor within Civ. Code 1902, § 2655, providing that every agreement between bailor and bailee whereby the bailor reserves title to himself shall be void as to subsequent creditors, unless recorded, his claim was not such a consideration as could make him a purchaser for value without notice, within the statute.

#### 4. SAME—NATURE AND ELEMENTS.

Bailment is the delivery of goods for some purpose on a contract, express or implied, that

\*For opinion on rehearing, see 58 S. E. 1135.

after the purpose has been fulfilled they should be redelivered to the bailor, or otherwise dealt with according to his directions, or kept until he reclaims them.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; O. G. Dantzler, Judge.

Action by Armour & Co. against M. L. Ross and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

J. C. Jefferies, for appellant. Butler & Osborne, for respondents.

GARY, A. J. This is an action to recover the value of goods alleged to have been converted by the defendants to their own use. This is the second appeal. The first is reported in 75 S. C. 201, 55 S. E. 315. The complaint alleges that at the time hereinafter mentioned the plaintiff was the owner of a quantity of bacon and lard, of the value of \$1,353.41; that at said time the property was in possession of defendant St. John Butler, as plaintiff's agent, and was in his hands upon consignment; that on or about the 20th of August, 1901, the defendants, knowing that the plaintiff was owner of said property, and in order to pay an old debt due the defendant St. John Butler to his codefendants, H. L. Ross and W. A. Turner unlawfully and wrongfully converted the same to their own use, and placed it out of the possession of said agent, who thereupon left the state, and that the defendants Ross and Turner detained and concealed said property from the plaintiff for the purpose of appropriating it to their own use. The defendants Ross and Turner in their original answer, upon which they went to trial the first time, denied the allegations of the complaint, and set up as a defense that they were purchasers for valuable consideration without notice. After the case was remanded for a new trial, the defendants amended their answer by alleging, also, that they were subsequent creditors for valuable consideration without notice. At least a part of the indebtedness was contracted about the 8th of June, 1901, at which time the property in question was in the possession of St. John Butler, which was more than two months before he is alleged to have sold the property. The jury rendered a verdict in favor of the defendants, and the plaintiff appealed.

The first assignment of error is because his honor, the presiding judge, ruled that the agreement entered into between the plaintiff and St. John Butler was null and void as to subsequent creditors or purchasers for valuable consideration without notice, as it was not recorded within the time required by section 2655 of the Civil Code of 1902, which is as follows: "Every agreement between the vendor and vendee, bailor or bailee of personal property, whereof the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent

creditors or purchasers for valuable consideration without notice, unless the same be reduced to writing in the manner now provided by law, for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers, or any other persons letting or hiring property for a temporary use, or depositing such property for the purpose of having repairs or work or labor done thereon." The agreement made between the plaintiff and St. John Butler was in form an instrument of writing, dated the — day of June, 1899, directed to St. John Butler, signed by Armour & Co., and containing, among others, the following provisions: "Upon your acceptance in writing indorsed hereon, you are constituted our broker and commission merchant Gaffney, S. C., to sell provisions and products, as we may offer through or consign to you, or to your care for that purpose, upon the following conditions: (1) The title of all goods is to remain in us until sold by you, in accordance with the terms fixed by us, and when sold, the proceeds of sale shall at all times be the property of Armour & Co., and you shall any time deliver any or all unsold goods to whomsoever Armour & Co. may authorize to receive them." St. John Butler accepted the terms of the proposed contract. In 3 Enc. of Law, 733, the word "bailment" is defined as follows: "Bailment is the delivery of goods for some purpose, upon a contract expressed or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept until he reclaims them." The agreement herein is embraced within this definition. Section 2655, Civ. Code 1902, was construed in the case of Ludden & Bates v. Dusenbury, 27 S. C. 467, 4 S. E. 60, in which there was an agreement stipulating for the hiring of an organ, valued at \$95, for the term of nine months, at a monthly rental of \$10, with an option to the bailee to buy it at any time within that period at the said valuation, in which case the money paid for the rental should be deducted from the purchase money. The court held that it was not a mortgage, nor a conditional sale, but a contract of hiring only, with an option to buy at a future time, and that the agreement, not having been recorded in the manner provided by said section, was void as to a purchaser of the property at sheriff's sale under a judgment recovered against the bailee by a subsequent creditor for valuable consideration without notice. The court concludes with the following statement of the law: "It will thus be seen that the law as it now stands and as it stood when the agreement here in controversy was made is no longer confined to verbal agreements, but extends to every agreement, and it covers agreements between bailor and bailee, as well as those between vendor and vendee, and that all such agreements must be reduced to writing and recorded like mort-

gages, in order to make them valid against the claims of subsequent creditors or purchasers for valuable consideration without notice. Inasmuch, therefore, as the agreement here in question was never recorded, and inasmuch as there is no evidence that the defendant, who, as we have seen, must be regarded as a subsequent purchaser, ever had any notice of the agreement, it is quite clear that, even regarding the agreement as a contract, not of sale, but a contract of hiring, which is a bailment, the defendant was entitled to recover." The exceptions raising this question are overruled.

The next error assigned is because his honor, the presiding judge, refused to direct a verdict or grant a new trial, on the ground that there was no testimony whatever tending to sustain the defense that the defendant Ross was a creditor or purchaser for valuable consideration without notice. Upon the former hearing of this case, before the defense was amended by alleging that he was not only a purchaser, but a subsequent creditor for value without notice, this court used the following language: "There is testimony to the effect that the defendants were purchasers, and that they did not have notice of the agreement hereinbefore mentioned between the plaintiff and Butler; but the defendants failed to introduce any testimony whatever tending to show that there was such consideration as equity recognized in support of their defense. On the contrary, the testimony of the defendant Ross was to the effect that the sale of the articles to him by Butler was based upon the consideration of past indebtedness, which is not sufficient to sustain said defense. Quite a different question would be presented if the appeal involved the construction of section 2456 of the Civil Code, as that section was amended in 1898 (22 St. at Large, p. 746), by adding the words: 'Whether simple contract creditors or lien creditors.' *Marsh v. Ramsay*, 57 S. C. 121, 35 S. E. 433." In determining upon that hearing whether Ross was a purchaser for valuable consideration without notice, the question whether he was such a creditor as the statute contemplated was necessarily involved, and, if this court had entertained the view that he was such creditor, it would have been compelled to rule that he was entitled to the protection of the statute. In such a case he would have had the right, under judicial proceedings, to subject the property to the payment of his indebtedness, or to become the purchaser of the property, in consideration of said indebtedness, provided he did not have notice of the agreement at the time of his purchase. The statute, however, does not have reference to simple or unsecured creditors, but to those whose claims have been reduced to judgment, to those holding other liens on the property, before receiving notice of the unrecorded instrument. *King v. Fraser*, 23 S. C. 543; *Carraway v. Carraway*, 27 S. C. 576, 5 S. E.

157; *Summers v. Brice*, 36 S. C. 204, 15 S. E. 374; *Turpin v. Sudduth*, 53 S. C. 295, 31 S. E. 245, 306; *Armstrong v. Carwile*, 56 S. C. 463, 35 S. E. 196. The respondents' attorneys rely upon the case of *Herring Co. v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661, to show that Ross was entitled to the protection of the statute. The facts of that case were as follows: In August, 1880, Herring & Co. sold and delivered to E. S. Griffin a safe for \$105.63, payable January 1 and April 1, 1881, and took notes therefor, in which they reserved the title to said safe in themselves until paid for, but failed to record the notes. After the purchase of the safe, and while it was in Griffin's possession, Griffin contracted debts with two different firms, who had no notice of Herring's claims. These creditors sued Griffin, and attached the safe, and recovered judgment for their debts before they had any notice of Herring & Co.'s claim. The safe was sold by the sheriff under the attachment proceedings. Jas. F. Izlar, who was notified of Herring & Co.'s claims, bought the safe at the sale, and afterwards sold it to Cannon, the defendant. The court used the following language: "It is conceded in the case that the safe was seized and sold under legal process issued by subsequent creditors without notice, and therefore it is unnecessary to inquire whether Izlar, the first purchaser, or Cannon, to whom he sold, had actual notice of plaintiff's claim at the time of their respective purchases. The purchase at the sheriff's sale for the benefit of suing creditors, admitted to be subsequent creditors without notice, gave to the purchaser that protection which is extended to the class to which the creditor in execution belonged, whether he, the purchaser, had actual notice or not." That case is not conclusive of the question under consideration, as it was therein conceded that those under whose attachment proceedings the safe was sold were subsequent creditors for value without notice. The amendment to section 2456 of the Civil Code in 1898 by inserting the words, "whether simple contract creditors or lien creditors," is not applicable, as that section and section 2655 are separate and distinct; and, if the Legislature had intended to amend the latter section, it would have been very easy to have so expressed its intention. Finally, our reason for ruling that the defendant Ross was not entitled to the protection of the statute is that the transaction by which he became a creditor of St. John Butler was separate and distinct from that in which he purchased the property; and, as he was not such a creditor as came within the purview of the statute, his indebtedness was not such a consideration as could sustain the defense of purchaser for value without notice.

The thirteenth and fifteenth exceptions cannot be sustained, as the propositions for which the appellant contends were inapplicable to the case under the pleadings and testimony.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WOODS, J. (dissenting). I dissent, as I am unable to agree that the amendment of 1898 (22 St. at Large, p. 746), making section 2456 of Civil Code apply to the protection of simple contract creditors, as well as lien creditors, had no effect on section 2655, requiring record of certain agreements between vendor and vendee and bailor and bailee. By the act of 1876 (16 St. at Large, p. 92) it was provided deeds, mortgages, and other specified papers "and generally all instruments of writing now required by law to be recorded," etc., should be valid so as to affect subsequent creditors or purchasers without notice only when recorded within 40 days. In 1882 an act was passed providing: "Every agreement between the vendor and vendee, bailor and bailee, of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice unless the same be reduced to writing and recorded in the manner now provided by law for recording of mortgages: provided, that nothing herein contained shall apply to livery stable keepers, or inn keepers, or any other persons letting or hiring property for a temporary purpose." 18 St. at Large, p. 35. Clearly the main purpose and effect of this act was to make agreements of the kind mentioned between vendors and vendees, and bailors and bailees, "instruments required by law to be recorded," within the meaning of the act of 1876, and such instruments fell as fully under that statute as if the statute had been amended, and the agreements between vendors and vendees, and bailors and bailees, had been mentioned along with deeds and mortgages. When, therefore, the statute of 1876 was amended in 1898 to the form of section 2456 of Civil Code, so as to protect not only subsequent lien creditors, but also subsequent simple contract creditors, the amendment applied to all "instruments required by law to be recorded," and agreements between bailors and bailees like that involved in this case are such instruments.

For these reasons, I think the judgment of the circuit court should be affirmed.

(78 S. C. 8)

#### CUMMINS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 20, 1907.)

#### 1. CARRIERS—DELAY IN FREIGHT—ACTION FOR DAMAGES.

A complaint alleging that defendant carrier unreasonably delayed a shipment for one day, without alleging negligent delay, held to state a cause of action in contract against the

carrier for failure to transport with reasonable dispatch.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 436.]

#### 2. SAME—REASONABLE DILIGENCE.

The issue of reasonable diligence in the shipment of freight is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 449.]

Appeal from Common Pleas Circuit Court of Charleston County; Aldrich, Judge.

Action by E. L. Cummins against the Atlantic Coast Line Railroad Company. From an order overruling a demurrer, the defendant appeals. Affirmed.

W. Huger Fitzsimons and T. Moultrie Mordecai, for appellant. Legare & Holman, for respondent.

GARY, A. J. This is an action to recover damages for the alleged delay in the transportation of freight.

The complaint sets forth three causes of action, the first of which alleges "that on the 8th day of May, 1905, the plaintiff delivered to the defendant, at Meggetta, S. C., a station on its line of road, 220 crates of cabbage; that the same were received for transportation to the city of New York, there to be delivered to certain commission merchants for sale for the account of the plaintiff, that the cabbage should have been delivered to the said commission merchants on the 11th day of May, 1905, but that the same were unreasonably delayed in transportation for one day, and were not delivered until the 12th day of May, 1905; that, by reason of such delay in transportation, the cabbage were rendered worthless, and the same resulted in a total loss to the plaintiff; that, if said cabbage had been received in due time and in good condition, the plaintiff could have realized a net profit of 85 cents per crate, whereby the plaintiff has been damaged in the sum of \$187." The second and third causes of action are similar to the first. The defendant demurred to the complaint, and to each cause of action, on the ground that it did not state facts sufficient to constitute a cause of action; (1) in that it is not alleged that the delay was negligent; and (2) in that it is alleged that the delay was only one day, which is not sufficient to raise the presumption of negligence. The demurrer was overruled, and the defendant appealed.

The plaintiff had the right to bring his action either *ex contractu* or *ex delicto* (Pickens v. Railroad, 54 S. C. 498, 32 S. E. 567); and even conceding that the allegations are not sufficient to constitute a cause of action founded upon tort, they nevertheless are appropriate to a cause of action based upon contract. The ruling of his honor, the presiding judge, is not only in harmony with the doctrine prevailing generally, but is sustained by the decisions in this State. In Nettles v. Railroad, 7 Rich. Law, 190, 62 Am. Dec. 409, the court uses this language: "The defend-

ants were by the contract, which as common carriers they made with the plaintiff, bound to deliver the goods in Camden within a reasonable time. *Rapheal v. Pickford*, 5 Man. & Gran. 551. After the expiration of a reasonable time, without disproof of negligence on their part, they became answerable for the wrong of nondelivery; and, if nothing more had appeared, the measure of damages would have been the value of the goods at the place where they should have been delivered, together with any reasonable loss and expenses which had been directly occasioned by the wrong." In the case of *Harby v. Railroad*, 75 S. C. 321, 325, 55 S. E. 760, 762, the court said: "The correct rule in such cases is that, when no time is expressly agreed upon, the goods must be transported with all reasonable diligence"—which must be determined by the jury, citing *Nettles v. Railroad*, 7 Rich. Law, 190, 62 Am. Dec. 409, and 6 Cyc. 442.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 334)

**POPE et al. v. PATTERSON.**

(Supreme Court of South Carolina. Oct. 5, 1907.)

**1. DEEDS—CONSTRUCTION.**

The object of construction of a deed is to ascertain the intention of the parties, and, when so ascertained, nothing remains but to effectuate that intention, if it can be done according to law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 281.]

**2. TRUSTS—TRUST DEEDS—CONSTRUCTION—LEGAL TITLE.**

Grantor, in consideration of his natural love and affection for his children, conveyed certain premises on the following trust: The rents and profits were reserved to grantor for life. The premises, on grantor's death, were to be equally divided among his children. The share of one of the children was to be for her use during life only, with remainder to her children living at her death, and the share of a grandson named was limited to the use of his wife during her life, remainder to his children at her death, and the trustee was to hold on the further trust to sell, when so directed by grantor. *Held*, that the intent of grantor was to vest the legal title in the trustee until a sale at his request or his death, and that, it being the duty of the trustee to convey on request of grantor, the statute of uses did not execute the use or vest the legal title in the beneficiaries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 175.]

**3. SAME—STATUTE OF USES.**

Where an estate in real property is conveyed to one for the use of, or in trust for, another, and no duty is imposed on the trustee for the proper performance of which it is necessary that the legal title remain in the trustee, such title by operation of the statute of uses passes to the *cestui que trust*, but, where there is anything for the trustee to do, rendering it necessary that he retain legal title, then the statute will not execute the use, and legal title remains in the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 175.]

**4. SAME.**

Grantor, in consideration of his natural love and affection for his children, conveyed certain premises in trust to pay grantor the rents and profits for life, and after his death the whole estate to be equally divided among his children as therein directed, and it was provided that such deed was on the further trust that trustee would convey the same, when so directed by grantor. *Held*, that if necessary to effectuate the intention of grantor to retain the *jus disponendi*, and to place legal title in the trustee, and not in his beneficiaries, the clause in reference to the sale of the land by trustee might be transposed and placed first in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 162.]

**5. EVIDENCE—PRESUMPTION—PERFORMANCE OF CONDITION PRECEDENT.**

Where a trust deed vested in the trustee the legal title with the duty to convey on written request of grantor, and the trustee executed a deed, a written request to do so will be presumed after the lapse of 20 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 90.]

**6. LIMITATION OF ACTIONS—PERSONS BARRED—CESTUI QUE TRUST.**

Where the statute of limitations has run against a trustee vested with legal title to land, the *cestui que trust* is also barred, though she is a married woman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 660.]

Appeal from Common Pleas Circuit Court of Barnwell County; J. B. McDonald, Special Judge.

Partition by M. L. Pope and others against E. L. Patterson. Judgment for defendant, and plaintiffs appeal. Affirmed on the opinion of the court below.

The following is the opinion of McDonald, J., in the court below:

"This is an action for the partition of real estate, and was heard by me at a special term of the court for Barnwell county October, 1905, upon the pleadings and an agreed statement of facts. By agreement of counsel, a jury was waived. Since the hearing of the case, my time has been so fully occupied by pressing business engagements that I have not been able heretofore to consider the numerous authorities cited by counsel for plaintiffs in his very full and able argument. I sincerely regret this delay in my decision of this very interesting case.

"The plaintiffs allege, in their complaint, that they are seised in fee and entitled to the possession of two-fifths interest in fee in a tract of land situate in Barnwell county, S. C., containing 1,300 acres, more or less, and that the defendant is entitled to three-fifths thereof in fee, but that he has been in exclusive possession of said lands, collecting and receiving the rents and profits thereof, and converting them to his own use. The plaintiffs therefore demand partition of the premises, and an accounting of the rents and profits received by the defendant for the time that he has been in exclusive possession of the said premises. The defendant sets up three defenses: (1) A general denial. (2) The pre-

sumption of a grant, arising from 20 years' continuous adverse possession. (3) Adverse possession for 10 years under claim of title, founded upon a written instrument.

"The plaintiffs base their claim to their alleged interests in the tract of land described in the complaint upon a certain deed executed and delivered by one H. D. Duncan to H. A. Duncan, as trustee, bearing date the 13th day of April, 1868. That deed is in the following language: 'The State of South Carolina, Barnwell District. Know all men by these presents, that I, Hansford D. Duncan, of the said state and district, for and in consideration of the natural love and affection which I bear towards my children, H. A. Duncan, Harriet Eliza Twiggs, widow of the late George W. L. Twiggs, deceased, Sarah E. Eaves, wife of Dr. Paul F. Eaves, Mary Lucia Sams, wife of the Rev. Marlon W. Sams, and my grandson, Darling P. Duncan, and also the sum of one dollar to me in hand paid by H. A. Duncan, the receipt of which I do hereby acknowledge, have given, granted, bargained, sold and released, and by these presents do give, grant, bargain, sell and release unto the said H. A. Duncan all that tract of land situate, lying and being in the said district on the lower three runs, containing fifteen hundred acres, on which I formerly resided, and known as the Sandy Run Place. Also my two lots in the village of Barnwell, on which I now live, containing ten and eleven acres. To have and to hold all and singular the above described premises, together with the rights, members, and appurtenances thereto belonging unto the said H. A. Duncan, his heirs and assigns forever. And I, the said H. D. Duncan, do hereby warrant and forever defend the said premises unto the said H. A. Duncan against me, my heirs, executors and administrators, and all other persons claiming or to claim through me. In trust, nevertheless, that the rents and profits of the said land are to be paid over to the said H. D. Duncan for and during his natural life, and the use of the said residence in Barnwell village for the same term. And after the death of the said H. D. Duncan, then the whole estate herein conveyed to be equally divided, share and share alike, between my children, H. A. Duncan, H. E. Twiggs, S. A. Eaves, M. L. Sams, and my grandson, D. P. Duncan. The share of my daughter, M. L. Sams, to her sole and separate use during life, and after her death, to be equally divided among her children who may be living at the time of her death; the share of a deceased child, should the child so dying leave a child or children alive, to be equally divided among the children of said deceased child. The share of my grandson, D. P. Duncan, for the sole and separate use of his wife, Rosa, during life, and after her death to be equally divided among the children of the said D. P. Duncan who may be living at the time of his death; the share

of a deceased child, should the child so dying leave a child or children alive, to be equally divided among the said children of said deceased child. The shares of my children, H. A. Duncan, H. E. Twiggs, S. A. Eaves, to vest absolutely upon the falling in of the life estate of myself. And on the further trust that should the said H. D. Duncan desire to sell the whole or any part of the above described property, the said H. A. Duncan shall execute such titles of the same to such person as he, the said H. D. Duncan, shall direct, in writing, without the necessity of applying to any court for that purpose. In witness whereof I have hereunto set my hand and seal this, the 13th day of April, A. D. 1868. H. D. Duncan. [L. S.] Signed, sealed, and delivered in the presence of W. W. Woodward, B. B. Sams.'

"From the agreed statement of facts, it appears that all of the plaintiffs, except Rosa Aldrich and A. P. Aldrich, are children of Mrs. Lucia Sams and her husband, Marlon Sams. Mrs. Lucia Sams was the daughter of the grantor, H. D. Duncan, mentioned as M. L. Sams in the above deed. H. D. Duncan, the grantor in the above deed, died in the year 1881, and the trustee, H. A. Duncan, died in the year 1882. Mrs. Sams died on the 6th of November, 1902, her husband, Marlon Sams, having predeceased her on the 2d of August, 1899. The plaintiffs Rosa Aldrich and A. P. Aldrich are the wife and child of D. P. Duncan, the grandson of H. D. Duncan mentioned in said deed. D. P. Duncan died on the 31st of March, 1894, leaving him surviving, as his heirs at law, his wife, the plaintiff Rosa Aldrich, and an only child, the plaintiff A. P. Aldrich. D. P. Duncan and Rosa Duncan were husband and wife at the time of the execution of the above trust deed. On the 30th day of August, 1879, H. A. Duncan, as trustee, conveyed to H. D. D. Twiggs the property in dispute, and on the same day, in pursuance of a sale for delinquent taxes, a deed was also executed and delivered to the said H. D. D. Twiggs by the sinking fund commission conveying the property in dispute, the same having been sold for delinquent taxes in the name of H. A. Duncan. On the 18th day of February, 1880, H. D. D. Twiggs conveyed the property in dispute to H. F. Snelling. Thereafter, on the 18th of April, 1893, H. F. Snelling conveyed to Benjamin Graham 800 acres of the land in dispute. On the — day of —, 18—, H. F. Snelling conveyed to the British & American Mortgage Company, Limited, by way of mortgage, 500 acres of the land in dispute. Subsequently the said mortgage was foreclosed and the land sold. The British & American Mortgage Company, Limited, became the purchaser thereof, and took deed thereto bearing date the 12th day of November, 1897. The British & American Mortgage Company, Limited, on the 19th of November, 1897, conveyed to the defendant E. L. Patterson said



500 acres of land, being part of the land in dispute, and on the 4th day of June, 1903, Benj. Graham conveyed to the defendant E. L. Patterson 800 acres, being part of the land in dispute. All of the above deeds were duly placed on record in the office of the registrar of mesne conveyance for Barnwell county, and the respective and successive owners of said land paid the state and county taxes thereon after the date of the sale for taxes in the year 1879. The defendant claims title by virtue of above deeds and possession thereunder. It is admitted in the agreed statement of facts that the successive owners of the land in dispute held the same openly, notoriously, exclusively, and adversely against all persons whomsoever, but this admission is without prejudice to the right of the plaintiffs to contend that such possession was not adverse as to them, it being contended that as to Mrs. Lucia Sams, she being a married woman, and under the disability of coverture at the time of the execution of the above trust deed, the possession of the several successive owners could not be adverse to her. This action was commenced on the 24th day of February, 1904. These are the salient facts upon which the issues in this case arise.

"It is contended by the plaintiffs that under the above deed from H. D. Duncan to H. A. Duncan, trustee, the beneficiaries mentioned therein took vested remainders at the time of the execution of said deed, the enjoyment thereof, however, being postponed until the falling in of the life estate reserved in said deed to the grantor, H. D. Duncan. They contend, further, that the trustee, H. A. Duncan, did not hold the legal title in trust for the remaindermen, but that his office as such trustee terminated with the death of H. D. Duncan, the grantor and life tenant. In other words, it is the contention of the plaintiffs that the statute of uses executed the use and vested the legal title in the remaindermen immediately upon the execution of the trust deed, and that the reservation or power of sale contained in the trust deed is null and void, as being repugnant to the estate granted. This in brief is the main contention on behalf of the plaintiffs. They, of course, contend, further, that the tax deed above mentioned is void as against them, for noncompliance with statutory requirements; and they also contend that there could be no adverse possession as to them under the facts above stated. On the other hand, the main contention of the defendant is that, under this trust deed, the legal title vested and remained in the trustee; that his conveyance was a valid execution of the power of sale under the terms of the trust deed; and that the defendant, his predecessors and grantors, having held adversely for more than 20 years, will be presumed to have acquired title to the land in dispute by a grant from the state. He also contends that, as the legal title remained in the trustee, the statute of limitations be-

gan to run against him upon his conveyance to H. D. D. Twiggs, and that not only the trustee, but the cestui que trust, would be barred at the end of the statutory period. The defendant also relies upon adverse possession under tax title.

"From the view that I take of the facts in this case, it will not be necessary to pass upon every issue that has been raised between the plaintiffs and defendant. It is evident that the pivotal point in the case depends upon the construction of the trust deed above set forth. If the plaintiffs' contention that the legal title in remainder vested in the cestui que trust at the time of the execution of the trust deed under the operation of the statute of uses be sustained, then it is manifest that plaintiffs are entitled to the relief demanded in their complaint, unless their rights are otherwise barred by the presumption of a grant, lapse of time, adverse possession, or by the tax title offered in evidence by the defendant. If, however, the legal title did not so vest in the cestui que trust, then it is equally evident that the conveyance by the trustee, in the absence of fraud, would bar any supposed rights that the plaintiffs might claim in the premises. The solution of these questions, as has been stated, depends upon the proper construction of the trust deed. The object of construction of all contracts by the courts is to ascertain the intention of the parties, and, when so ascertained, nothing remains but to effectuate that intention, if it can be done according to law. It is not for the courts to make contracts by construction, but it is their duty to carry out the expressed intention of the parties if it can be done consistently with sound and settled legal principles. As is said in 2 Devlin on Deeds, § 836: 'As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law.' Again, in same section, it is said: 'If a question of law arises upon the construction of a deed, it is the province of the court to construe it, and to decide from the language what the intention of the party was. When the intention of the parties can be plainly ascertained, arbitrary rules are not to be resorted to. The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law.' Again, in section 837, quoting the language of Chief Justice Kent, in *Jackson v. Myers*, 8 Johns. (N. Y.) 388, 389, 8 Am. Dec. 504, it is said: 'The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every

part of it meaning and effect.' And, if a deed cannot take effect in the precise way intended, yet, if it can operate in another mode, it will be so construed. In note 3, on page 106, same volume, will be found a quotation from the opinion of Mr. Chief Justice Ruger, in *Coleman v. Beach*, 97 N. Y. 545, 553, which states the rule very clearly, as follows: 'If the disposition which the owner of property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the courts are called upon to perform in construing his transfers of title is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the courts are of necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon and interpretations of the literal signification of the language used must be imposed as will give some effect, if possible, to all of the provisions of the deed.' The well-settled rule of construction adopted by our own courts is in harmony with the above statement of the law. In *McCown v. King*, 23 S. C. 235, the rule is stated in the following language: 'The object of construction as to deeds—in fact, as to all papers in contest before the courts—is to reach the intention of the parties, because it is this which must control, otherwise the contract would be the contract of the court, and not of the parties. The ascertainment, however, of this intention is not to be had by conjecture or by what seems to be natural justice, or what the court would have done under the circumstances, but it must be had by the application of the rules of construction laid down in the books, and which the wisdom of the past has established as the best means of reaching the true meaning and intent of such papers. Whatever the application of these rules evolves, nothing more, nothing less, must be regarded and declared to be the intent of the matter under construction, whether it be in consonance with our notions of what it ought to be or not.' See, also, *Mellichamp v. Mellichamp*, 28 S. C. 129, 55 S. E. 333; *Fuller v. Missroon*, 35 S. C. 327, 14 S. E. 714; *Brown v. McCall*, 44 S. C. 511, 22 S. E. 823; *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370; *Faber v. Police*, 10 S. C. 386.

Applying these principles of construction to the deed in question here, I do not think it can be seriously doubted that it was the intention of H. D. Duncan that the legal title to the tract of land in question should not vest in the beneficiaries at the time of the execution of the deed. On the contrary, I think it was his clear intention to vest the legal title in the trustee, there to re-

main until divested upon the happening of certain contingencies, to wit, a sale at his request, or his dying without exercising the power to direct a sale. It was certainly not his intention, in my opinion, that the legal estate should be vested in his children under the statute of uses. The following facts and circumstances, in my opinion, strongly support this view: (1) The grantor uses apt and technical words to convey the entire fee to the trustee, and he even inserts the warranty clause before the language declaring the trust. (2) The rents and profits are reserved, and 'are to be paid over' to the grantor for and during his natural life. (3) The estate conveyed is not to be divided among his children until after the death of the said grantor. (4) After directing a division, he provided that the share of Mrs. Sams should be for her sole and separate use during her life only, with remainder to her children living at the time of her death, etc., and the share of his grandson, D. P. Duncan, is limited to the sole and separate use of the wife of D. P. Duncan during her life, with remainder to his children living at the time of her death, etc. (5) The shares of the other children are not 'to vest absolutely' until the falling in of the life estate. (6) The trustee is to hold the land upon the further trust, to sell the whole or any part thereof when so directed, in writing, by the grantor. If the contention of plaintiffs' counsel is correct, then no effect whatever can be given to that clause of the deed which provides a life estate for Mrs. Sams, and for the wife of his grandson, D. P. Duncan, nor can any force or effect be given to that clause of the deed in which the grantor provides for a sale by the trustee if he is so directed in writing. To so construe this deed would bring about a result manifestly contrary to the plain intention of the grantor. His intention must be carried out, unless repugnant to some principle of law. It is contended that to give effect to that clause providing for a sale would violate the rule of law whereby the legal title becomes vested under the statute of uses when the trustee has no duties to perform. Does the statute of uses apply to this case? The rule on this subject is clearly stated in *Snelling v. Lamar*, 32 S. C. 75, 76, 10 S. E. 825, 17 Am. St. Rep. 835, in the following language: 'It is well settled that where an estate in real property is conveyed to one for the use of or in trust for another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in the trustee, such estate, by the operation of the statute of uses, will pass at once to the cestui que trust, or person for whose use the estate is conveyed; but when there is anything for the trustee to do, which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the instrument creating the

trust, then the statute will not execute the use, as it is termed, and the legal estate will remain in the trustee. These principles have been so often determined that it cannot now be necessary to do more than refer to some of the cases in which they have been settled. *Ramsay v. March*, 2 McCord, 252, 13 Am. Dec. 717; *Faber v. Police*, 10 S. C. 376; *Bristow v. McCall*, 16 S. C. 545; *Howard v. Henderson*, 18 S. C. 184; *Ayer v. Ritter*, 29 S. C. 135, 7 S. E. 53. The rule was also stated by Chancellor Harper, in *Posey v. Cook*, 1 Hill (S. C.) 413, as follows: 'Perhaps the rule might be more accurately expressed to say that where the intention is that the estate shall not be executed in the cestui qui use, and any object is to be effected by its remaining in the trustee, then it shall not be executed.' See, also, *Farr v. Gilreath*, 23 S. C. 512; *Ayer v. Ritter*, 29 S. C. 136, 7 S. E. 53; *Wieters v. Timmons*, 25 S. C. 488, 1 S. E. 1; *Carrigan v. Drake*, 36 S. C. 365, 15 S. E. 339; *Brown v. McCall*, 44 S. C. 508, 22 S. E. 828; *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370; *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82; *Bank v. Garlington*, 54 S. C. 424, 32 S. E. 513.

"It was perfectly competent, in my opinion, for the grantor, by the deed here under consideration, to convey the property to the trustee for the purpose of selling the whole or any part thereof when he should be so directed in writing by the grantor. Such a trust does not violate any rule of law. In order that the trustee might convey the land, it was certainly necessary that the legal title should remain in him for that purpose, and, hence, as he had this duty to perform with reference to the land, if he should be called upon to do so by the grantor, the statute of uses would not execute the use nor vest the legal title in the grantor's children. I think the intention of the grantor was to retain the *jus disponendi*, so to speak, during his life, and his children were to take under this deed only in the event that he did not direct the trustee to sell the land during his lifetime. I think this is made more evident when we consider the fact that the grantor provided in effect that the land should not be divided until after his death, by the further fact that he gives one of his daughters only a life estate in the property, and that the share provided for his grandson was limited to the use of his wife for life, and, finally, by the fact that as to the shares of the other children he provides that they are not 'to vest absolutely' until the falling in of the life estate. In other words, as to the shares of H. A. Duncan, S. A. Twiggs, and S. E. Eaves, there was to be no absolute vesting of the estates until the termination of the grantor's life estate. In order to carry out the intention of the grantor, it is legally permissible to transpose the two clauses of the deed which declare the trust; and, if necessary to effectuate the intention of the grantor, the clause in reference to the sale of the land

may be placed first in the deed. *McCown v. King*, 23 S. C. 235, 236. In the deed construed in that case, the trust clause was separated from the granting clause, as is the case here, by the interposition of the warranty clause, and yet the court so transposed the different clauses as to carry out the manifest intention of the grantor. If this be done here, then the deed can be so construed as to effectuate the intention of the grantor, and every part of it can be given effect without violating any known principle of law.

"But, even if it were not clearly permissible to so transpose the several clauses of this deed, in my opinion, the latter trust clause may be enforced and given effect without violating any sound legal principles. In the case of *Wieters v. Timmons*, 25 S. C. 488, 1 S. E. 1, a very similar provision was made in a trust deed, and the court held, at least by the clearest implication, that the power of sale therein given might have been exercised during the joint lives of the grantor and his wife. At page 495 of 25 S. C., at page 4 of 1 S. E., it is said: 'During the life of the grantor he was to have control of the entire income of the property to be used by him in the support and maintenance of his wife and children, and the education of said children, and it was not unreasonable that he should attach thereto the proviso in question permitting him and his wife to change the property, if found necessary, subject to be reinvested for the same purposes as expressed in the original deeds. Up to his death, the interest of the issue, other than support and maintenance, was contingent, and the proviso could in no way therefore affect them. Upon the death, however, of the grantor, the interest of the wife and the issue was separated by the terms of the deed, the wife being entitled to the use and benefit of one moiety for life, and the other moiety to go to the issue in fee. The grantor died without making any request jointly with his wife for the sale of the property, or any portion thereof, and for the reinvestment of the proceeds, and therefore it is no longer possible for such joint request to be made; and, although it is true the proviso empowered the survivor to make such request, yet it would be utterly inconsistent with the vested interest of the issue in the moiety to which they became entitled at the death of their father (the grantor) to suppose that this power extended to said interest.' The clear inference from this language is that a conveyance upon the joint request of the grantor and his wife would have been sustained by the court, and the interest of the issue would have been thereby barred. For these reasons, I am of the opinion, and so hold with reference to the deed here under consideration, that the statute of uses did not execute the use or vest the legal estate in the children of H. D. Duncan, the grantor.

"Having held that the legal title remained

in the trustee, and that he had the right to convey upon the written request of the grantor, it only remains to consider what was the effect of his conveyance to H. D. D. Twiggs upon the contingent interest of the plaintiffs. This deed was made by the trustee on the 30th day of August, 1879, and the written request of H. D. Duncan will now be presumed after the lapse of 20 years. It is admitted that Twiggs and those who succeeded in title under him up to the time of the commencement of this action, in February, 1904, were in open, notorious, exclusive, and adverse possession of the land. It is contended, however, that owing to the fact that Mrs. Sams was a married woman, and under the disability of coverture, the possession could not be adverse as to her, and that the rights of the other tenants in common would thereby be preserved. There would be great force in this position if it were not for the fact that the legal title, as I have held, was in the trustee, and not in Mrs. Sams, and, the trustee having made a conveyance of the land, the statute of limitations began to run as against the legal title and in favor of those in possession at the time of such conveyance; and, notwithstanding the fact that Mrs. Sams was a married woman, I am unable to perceive how the running of the statute would be arrested in view of these facts. As to this point, in *Benbow v. Levi*, 50 S. C. 128, 27 S. E. 655 (a case where the legal title was in the trustee), it is said: 'If an executor, or an administrator, or committee of a lunatic, or a guardian of a tender infant has a chose in action properly in his hands belonging to the estate of his cestui que trust, and such personal representative allows time enough to elapse from maturity of the chose to bar a recovery thereon, and he brings an action thereon and fails to recover, his right of action is gone, and with his loss of such right so goes that of his cestui que trust. So as to land. If trustees who hold a legal title allow the statute of limitations to bar them, or a presumption of a grant to arise, the right of action for the land is barred and their cestui que trust are barred also. *Trustees v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854.' Here on the 18th day of February, 1890, H. D. D. Twiggs, the grantee of the trustee, H. A. Duncan, conveyed the land in dispute to H. F. Snelling, who, it is admitted, was in possession for more than ten years under his conveyance. This gave him, as against the trustee and Twiggs, at least a title by adverse possession under the statute of limitations, and such title was subsequently acquired by the defendant.

"This being my view of the law applicable to the facts in the case, I do not regard it material to decide what effect, if any, should be given to the tax title set up by the defendant herein. I may say, however, that owing to the absence of proof as to statutory requirements having been complied with, I

am doubtful whether the plaintiffs would be barred by that deed if they otherwise had any rights in the premises. My conclusion, therefore, is that the plaintiffs have failed to establish any title to the two-fifths interest in the land in dispute, and I hold that the same is in the defendant.

"It is therefore ordered and adjudged that the plaintiffs have no interest in the tract of land described in the complaint, and that the complaint herein be dismissed, with costs."

B. T. Rice, for appellants. J. O. Patterson & Son, for respondent.

WOODS, J. This is a case of much difficulty, and the plaintiff's counsel has made a strong presentation of the argument against the construction of the trust deed from W. D. Duncan to H. A. Duncan adopted by the circuit judge. After careful consideration, however, we have concluded to adopt the reasoning of the circuit decree as sound and convincing.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 317)

COOPER et al. v. COOPER et al.

(Supreme Court of South Carolina. Oct. 5, 1907.)

#### 1. WILLS—CONSTRUCTION—PERSONS ENTITLED TO TAKE.

Testator, who had been twice married, after making certain bequests to his widow in lieu of dower, provided: "I give her also a life interest, or as long as she remains my widow, an equal portion with my children, \* \* \* and at her death or marriage said property to be equally divided between all of 'our' surviving children, or those of them who may not have completed their education, should there be any such." The residue of his estate was given to "my" surviving children, to be equally divided among them, except a daughter by his first marriage, who was given an equal share in the real estate only, and except, also, two sons of that marriage, as to whom he provided that, having completed their education, he desired them to receive only one-third each of a child's portion of his personal estate, besides their full share of his real estate. At the will's date the children of the first marriage were all of age, and had completed their education, but none of the children of the second marriage were of age, and some were of quite tender years. *Held*, that children of the first marriage, who survived the widow, were not entitled to share in the remainder after her life estate, and that the same went to the children of the second marriage, and, all of them having completed their education at the widow's death, only those who survived her were entitled to take.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1063.]

#### 2. SAME—VESTED OR CONTINGENT ESTATES.

Where the persons who are to take under a will are uncertain, as where it depends on who shall survive a life tenant, the remainder is not only contingent, but nontransmissible.

Appeal from Common Pleas Circuit Court of Sumter County; D. E. Hydrick, Judge.

Partition by Robert Muldrow Cooper and

others against Francis Pelot Cooper and others. Decree for defendants, and plaintiffs appeal. Affirmed on the opinion of the court below.

The following is the opinion of Hydrick, J., in the court below:

"This is an action for the partition of the tract of land described in the complaint, and incidentally for the construction of the will of George William Cooper. Trial by the jury was duly waived by consent of the attorneys for all parties. The original will is in the handwriting of the testator, and the word 'our,' in the paragraph hereinafter copied, was underscored in the original will by testator. The will is dated July 30, 1874. Testator died April 5, 1875, leaving surviving him his widow, Rosa I. Cooper, and nine children, three by a former marriage, viz., Mary Jane Petrie, William Albert Cooper, and Robert Muldrow Cooper, and six by the second and last marriage, viz., Rosa Leicester Cooper, Francis Pelot Cooper, Edward Wood Cooper, Harriett Cooper Cheyne, Hamilton Witherspoon Cooper and Augustus Thomas Cooper. At the date of the second marriage, the children of the first marriage were all quite small, the youngest of them being an infant in arms, who never knew any other mother than his step-mother, who treated the children of the first marriage just as she did her own. The children of the two marriages treated each other just as brothers and sisters of the whole blood, so that the family lived together most amicably. After giving the widow \$5,000 in cash, or securities, at her option, his best carriage and pair of horses, her saddle pony, all the property which she possessed at the time of their marriage, and all that she had subsequently inherited, the same to be in lieu of dower, the will proceeds as follows: 'I give her also a life interest or as long as she remains my widow, an equal portion with my children, as hereinafter named, i. e. a child's portion, of all property both real and personal, of which I may be possessed at the time of my decease. She to occupy my dwelling house or houses, with my children, and have exclusive use of all my household and kitchen furniture and at her death or marriage, said property to be equally divided between all of our surviving children, or those of them who may not have completed their education, should there be any such.' The residue of the estate is given to his surviving children, to be equally divided among them, except Mary Jane Petrie, who is given an equal share only in the real estate, and except, also, William Albert and Robert Muldrow, of whom the will says: 'My sons, Wm. A. and Robt. M. Cooper, having completed their education, I desire them to receive one-third each of a child's portion of my personal estate besides their full share of my real estate.'

"At the date of the will, the children of

the first marriage were all of age and had all practically completed their education. Robert M. Cooper was at college during the last year of his father's life, but it was his last year at college before graduating, and his education was so nearly completed that his father regarded it as practically completed, and so states in his will. At that time none of the children of the second marriage were of age and some of them were of quite tender years. The tract described in the complaint was set apart to the widow, under the provisions of the will above quoted, and occupied by her until her death, which occurred May 13, 1905. The widow was survived by Mary Jane Petrie and Robert Muldrow Cooper, children of the first marriage, and by Francis Pelot Cooper, Harriett Cooper Cheyne, Hamilton Witherspoon Cooper, and Augustus Thomas Cooper, children of the second marriage. After the death of testator, and before the death of his widow, William Albert and Edward Wood Cooper died, leaving no issue, and Rosa Leicester Cooper, having intermarried with James Read Muldrow, died leaving one child, the defendant, Sarah Rosa Muldrow. The defendants, Thomas Hasell Dick and George W. Dick, are the children of Mary Scott Cooper, the eldest daughter of testator, who intermarried with Thomas Hasell Dick, Sr., and died before her father.

"The questions arising upon the record are (1) whether the remainder to 'our surviving children' is transmissible; and (2) whether the children of the first marriage who survived the widow are entitled to share therein. I have had no doubt on either point. But in deference to the earnestness and zeal, as well as the ability, with which counsel for plaintiffs maintained their contention, I have given the points careful consideration.

"It is alleged in the complaint, and argued by plaintiff's counsel, that the scheme of the will manifests an intention of testator that all his property should be equally divided among all his children. That may be so if previous advancements and educational advantages are taken into account, but not otherwise. It is not conceded, however, that absolute equality in the division was intended, at any rate that such intention is to be gathered from the will; for upon the face of the will it appears that Mrs. Petrie was to get no part of the personal estate and William A. and Robert M. were to get only one-third each of a child's part thereof, for the reason, as stated by the testator as to the two last named, that they had already completed their education. Nor does such an intention appear when the will is read in the light of the testimony, from which it appears that testator had two grandchildren, the children of a predeceased daughter, for whom no provision is made. It would be purely speculative to undertake to account for these apparent inequalities. It suffices that it was the

testator's will. Throughout the will, testator uses the pronoun 'my' where it is appropriate to express his intention. In referring to the children of both marriages, he speaks of them as 'my' children. Had he intended to give the remainder in question to all his children, he would not have changed the use of 'my,' and used 'our,' for 'my' would have been the more appropriate word to express that intention. When he abandoned the use of 'my' and used 'our' and underscored it, the conclusion seems inevitable that he meant to emphasize the distinction between the two words, and thereby say to the expositor of his will 'I mean that "our" shall be construed to mean "our" (that is, mine and my wife's) in contradistinction to "my" children, which includes the children of both marriages.' This intention is made even clearer by the succeeding words, 'or those of them who may not have completed their education, should there be any such'; for, having already said that the older set of children had all completed their education, these words show clearly that he meant the remainder to be used in the first contingency, as an educational fund for the benefit of those children of the second marriage who might not have completed their education at the falling in of the prior estate. If, at that time, there had been some who had completed their education, and some who had not, those who had not would have taken to the exclusion of those who had. This intention, though clearly enough expressed in the language of the will, is made even clearer by reading the will in the light of the circumstances of the testator when he penned it. As all the children of the second marriage had completed their education prior to the death of the widow, the only remaining contingency was as to which of them would survive the period of distribution. Where the persons who are to take are uncertain, as where it depends upon who shall survive, the life tenant, as in this case, the remainder is not only contingent, but nontransmissible. *Roundtree v. Roundtree*, 28 S. C. 450, 2 S. E. 474.

"Therefore only the children of the second marriage who survived the widow are entitled to share in the remainder; and it is so ordered, adjudged, and decreed. Parties may apply for such further orders as may be necessary to carry out these views."

Shand & Shand and Haynsworth & Haynsworth, for appellants. Lee & Moise, for respondent Augustus Cooper. James Simons, for respondent F. P. Cooper. McLeod & Dennis, for respondent Mrs. Harriett C. Cheyne.

WOODS, J. The reasoning of the circuit decree is convincing, and we are satisfied to adopt it.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 57)

## FREE v. SOUTHERN RY.

(Supreme Court of South Carolina. Sept. 2, 1907.)

## 1. STATUTES—EVIDENCE OF FOREIGN STATUTES.

The statutes of another state can only be proved by printed volumes of the statutes purporting to have been published by state authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 890; vol. 20, Evidence, §§ 1235, 1236.]

## 2. DEATH—ACTION—PLEADING.

Under the statutes of North Carolina granting recovery by personal representatives in an action for wrongful death, a nonsuit should not be granted because the statute gave a personal representative the right to sue without naming the beneficiaries, where the complaint alleged that the action was for the benefit of the parents of deceased.

## 3. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

Where the evidence shows that a railroad employé while working in the yard and watching another train was run over by a switch engine which had no watchman, gave no warning, but was running at a rapid rate of speed, the jury may infer negligence and a want of contributory negligence.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Prince, Judge.

Action by John Free, administrator of Jules Free, against the Southern Railway. From an order of nonsuit, plaintiff appeals. Reversed.

Stanyarne Wilson, for appellant. Sanders & De Pass, for respondent.

WOODS, J. Jules Free, an employé of the Southern Railway Company, was killed by one of its engines in September, 1904, at Charlotte, N. C. His father, John Free, qualified as administrator in this state and brought this action to recover damages. The complaint contains this allegation: "That under the law of the state of North Carolina, known as the 'Lord Campbell Act,' the defendant, by the said wrongful killing of Jules Free, became liable to this plaintiff as administrator, for the benefit of his parents, for the damages caused by the said wrongful conduct, and that said plaintiff, as such administrator, was thereby damaged in the sum of \$2,000, for which he asks judgment." A nonsuit was granted on the grounds that there was no proof of a statute in North Carolina allowing such a suit for the benefit of parents of the person killed. The following statute of North Carolina was admitted: "That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness, or incapacity of any servant, employee, or agent of the company, or by any defect in the ma-

chinery, ways, or appliances of the company, shall be entitled to maintain an action against such company."

1. The plaintiff attempted to prove the statute law of North Carolina provided that such an action as this should be brought for the benefit of parents by introducing the reports of the Supreme Court of North Carolina. A statute of a sister state cannot be so proved in the courts of this state. Nothing less than printed copies of the volume containing the statute purporting to have been published by the state authority will be taken as evidence. Civ. Code 1902, § 2890. The circuit judge was therefore right in holding that the only statute law of North Carolina before the court was the statute above quoted. An examination of the case of *Killian v. Railway Co.*, 128 N. C. 261, 38 S. E. 873, on which the plaintiff relied, shows that he was also right in holding that that case does not state the law of North Carolina to be that an action like this is to be brought for the benefit of the parents. For the purposes of this case, therefore, the statute law of North Carolina must be taken as giving a right of action to the personal representative of the person who shall have suffered death in the manner laid down in the statute above quoted, without providing for any special beneficiary.

2. The case, then, is this: The plaintiff in bringing this action as the administrator of Jules Free made allegations complete and sufficient in all respects under the statute, except he erroneously alleged the defendant became liable to him, as administrator of Jules Free, for the benefit of his parents. The circuit judge granted the nonsuit on the ground that the use in the complaint of the words, "for the benefit of his parents," was a fatal departure from the statute. We are unable to assent to this view. If the plaintiff, as administrator, was entitled to recover, his recovery should not be defeated because he has erroneously alleged he must hold his recovery for the benefit of certain persons. Under the statute of North Carolina, as proved, a complete cause of action was stated in the complaint, without the reference to the supposed beneficiary, and that should have been regarded as mere surplage. This conclusion rests well on the reasoning of Mr. Justice Jones in *Morris v. Gas & Elec. Co.*, 70 S. C. 281, 49 S. E. 854: "The statute is remedial, and should be liberally construed, so as to accomplish its object. It was designed to remove the common-law rule, founded on the maxim, 'Actio personalis moritur cum persona,' as an obstacle to the recovery of damages for the death of a party by a wrongful act, neglect, or default of another, and to create a right of action in the administrator of the deceased for the benefit of the person named in the statute. In re Estate of Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. The award of damages for the wrongful death is the important matter. The manner of distribution is

of secondary consideration." The case of *Lilly v. Railway Co.*, 32 S. C. 142, 10 S. E. 932, was obviously different, and we think the doctrine of that case should not be extended.

The defendant contends, however, that the law of North Carolina, as proved in this case, is essentially different from the law of this state, in that it does not designate the persons for whose benefit the administrator is allowed to recover; while the corresponding statute of this state provided for distribution among certain kindred of the deceased. As indicated in *Morris v. Gas & Elec. Co.*, supra, the essential thing in the varying statutes of the several states is the same, namely, the giving of a right of action to the administrator or some other person interested in the life of the deceased in his own behalf or as trustee for others. Any variance as to the beneficiaries and the method of distribution ought to be regarded as a minor difference. It was held in *Dennick v. Central R. Co.*, 103 U. S. 11, 18, 26 L. Ed. 439: "Wherever, either by the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. \* \* \* If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else, because it depended upon statute law, and not upon common law? It would be a very dangerous doctrine to establish that, in all cases where the several states have established the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred." After much judicial discussion, the authority and reasoning of this case is now generally recognized with this qualification, that the courts of one state will not recognize a cause of action arising in another state, when the statute of such other state giving the right of action is contrary to the public policy of the state where the action is brought. *Dennis v. Railroad Co.*, 70 S. C. 257, 49 S. E. 869, 106 Am. St. Rep. 746; *Huntington v. Attrill*, 146 U. S. 657, 18 Sup. Ct. 224, 36 L. Ed. 1123; *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Texas, etc., R. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Leonard v. Columbia S. E. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Higgins v. Central, N. E. & W. R. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544. The numerous other federal and state cases to the same effect will be found collated in *Attrill v. Huntington*, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 354; 10 *Rose's Notes on U. S. Reports*, 3; Id. 856.

The North Carolina statute on which this action rests is entirely consistent with the public policy of this state as expressed in its statute giving a right of action in such case

to the personal representative of the deceased; and it is not opposed to the public policy of this state because in the subordinate matter of distribution the South Carolina statute names the beneficiaries, and the North Carolina statute, as proved, leaves the recovery in the hands of the administrator for general distribution. It is true the plaintiff's exception does not set out as clearly as is desired the error which we think was committed in granting the nonsuit. But exceptions should be liberally construed where they do not mislead or surprise opposing counsel. Looking at the exception in that light, it does raise the question that a nonsuit should not have been granted for failure to prove, by the printed volume of the statute of North Carolina, that any recovery by the administrator would be for the benefit of the parents. Respondent's counsel was not surprised nor misled, for the point on which we think the judgment should be reversed was fully and ably argued by him.

3. The defendant has given due notice that he would ask to have the nonsuit sustained on the additional grounds (1) that there was no proof of negligence by the defendant; and (2) that no other inference could be drawn from the evidence than that the plaintiff was guilty of contributory negligence. Defendant offered no evidence, and plaintiff's witnesses were in substantial agreement as to the circumstances of the killing. Jules Free was a boy employed to carry water to a gang of hands working near the station at Charlotte, N. C. As Free was returning across the tracks with water, his attention attracted by an approaching freight train, he was struck and killed by a switch engine coming from the opposite direction on another track. Witnesses variously estimated the speed of the switch engine at from 20 to 35 miles an hour, and they all testified there was no watchman on its pilot, and no warning of its approach by bell or whistle. From this evidence the jury might well infer the defendant was negligent in running its switch engine at such a rate of speed in a yard where there were several tracks and the confusion of other moving trains, without a guard on the pilot and without signals, and that, in these circumstances, the unfortunate boy in crossing the track in the discharge of the duty assigned to him was not guilty of contributory negligence in not seeing the engine and getting out of its way.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

GARY, A. J. (dissenting). This is an action under the statute of North Carolina (Revised 1905, § 59), commonly known as "Lord Campbell's Act," on account of the death of plaintiff's intestate, who was in the employment of the defendant, and was killed, by one of its switch engines in the yards at Charlotte, N. C., while crossing one of its

tracks. The sixth paragraph of the complaint is as follows: "That under the law of the state of North Carolina, known as the 'Lord Campbell Act,' the defendant, by said wrongful killing of said Jules Free, became liable to this plaintiff as his administrator for the benefit of his parents for the damages caused by said wrongful conduct, and that said plaintiff, as such administrator, was thereby damaged in the sum of \$2,000, for which he asks judgment." The defendant answered the complaint, denying all except the formal allegations thereof, and setting up the defenses of contributory negligence and assumption of risk. The plaintiff filed a reply alleging the statute of North Carolina as follows: "That any servant or employé of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employé who shall have suffered death in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant, employé or agent of the company, or by any defect in the machinery ways or appliances of the company, shall be entitled to maintain an action against such company." At the close of the plaintiff's testimony the defendant made a motion for a nonsuit on the following grounds: "(1) That there is no proof here that, under the law of North Carolina, where this accident happened, that the plaintiff can recover. This act does not set out for whose benefit the action shall be brought. (2) That if the suit is brought here in the name of the personal representative that personal representative must be a personal representative of North Carolina, and not a man in this state. (3) That as an additional ground all the evidence shows the deceased was guilty of contributory negligence." The plaintiff then requested permission to amend paragraph 6 of the complaint, so as to conform the pleadings to the facts proved, but the request was refused.

The nonsuit was granted on the first of said grounds, and the plaintiff appealed, upon a single exception, which is as follows: "That his honor erred in holding that the only way in which the Lord Campbell act of North Carolina, referred to in the complaint, could be proven, was by a volume of the statutes of North Carolina, and in granting nonsuit because such statute was not produced; it being respectfully submitted that the proof offered by the plaintiff, to wit, the decision of the Supreme Court of North Carolina, and the decision of the Supreme Court of South Carolina, as to what that statute was, was sufficient proof of such statute to go to the jury." It seems to us that the exception was taken under a misapprehension of the ruling of his honor, the presiding judge. The decision in the case of Killian v. Railroad, 128 N. C. 261, 38 S. E. 873, was introduced in evidence without objection, but, when the plaintiff offered to introduce the decision in the case of Dennis v. Railroad, 70



S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746, the following took place: "Mr. Sanders: We do not admit that as evidence. Mr. Wilson: I offer it as evidence. Mr. Sanders: We object to the South Carolina report going in as evidence. Court: I hold that the statement found in that decision of the Supreme Court of South Carolina, as to what Lord Campbell's act is in North Carolina, is not evidence, is not the best evidence of what that act really is. That is not the way to prove it. That can only be proven by the volume of the statutes of North Carolina. What the act of the North Carolina Legislature is cannot be proven by the decision of the Supreme Court of South Carolina. As to the case of Killian v. Railroad Company, 128 N. C. 261, 38 S. E. 873, introduced in behalf of the plaintiff, for the purpose of showing what the Lord Campbell's act in North Carolina is, it is, in my judgment, insufficient for that purpose, even if I were of the opinion that the decision of the Supreme Court of South Carolina was the proper method of proving a North Carolina act. In that case it was shown that the Lord Campbell's act, § 1498 (Code 1883), provided: Whenever the death of a person is caused by the wrongful act of another, action therefor may be brought. Section 1499 provided that the plaintiff in such action may recover such damages as are fair and just compensation, resulting from such death. That being the case, and as the court is now advised that this North Carolina case, even if it is proper evidence as to what provision is made, for whose benefit the suit is to be brought, and as the plaintiff has alleged in his complaint that the act provides for the bringing of such a suit by the personal representative, in a case like this, where there is the death of his son, for the benefit of the parent, and as this suit is brought for the benefit of the parent of the deceased by the personal representative, and that there is no evidence before the court that under the North Carolina statutes suit can be brought and maintained for the benefit of the parent, the motion for a nonsuit is sustained for want of evidence, showing that an action under the statute of North Carolina, for a wrongful act causing the death of the deceased, is authorized to be brought by the personal representative, for the benefit of the parent of the deceased, when that deceased is a child."

Section 2890 of the Code of Laws, which provides the manner of proving the statutes of other states, is as follows: "Printed copies in volumes of statutes, Code, or other written law enacted by any other sovereignty, state or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such sovereignty, state, territory, or government, shall be admitted by the courts and officers of this state, on all occasions, as pre-

sumptive evidence of such laws. The unwritten or common law of any other sovereignty, state or territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law." This section shows that the ruling of the presiding judge, when objection was interposed to the introduction in evidence of the South Carolina decision, was free from error. We do not understand his honor to have ruled that the decision in the Killian Case was not competent evidence of the North Carolina statute, but that it failed to show that the personal representative of the deceased could bring the action for the benefit of the parents, in consequence of which there was no testimony to sustain the allegation of the complaint in this respect.

For these reasons, I dissent.

(78 S. C. 105)

#### FORREST v. McBEE.

(Supreme Court of South Carolina. Aug. 20, 1907.)

##### 1. JUDGMENT—RES JUDICATA.

The judgment of a circuit court on appeal from a magistrate's court is *res judicata* of the issue involved when not appealed from.

##### 2. AGRICULTURE—LIENS—FORECLOSURE—VOID WARRANT—LIABILITY OF PLAINTIFF.

Where plaintiff brought an action before a magistrate to foreclose an agricultural lien, he is responsible for the acts of the constable acting under a warrant which was void because of the negligence of the magistrate, though plaintiff acted in good faith, and did not specially authorize the constable to make the levy.

##### 3. APPEAL—LAW OF CASE.

Questions of law determined by the Supreme Court are the law of the case on any subsequent trials.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4661.]

Appeal from Common Pleas Circuit Court of Greenville County; Watts, Judge.

Action by Anderson Forrest against S. L. McBee. Judgment for plaintiff, and defendant appeals. Affirmed.

See 51 S. E. 675.

J. J. McSwain, for appellant. Blythe & Blythe, for respondent.

GARY, A. J. This is an action to recover damages for the seizure of the plaintiff's crops under an agricultural warrant issued by a magistrate at the instance of the defendant, on the ground that the proceedings were null and void, by reason of the fact that the defendant failed to file an undertaking in compliance with the requirements of the statute. The facts are stated in the former opinion of this court, reported in 72 S. C. 189, 51 S. E. 675. The jury rendered a verdict in favor of the plaintiff for \$25, and the defendant appealed.

The appellant's attorney, in his printed argument, discusses the exceptions under three general heads, and in considering the ques-

tions presented by the exceptions we will follow his arrangement.

1. The first of the heads is "that the presiding judge erred in his construction of the opinion of this court upon the former appeal." After reading to the jury all the requests of the defendant, his honor, the presiding judge, charged: "Now, gentlemen, that is very good law, and I charge it to you, except as I may hereinafter modify it in charging you, generally. I charge you as a matter of law that the court having decided that the taking of that property under the warrant sworn out by Mr. McBee was illegal, unlawful, and wrong, that has been adjudicated, and there was no appeal taken from that. The record shows that, when the matter came up before Judge Klugh, he sustained the magistrate, and held that the attachment was illegal and unlawful, and, if Mr. McBee had seen fit, he could have appealed, but there was no appeal taken, and that is out of it. And the court has decided that the taking of the property by the constable under the proceedings issued by Mr. Cox, at the instigation of Mr. McBee, was unlawful and illegal, and, that being the case, the plaintiff is entitled to recover whatever actual damages he has sustained by the taking of that property, and the jury can award him such actual damages as flow from the seizure of that property illegally." Our construction of this portion of the charge is that his honor, the presiding judge, had reference to the ruling of his honor, Judge Klugh, and not to the opinion of the Supreme Court. But, even if we are in error, the decision of Judge Klugh had the effect which the appellant contends the presiding judge erroneously ascribed to the opinion of this court, and therefore there was not, in any event, prejudicial error.

2. Under the second of said general heads, the appellant contends "that the defendant, McBee, is not liable for the act of the constable, done in pursuance of a warrant, which was void by reason of the negligence of the magistrate, when defendant, McBee, acted in good faith, did not improperly influence the magistrate to issue such void warrant, nor specially authorize the constable to make a levy under such void warrant, nor did he subsequently ratify the same." The principles for which the appellant's attorney contend are antagonistic to the views expressed by this court in its former opinion, and cannot be sustained for the following reasons: In the first place, the questions of law determined by this court upon the former appeal are res judicata, and the principles then announced must be followed throughout the trial of the case, until it is finally disposed of (*Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881); and, in the second place, the court, after carefully reviewing the doctrine stated in the former opinion, sees no reason to recede from it.

3. Under the trial of the general heads, the appellant's attorney contends "that the pre-

siding judge charged on the facts, and indicated his opinion." Before the commencement of the last trial on circuit, the court allowed the plaintiff to strike out of the complaint all allegations of willfulness or malice on the part of the defendant in instituting the proceedings to seize the crops of the plaintiff, and also granted the motion to strike out of the answer certain allegations and defenses, by which amendments the issues that remained were very few. After considering the charge of the presiding judge in its entirety, we are unable to discover wherein it violated article 5, § 26, of the Constitution.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 23)

LANGSTON v. COTHRAN et al.

(Supreme Court of South Carolina. Aug. 20, 1907.)

#### 1. WITNESSES—TRANSACTIONS WITH DECEDENT.

A son, after introduction of a deed to him by his father, since deceased, may testify that he bought the land of the father and paid for it, such testimony being not inadmissible under Code Civ. Proc. 1902, § 400, as relating to transactions with decedents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 664.]

#### 2. SAME.

That decedent was in possession of certain land when he conveyed the same to the witness is not a transaction between the witness and the decedent as to which the witness was incompetent to testify.

#### 3. PROPERTY—EVIDENCE OF CLAIM OF TITLE—DOCUMENTARY.

Tax receipts are admissible to show that the party paying the taxes claimed the land.

#### 4. TRIAL—INSTRUCTIONS.

A request to charge is properly denied where there is no evidence on which to base it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

#### 5. ADVERSE POSSESSION—DISCLAIMER.

Where a person disclaimed title to land, and thereafter held it openly, notoriously, and adversely for 10 years, he would have a good title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

#### 6. PROPERTY—TITLE—POSSESSION—LEGALITY—BURDEN OF PROOF.

It is incumbent on those alleging that possession of land is unlawful to establish such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 9.]

#### 7. TRIAL—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where an answer denied title to the land in controversy in plaintiff, and also set up adverse possession, it was proper to refuse to charge only on the question of adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 587.]

#### 8. EJECTMENT—INSTRUCTIONS.

Where the court in ejectment gave an instruction in accord with the request of plaintiff, and added thereto: "This is good law, and, if plaintiff has shown good title, it is a question of fact for you whether it has been defeated"—such added words were simply explanatory.

tory, and did not affect the proposition of law as given.

#### 9. APPEAL—HARMLESS ERROR.

A correct abstract proposition not applicable to the evidence held not prejudicial, where it could not have misled the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

Appeal from Common Pleas Circuit Court of Greenville County; Purdy, Judge.

Action by Elizabeth Langston against John Cotheran and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The following are the exceptions:

"(1) That his honor, the presiding judge, erred in allowing the witness T. O. Cooley, one of the defendants, to testify, against the objection of the plaintiff, as to transactions between the said witness and the deceased, John J. Cooley; said testimony being inadmissible under section 400 of the Code of Civil Procedure of 1902.

"(2) That his honor erred in allowing the witness John T. Cooley, one of the defendants, to testify, against the objection of the plaintiff, as to transactions between the said witness and John J. Cooley, deceased, said testimony being inadmissible under section 400 of the Code, and to testify that the said John J. Cooley was 'in possession' of the land in dispute at the times designated by the witness; the question of possession being one of law in this case.

"(3) That his honor erred in allowing the witness John C. Cotheran, one of the defendants, to testify, against the objection of the plaintiff, to transactions between the said witness and John J. Cooley, deceased, said testimony being inadmissible under section 400 of the Code of Civil Procedure of 1902.

"(4) That his honor erred in admitting in evidence, against the objection of the plaintiff, tax receipts of John J. Cooley, deceased, without any proof whatever that they referred to the land in dispute.

"(5) That his honor erred in refusing to charge the jury, as requested by plaintiff's counsel, as follows: 'That, if the jury believe that John J. Cooley went into possession of the land in question as one of the heirs at law of Hiram Cooley, then he could not as a matter of law hold adversely to the other heirs without giving them unequivocal notice of such claim; and, if the jury further believe that he gave no such notice to the other heirs, then these defendants claiming under him cannot successfully plead the statute of limitations against the claim of the plaintiff, and their verdict should be for the plaintiff.'

"(6) That his honor erred in refusing to charge the jury, as requested by plaintiff's counsel, as follows: 'That to constitute adverse possession, the party setting up such plea must show that he held the land, claiming it as his own, against all other claimants, and, if the jury believe from the evidence that John J. Cooley at any time while culti-

vating the land admitted that he had no title to it, and did not claim it as his own, then the plea of adverse possession and the statute of limitations must fail, and the verdict of the jury must be for the plaintiff.'

"(8) That his honor erred in refusing to charge the jury, as requested by the plaintiff's counsel, as follows: 'That there is no presumption of law in favor of one in possession of land unless he claim it as his own and notify others who may be interested, if any, that he does so claim it.'

"(9) That his honor erred in refusing to charge the jury, as requested by the plaintiff's counsel, as follows: 'That the defense in this case rests entirely upon the theory of adverse possession in John J. Cooley, for no paper title in John J. Cooley has been shown, except the will of Hiram Cooley, which conveys to John J. Cooley 200 acres, and no more.'

"(10) That his honor erred in refusing to charge the jury, as requested by plaintiff's counsel, as follows: 'That, if the jury find that the plaintiff has shown a good title to the land, then she is presumed to be the owner of the land until the contrary be shown.'

"(11) That his honor erred in charging the jury as follows: 'If John J. Cooley went into possession of the land in dispute before the death of Hiram Cooley, and remained continuously in open, notorious possession thereafter for 10 years, holding the same adversely to the said Hiram Cooley and the whole world, and such period of adverse holding had elapsed before the death of the said Hiram Cooley, he thereby acquired good title to the said land against the said Hiram Cooley and the whole world—there being no evidence of any such holding, and so misleading and confusing the jury.'

"(12) That his honor erred in charging the jury as follows: 'That, if John J. Cooley had acquired title to the said land by such adverse holding at the death of the said Hiram Cooley, the said Hiram Cooley could not defeat it or take the land away from him by last will and testament or otherwise without his consent—there being no evidence of any such state of facts in the case.'

"(13) That his honor erred in charging the jury as follows: 'If the said John J. Cooley had not in any way acquired title to the land in dispute at the time of the death of the said Hiram Cooley, and if the said Hiram Cooley did not give the same to him by last will and testament, and did not give it to any one else by his last will and testament, then, under the tenth clause of the last will and testament of Hiram Cooley, it became the duty of his executor to sell the same and apply the proceeds of sale as therein directed'—this being irrelevant and having no bearing upon the facts proven.

"(14) That his honor erred in charging the jury as follows: 'If the said John J. Cooley was continuously in open, notorious, and ad-

verse possession of the said tract of land, holding it adversely to all the world, for 30 years after the death of Hiram Cooley, and after his will was admitted to probate, then the law presumes that after such a length of time that the executor of the said will, or some person having authority to carry out the provisions of said will according to law, sold said land as directed in the will and executed and delivered a deed to the said John J. Cooley. The law raises such presumption to quiet possessions of long standing and put an end to litigation—this being in direct contradiction of the facts proven and tending to mislead the jury.

"(15) That his honor erred in charging the jury as follows: 'If said John J. Cooley was in the exclusive, open and notorious possession of said land for 30 years after the death of the said Hiram Cooley, holding it adversely to all the world, he would under such presumption have good title thereto, and if being so in possession, and after having so acquired title thereto, he conveyed or devised the same to the defendants, or to others from whom the defendants have derived title thereto, your verdict should be for the defendants'—there being no proof that John J. Cooley ever held the land adversely, but, on the contrary, repeatedly stated that he claimed no title to it.

"(16) That his honor erred in charging the jury as follows: 'If the said John J. Cooley was in the exclusive, open, and notorious possession of the land in dispute for 20 years continuously after the death of the said Hiram Cooley, holding it openly and adversely to the heirs at law of the said Hiram Cooley and all the world, the law at the end of the 20 years of such holding presumes that he acquired title thereto from the state and every other person in interest, including such heirs at law. And the law in such case presumes that he acquired title at the beginning of his possession'—there being no proof of such holding.

"(17) That if the said John J. Cooley acquired title to said land in any manner, and if, after acquiring title thereto, he conveyed or devised the same to the defendants or others through whom the defendants have obtained such title, then your verdict should be for the defendants—the testimony showing that John J. Cooley neither acquired nor claimed title to the land.

"(18) That his honor erred in charging the jury as follows: 'That if the said John J. Cooley claimed the land to known boundaries or fenced or inclosed the same, and held exclusive, open, notorious, and adverse possession of the same to such fence, inclosed or known boundaries, for the period of time hereinabove stated, he would be entitled to all the land within such known boundaries or extending to such fence or inclosure'—there being no proof of any such state of facts in the case."

Julius H. Heyward, for appellant. B. M. Shuman, for respondents.

GARY, A. J. This is an action to recover the tract of land described in the complaint.

The facts are thus stated by the appellant's attorney: "In the year 1820 one Pleasant Saddler conveyed to Hiram Cooley a tract of land lying in Greenville county (then district), and containing 266 acres, more or less. In the year 1859, or 1860, Hiram Cooley measured off 200 acres from this tract, and allowed his son, John J. Cooley, to occupy the said 200 acres, but made him no deed. Subsequently Hiram Cooley moved to Anderson, where he died in 1864, leaving a will whereby he devised, inter alia, as follows: '8th. I give and bequeath to my son, John J. Cooley, the two hundred acres of land upon which he now lives, being the same I had surveyed for him some two or three years ago, but never executed the title.' This will is dated February 11, 1862, and was probated in Anderson in April, 1864; one B. F. Mauldin being appointed executor. By the tenth clause of said will the executor is required to 'sell and convey the entire residue of my property, both real and personal, not disposed of by this will, and divide the proceeds equally among my children,' as therein named. On July 4th the executor, B. F. Mauldin, died without having sold the 66 acres of the Saddler tract. In the meantime John J. Cooley used the said 66 acres, but repeatedly stated to his children and others that it was not his land, and that he claimed no title to it. In July, 1896, John J. Cooley and his then wife, Stacey Cooley, executed together certain deeds purporting to convey, with other lands, parts of the said 66 acres to certain of their children, and in November of the same year John J. Cooley executed a will, whereby he undertook to devise the remaining portions of said land to others of his children by said marriage. All these papers were executed while the said John J. Cooley was in a dying condition. On December 13, 1896, John J. Cooley died. He had been twice married, and left children by each marriage. In the year 1896, before the death of John J. Cooley, action was commenced in the court of common pleas for the county of Greenville by the children of the first wife against John J. Cooley and his children of the second wife, for the recovery of the said 66 acres, as the property of their mother, the first wife. In the progress of said action, this plaintiff, for the first time, received information as to the condition of the title, and that she might have an interest in the land under the tenth clause of the will of Hiram Cooley, she being one of the children of Hiram named in said clause. This plaintiff thereupon, in the year 1898, instituted an examination of the records, and, having ascertained the fact as above set forth, applied, by advice of counsel, to the

probate court for Anderson county for appointment as administratrix de bonis non, cum testamento annexo of the will of Hiram Cooley, which appointment was duly made on the 21st day of March, 1902. On the 1st day of February, 1904, being sales day, said 66 acres was, after due advertisement, offered for sale at public outcry at Greenville courthouse, and duly knocked down to the plaintiff herein, she being the highest bidder therefor. A deed having been duly executed and delivered, this action was commenced on April 17, 1905, by service of the summons and complaint on the defendants personally. The cause came on for a hearing for the second time before Hon. R. O. Purdy, circuit judge, and a jury, at Greenville, at the June term, 1906. The jury found for the defendants, and judgment having been entered, this appeal is taken upon exceptions to the rulings and charge of the presiding judge." There was testimony also tending to show that John J. Cooley was in the open and notorious possession of the land, exercising acts of ownership, for more than 50 years prior to his death.

The exceptions will be set out in the report of the case, and considered in their regular order.

1. First exception: The exception fails to specify the transactions, but, waiving this objection, it cannot be sustained. The witness T. O. Cooley was allowed to testify that he bought the land from John J. Cooley and paid him for it. The deed which John J. Cooley executed to T. O. Cooley had already been introduced in evidence, and it was not contended that there was fraud in its execution. The seal to a deed imports a consideration. Therefore the amount paid by the witness for the land was wholly immaterial.

2. Second exception: His honor, the presiding judge, allowed the witness John T. Cooley to testify that John J. Cooley was in possession of the land when he made the several conveyances to the witness and others. This testimony did not relate to a transaction or communication between John T. Cooley and John J. Cooley, and was not objectionable under section 400 of the Code of Civil Procedure of 1902.

3. Third exception: There was no objection to the testimony mentioned in this exception.

4. Fourth exception: The tax receipts are not set out in the record. Such receipts are, however, admissible for the purpose of showing that the party paying the taxes claimed the land. *Ellen v. Ellen*, 16 S. C. 143.

5. Fifth exception: The request mentioned in this exception was refused, on the ground that the proposition contained therein was not applicable to the case. There is no testimony to the effect that John J. Cooley claimed the land as an heir at law of Hiram Cooley. The circuit judge, however, charged the

jury fully upon the question of adverse possession.

6. Sixth exception: After reading to the jury the request set out in this exception, the presiding judge said: "I will charge you that, with this modification: Any disclaimer on the part of John J. Cooley, if you believe there was such, would be in derogation of his title, and his title must be open, notorious, and adverse, must have been continuous; but if he disclaimed his title, and then held it openly, notoriously, and adversely for 10 years, he would still have a good title. He must have been on the land that length of time prior to 1870. It must have been for a period of 10 years. If he claimed it for 10 years openly, notoriously, and adversely, he would have a good title, and, if the period of 20 years was of force, he must have claimed it for a period of 20 years openly, notoriously, and adversely, and that would give him good title." The request was properly modified for the reason that it took from the jury the consideration of the question whether John J. Cooley could acquire by adverse possession after admitting, at any time, that he was not the owner of the lands. The request was not in accord with the principle announced in *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678.

Seventh exception: There is no exception by this number.

7. Eighth exception: In regard to the request mentioned in this exception, the circuit judge charged: "Well, gentlemen, I will charge you this in the place of that: If a person is in possession of land, and does such acts upon it, and his possession is open, notorious and adverse, and his acts indicate that he is claiming it as his own, and those acts are sufficient to put other people upon notice that such is the case, then they are bound by his possession, and he would have a good title. If his possession was secret, holding it under some one else, that would give him title by adverse possession. If he holds it openly, notoriously, and adversely, and does such acts upon it as would put other people upon notice that he was claiming it as his own, that would be sufficient and would give him title to the land, if he held it for a period of 10 years, if it was the 10-year period, or for 20 years if it was the 20-year period. Secret holding would never mature into title, but open, notorious, and adverse holding, giving notice to the world that he was holding it and claiming it as his own, would ripen into title." Instead of charging the substitute, the presiding judge might properly have refused the request altogether, as possession alone is sufficient to raise the presumption that such possession is rightful, and it is incumbent on those who allege that it is unlawful to establish that fact.

8. Ninth exception: This request was properly refused for the reason that it ignored the fact that the answer denied title in the plaintiffs, and the further fact that the de-

fendants relied upon the presumption of a grant.

9. Tenth exception: In ruling upon the request in this exception, the circuit judge said: "That is good law, and I so charge you. It is a question of fact for you whether she has shown good title, and, if she has shown good title, it is a question of fact for you whether it has been defeated." The superadded words were merely explanatory, and did not change the proposition of law embodied in the request.

10. Eleventh exception: To the eighteenth exception, inclusive, we adopt the arrangement of the appellant's attorney in considering these exceptions together. There was testimony to which the charge in these exceptions was applicable, but, even if there were no such testimony, it has not been made to appear that the rulings were prejudicial to the rights of the appellant. *Vann v. Howle*, 44 S. C. 548, 22 S. E. 735; *Boggero v. Railway*, 64 S. C. 112, 41 S. E. 819.

It is the judgment of the court that the judgment of the circuit court be affirmed.

(78 S. C. 10)

**FRANKS v. SOUTHERN COTTON OIL CO.**  
(Supreme Court of South Carolina. Aug. 20, 1907.)

**NEGLIGENCE—DANGEROUS PREMISES.**

Where an infant was drowned in a reservoir maintained by defendant for use in its business in an open field near the public highway, and among the residences of a city, where children were accustomed to play, with knowledge of the defendant, and was unguarded, defendant was liable to the parents of the infant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 54.]

Appeal from Common Pleas Circuit Court of Laurens County; R. O. Purdy, Judge.

Action by R. J. Franks against the Southern Cotton Oil Company and R. H. Hudgens. From an order overruling demurrers to the complaint, defendants appeal. Affirmed.

This is an appeal from an order overruling a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The first paragraph of the complaint alleges the corporate existence of the defendant; and the other paragraphs are as follows: "That the defendant R. H. Hudgens is now, and at the times hereinafter stated was, the manager of the cotton seed oil mill located at Laurens, S. C., and owned and operated by the defendant the Southern Cotton Oil Company. That the plaintiff is the qualified administrator of the estate of Luther Franks, deceased, who departed this life intestate on the 20th of April, 1906. That on the 20th day of April, 1906, and prior thereto, the defendant the Southern Cotton Oil Company owned, and jointly with its manager, R. H. Hudgens, maintained and used in connection with its oil mill at Laurens, S. C., a large and deep reservoir, which it kept filled with water,

to be used in connection with the said oil mill, said reservoir being located in an open field, near the public highways, streets, and many of the residences of the city of Laurens, where children of tender years were accustomed to resort for play, the said reservoir being not protected by a fence, guard, or otherwise, but was exposed and easily accessible to children, who, not knowing of the danger, made use of it as a place of amusement. That it was the duty of the defendant the Southern Cotton Oil Company, and also the defendant R. H. Hudgens, as manager of the said oil mill, to have securely protected the said reservoir, so that children resorting to it as a place of amusement would not be injured, but the said defendants, not regarding their duty in that behalf, carelessly, negligently, willfully, and wantonly permitted the said reservoir to remain uninclosed and unprotected in any way. That the defendant the Southern Cotton Oil Company, as well as the defendant R. H. Hudgens, knew of the unprotected condition of the said reservoir, and that children resorted there as a place of amusement, which facts this plaintiff is informed and believes, and so alleges, had been more than once called to the attention of the defendants, with the request that said reservoir be properly protected. That the plaintiff's intestate, Luther Franks, a small boy of tender years, being less than 10 years of age, while playing around the said reservoir, which was filled with water, was drowned. That the plaintiff is the father of the said Luther Franks, deceased, and Mrs. Nannie Franks is his mother, for whose benefit this action is brought. \* \* \* The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, in that it does not show that the injuries of the deceased were the result of a failure on the part of the defendant to perform any duty it owed to the deceased. Under the authority of *Bridger v. Railroad*, 25 S. C. 24, and *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114, his honor, the presiding judge, overruled the demurrer, and the defendant appealed.

Mitchell & Smith, Sheppard, Grier & Park, and Dial & Todd, for appellant. Simpson, Cooper & Rabb, for respondent.

GARY, A. J. (after stating the facts as above). The appeal raises the single question whether the defendants owed a duty to the deceased in regard to the reservoir. In the case of *Bridger v. Railroad*, 25 S. C. 24, this court followed the doctrine announced in *Sloux City, etc., v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745, the first of which are known as the turntable cases, in which it was held that an infant could recover for an injury causing him damages as the result of a failure on the part of the railroad company to keep its turntable locked or properly guard-

ed. If that principle is applicable to this case, it is conclusive of the question under consideration. The United States Supreme Court has not confined the doctrine to turntable cases, but has applied it in other cases, notably in *Union, etc., R. R. v. McDonald*, 152 U. S. 262, 279, 14 Sup. Ct. 619, 626, 38 L. Ed. 434, where it was held that the railroad company was guilty of negligence in leaving unguarded the slack pile, made by it, in the vicinity of its depot building. The court in that case uses this language: "In *Townsend v. Wathen*, 9 East, 277, 281, it was held that if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, would probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dogs be so attracted and thereby injured, an action on the case would lie. 'What difference,' said Lord Ellenborough, C. J., 'is there in reason between drawing the animal into the trap by means of his instinct, which he cannot resist, and putting him there by manual force?' What difference, in reason, we may observe in this case, is there between an express license to the children of the village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure. Referring to the case of *Townsend v. Wathen*, Judge Thompson, in his work on the Law of Negligence, well says: 'It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequence of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it, and tempted to intermeddle with it, by instincts equally strong, might thereby be killed or maimed for life.' Volume I, pp. 304, 305."

The principle is thus stated in Thompson on Neg. § 1024: "The owners and occupiers of real property are held by the law in some respects to a different standard of liability in case of injuries to children, coming upon their premises, from that under which they stand with respect to adult persons. It is believed that the following propositions may safely be stated to be the law: (1) The owner or occupier of real property stands under the same duty to children, who are expressly or impliedly invited to come upon his premises, in respect of keeping such premises safe, to the end that they will not be injured in so coming, under which he stands to adult persons. (2) As a general rule, he is not bound to keep his premises safe, or in any particular condition, for the benefit of the tres-

passing children of his neighbors, or for the benefit of children who occupy no more favorable position than that of bare licensees. (3) A well-grounded exception to the foregoing principles is that one who artificially brings or creates upon his own premises any dangerous thing which from its nature has a tendency to attract the childish instincts of children to play with it is bound, as a mere matter of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it, or coming in its vicinity." The same author uses this language in section 1030: "We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to some with or without license. These decisions proceed on one or the other of two grounds: (1) That where the owner or occupier of grounds brings or artificially creates something thereon which from its nature is especially attractive to children, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That although the dangerous thing may not be what is termed an 'attractive nuisance'—that is to say, may not have especial attraction for children by reason of their childish instincts—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them." In 1 Street's *Foundations of Legal Liability*, 160-161, the reason for the liability in the turntable cases is thus stated: "Liability in the turntable cases is strictly put upon the ground of implied invitation to children to come upon the premises in order to play there, the invitation being supposed to arise from the attractive nature of these dangerous engines. This hypothesis is hatched up to evade the obstacle which arises from the fact that the plaintiff is a trespasser. But it is unnecessary, as it is inadequate and artificial. Liability is to be ascribed to the simple fact that the defendant, in maintaining a dangerous agent from which harm may, under peculiar conditions, be expected to come, has the primary risk, and must answer in damages, unless a counter assumption of risk can be imposed on those who go there to play." See, also, 2 Woods, *Railway Law*, § 321 et seq. In *Cooley on Torts*, p. 624, the author says: "In the case of young children, and other persons not sui

juris, an implied license might sometimes arise, when it would not in behalf of others. Thus, leaving a tempting thing to play with exposed where they would be likely to gather for that purpose may be equivalent to an invitation to them to make use of it." In *Bishop, Noncont. Law*, 854, it is stated: "A child too young to be controlled by reason therefore not improperly led by its instincts receives from the law the protection which its special nature requires. For example, a man who leaves on his own ground, open to the highway or upon or beside any public place, a dangerous machine, likely to attract children, will be liable to one injured by playing with it, if he neglected precautions against such an accident." In 7 *Enc. of Law*, 403, 404, it is said: "A child injured while trespassing has no right of action, unless injured by the negligence of the defendant, when the injury might have been avoided by ordinary care on the defendant's part. But when a child of tender years commits a mere technical trespass, and is injured by agencies that, to an adult, would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication." In *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 208, 45 Am. St. Rep. 114, the court, held that a pond or pit in a populous city, in which the water is from 5 to 14 feet deep, with logs and timber floating therein, on which children are in the habit of playing near a driveway across vacant lots, but partially inclosed from the streets on the sides thereof, renders the city which owns them liable for the drowning of a child playing there, if the premises are found by the jury sufficiently attractive to entice children into danger and to suggest the probability of such an accident. In this case are cited numerous others in which the doctrine of the turntable cases is sustained, where the injuries were caused by the agencies of a different character.

To the same effect is the case of *Biggs v. Conn. Barb Wire Co.*, 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655, 658, which held that the maintenance of dangerous machinery on private grounds, unprotected from the visits of trespassing children, renders the owner thereof, who has knowledge that children are accustomed to frequent said grounds, and climb upon the structures supporting dangerous appliances, liable in damages to the next of kin of a boy 14 years of age who was caught in the exposed machinery and killed. The court quotes with approval the following language from the case of *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac.

450, 62 Am. St. Rep. 625: "It is, however, contended by the defendant in error that, inasmuch as the deceased was a trespasser upon its grounds, it owed to him no duty to guard against the accident which occurred. Without doubt, the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who go upon them, not by invitation express or implied, but for the pleasure or through curiosity. *Cooley on Torts* (2d Ed.) 718; 1 *Thomp. Neg.* 308; *Dobbins v. Missouri, K. & T. R. Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express."

The same principle was announced in *Koplekom v. Colo. Cem. Pipe Co.*, 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284, 285, where the court held that the owner of an uninclosed lot adjacent to a highway, in a thickly populated part of the city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which because of its large diameter is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is liable to a child who, not having arrived at years of discretion, is injured by the pipe toppling over on him while he is playing with it. The court used this language: "If it be said that the complaint itself shows that the piping was upon private premises, that the children were trespassers, and that they were not upon the land by invitation or consent of defendant, it may be answered, as it was by Chief Justice Cooley in *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, and approved by all of the authorities that we have cited: 'Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken.' Or, as was tersely and pithily expressed in the Minnesota case (*Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207, 18 Am. Rep. 393): 'What an express invitation would be to an adult, the temptation



of an attractive plaything is to a child of tender years.' \* \* \* If an owner sees fit to keep on his premises something that is an attraction and allurements to the natural instincts of childhood, the law, it is well settled, imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereby."

Under the caption of "Liability for Injuries to Children," the author, in 1 Thompson on Neg. § 1026, thus speaks in strenuous language of the doctrine that liability extends only to wanton injuries: "One doctrine under this head is that if a child trespass upon the premises of the defendant, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser, in sound legal theory, and visits upon him the consequences of his trespass, just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any duty towards him which they would not owe under the same circumstances towards an adult."

We recognize the fact that there are numerous decisions announcing a rule contrary to that hereinbefore stated, but we prefer to follow the doctrine based upon humanity and the wholesome maxim, "Sic utere tuo ut alienum non lædas."

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 67)

HORN et al. v. SOUTHERN RY.

(Supreme Court of South Carolina. Sept. 8, 1907.)

#### 1. TRIAL.—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

Where, at the beginning of his charge, the court, in the clearest language, placed on plaintiff the burden of proving by preponderance of evidence the allegations that the negligence of defendant was the proximate cause of the injury to plaintiff, a verbal slip placing on defendant the burden of proving contributory negligence by preponderance of evidence, which might be construed to mean that the primary inquiry was whether defendant had made out such a defense, was not misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 573.]

#### 2. SAME.

Where, in instructions concerning contributory negligence, there was language which might bear the meaning that defendant could not rely on the position that plaintiff's injury was due entirely to her own negligence, unless it proved that fact by the preponderance of evidence, it was not misleading, when the court charged that

the plaintiff must show that defendant's negligence was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

#### 3. CARRIERS—DUTY TO INVALID PASSENGER.

A carrier is bound to render reasonable assistance to a passenger whose inability to take care of himself is made known to the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1093-1097.]

#### 4. TRIAL — INSTRUCTIONS — CONSTRUING CHARGE AS A WHOLE.

An instruction that the negligence of defendant carrier entitled plaintiff to recover punitive damages if it intentionally injured her, "injured her carelessly, did not care whether she suffered injury or not. That is meant by willfulness"—was not ground for reversal, where, from all that was said on the subject taken together, the jury could not have failed to understand punitive damages could be recovered only for willful or wanton misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Klugh, Judge.

Action by Mary Louisa Horn and Ben Horn against the Southern Railway. Judgment for plaintiffs. Defendant appeals. Affirmed.

Sanders & De Pass, for appellant. De Pass & De Pass, for respondents.

WOODS, J. The plaintiff Mary Louisa Horn, her husband, John Horn, and her adult sister on March 5, 1905, were passengers from Union to Jonesville on the defendant's train. The action was brought for injuries alleged to have been received by the plaintiff in a fall due to the turning of a stool placed on the ground to aid passengers in alighting.

The plaintiff testified she had several parcels, and asked the conductor to help her when she reached Jonesville; that her husband preceded her in getting off the train with their baby in his arms; that neither conductor nor porter rendered her any assistance; that, when she stepped from the car with a clothes case in one hand, a hat and umbrella in the other, the stool turned and threw her to the ground because it was not set in the right place; that the conductor was standing on the ground where the passengers were alighting, saw her fall, and, so far from offering her assistance, actually laughed at her. The conductor testified he had no recollection of the request for assistance; that he did take the arm of the plaintiff as of other women to aid them in stepping off; that the stool was placed in exactly the proper place, but he observed the plaintiff come down the steps looking over at the crowd, and not at the stool; that the plaintiff merely staggered around without falling, and made no complaint whatever. He denied laughing at the plaintiff. His testimony that a number of other passengers had preceded the plaintiff and alighted in safety was not disputed. There was some evidence that the place where the car stopped was not quite level, but this was denied by the con-

ductor. This statement makes the issues of fact sufficiently clear. The jury found a verdict in favor of the plaintiff for \$800. The appeal relates to alleged errors in the charge of the circuit judge. We do not think there is any ground upon which this court can interfere with the judgment.

1. In imposing upon the defendant the burden of proving contributory negligence by a preponderance of the evidence, the circuit judge by a verbal slip used language which might be construed to mean that the primary inquiry was whether the defendant had made out the defense of contributory negligence, rather than whether the plaintiff had proved the defendant's negligence as a proximate cause of injury. But at the beginning of the charge, in the clearest language, he had placed on the plaintiff the burden of proving by the preponderance of the evidence the allegation that the negligence of the defendant was a proximate cause producing injury to the plaintiff, and had charged the plaintiff could not recover without discharging this burden. So, taking the instruction on this point as a whole, we do not think it could be inferred the jury were misled.

2. There is also language in the charge, which, standing alone, would bear the meaning that the defendant could not rely on the position that the plaintiff's injury was due entirely to her own negligence, unless it proved that fact by the preponderance of the evidence. But this language was used in the instructions concerning contributory negligence. It would be going too far to infer misapprehension by the jury on this point; for the instruction that the plaintiff could not recover without proving affirmatively by the preponderance of the evidence her injury to have been due to the negligence of the defendant certainly negatived the idea that she could recover unless the defendant assumed and discharged the burden of proving by the preponderance of the evidence the injury to have been due entirely to her negligence. The burden of proving the defendant's negligence as the proximate cause would imply to any reasonably intelligent mind the burden of proving the absence of the plaintiff's negligence as the sole proximate cause. The charge, therefore, does not warrant a reversal on the authority of *Kennedy v. So. Ry. Co.*, 59 S. C. 535, 38 S. E. 169, and *Michiner v. Telephone Co.*, 70 S. C. 525, 50 S. E. 190. If inadvertences like those relied on here are deemed by counsel to be material, they should be called to the attention of the circuit judge at the close of the charge. If they escape the attention of vigilant and learned counsel, this court ought not to infer they were so grasped by the jury as to lead them into error.

3. The defendant submits in the next place the following was a charge on the facts: "Well, now, I instructed you that it was bound to furnish passengers with safe and proper appliances and facilities for riding on

its trains. Now, if that included the assisting of passengers from the train by the railroad company's handling whatever parcel or package the passenger has, if a railroad company of ordinary prudence would do that, then in this case it is bound to do that. As a matter of course, the railroad company, no more than any other individual, can be held to do that which is impossible, and the railroad company must go upon appearances as the facts and circumstances make these appearances, and if a passenger is burdened with baggage and the employé of the railroad company sees that, why, the railroad company is bound to, if it becomes necessary to the safe alighting of the passenger from the train, for the railroad company to assist in handling any package or boxes. Now, it is the duty of the railroad company to do that. It is not the duty of the railroad company to go through the train, and see each passenger to know whether he wants assistance, or to ascertain what baggage he might happen to have to get off with. But if it is apparent, and would be apparent to a person of reasonable observation that the passenger is in need of assistance, then the railroad is bound to furnish assistance just the same as it is bound to assist a person in any other way prevented from safely alighting without assistance, if the person is sick or aged or infirm, or in any peculiar circumstances which are apparent to the railroad company or comes to the knowledge of the railroad company, which renders a greater degree of care necessary, why the railroad company is bound to afford that additional assistance, and exercise that additional degree of care if such appearances are obvious. As a matter of course, the railroad company is not bound to exercise that same degree of care in the case of an ordinary person alighting from its train." We do not discern in this language anything more than a fair statement of the law as to the duties of a carrier to passengers on its train.

The courts seemed at one time inclined against holding a carrier bound to aid in the alighting even of a passenger manifestly disabled from sickness or infirmity; the view being that such a passenger in undertaking a journey should provide for his own assistance. But it is now generally held that the carrier is bound to render reasonable assistance to a passenger whose inability to take care of himself has been made known to the carrier. *Simms v. Railway Co.*, 27 S. C. 268, 3 S. E. 301; *Doolittle v. Railway Co.*, 62 S. C. 130, 40 S. E. 133; *Madden v. Railway Co.*, 41 S. C. 440, 19 S. E. 951, 20 S. E. 65.

No doubt justice requires the exercise of great caution on the part of the judges in stating this principle of law, and on the part of the juries in applying it, especially when negligence is charged against the carrier for failing to assist a passenger incumbered with parcels. As a general rule, it is not the duty of the carrier to provide servants to carry

hand parcels. Considering the number of passengers usually on a car and the unreasonable burden it would be on the railroad to employ attendants enough to assist all of them, as a general rule, passengers ought not to incumber themselves with parcels they are not able to carry with safety. But there are exceptions to these rules which the carrier must recognize when brought to his notice, especially where assistance is asked, in form of the aged or maimed or sick, or children, or adult persons traveling with small children who may be unable to carry the parcels usually allowed to the passenger as reasonably necessary. The charge of the circuit judge did not impose any greater burden on the carrier than the duty to take notice of such exceptions.

4. The fourth exception relates to the following instruction: "Well, now, the plaintiff claims not only damages to compensate her for loss or injury, but also claims punitive damages. She claims the railroad was wanton and willful in its negligence, and therefore it ought to be punished by the awarding of damages, besides any damages which may be awarded for her actual injuries or loss. That's what is meant by punitive or, vindictive damages, damages to punish a wrongdoer. In this case the plaintiff claims the railroad company was a wrongdoer, and ought to be punished because it injured her willfully and wantonly; that is, it intentionally injured her, and that it injured her carelessly, didn't care whether she suffered injury or not. That is what is meant by willfulness. If you find that the railroad company did injure plaintiff and was either willful or wanton, and willed to do her injury, an intentional injury, that makes a case where the railroad company ought to be visited with such punishment as will prevent it from being willful or careless, or wantonly injuring a passenger or any other person in the future." The defendant submits this charge was erroneous, in that (1) "there is no evidence in the case to warrant the submission to the jury of the question of punitive damages"; (2) by this charge his honor made the terms "willful" and "careless" synonymous, and instructed the jury that a verdict for punitive damages could be given if the defendant "either willfully, intentionally, or carelessly injured the plaintiff." The use of the word "carelessly" in stating the basis of punitive damages was not fortunate, as it is more nearly synonymous with "negligently" or "inadvertently," than with "willfully" or "wantonly." But, taking all that was said on the subject together, the jury could not have failed to understand punitive damages could be recovered only for willful or wanton misconduct.

The sworn statement of the plaintiff that, when she fell, the conductor made no effort to aid her, and laughed at her, is some evidence of wanton misconduct. The court cannot interfere with the right of the jury to

pass on the credibility of the testimony. But, in addition to this, there was no motion for nonsuit as to punitive damages, nor request to charge that there was no evidence upon which punitive damages could be recovered. *Jennings v. Edgefield Mfg. Co.*, 72 S. C. 411, 52 S. E. 118.

The judgment of this court is that the judgment of the circuit court be affirmed.

(73 S. C. 20)

FLEMING et al. v. BYRD et al.

(Supreme Court of South Carolina. Aug. 20, 1907.)

# 1. ATTACHMENT—MOTION TO DISSOLVE.

Where a motion is made to dissolve an attachment because the cause of action alleged in the complaint is not the same as that set forth in the affidavit, the complaint may be considered with the affidavit, though not verified or made a part thereof.

# 2. SAME—AFFIDAVIT.

An affidavit setting forth that plaintiff has sustained damages to an extent named because of breach by defendant of a certain contract, and that defendant is a nonresident, shows plaintiff entitled to a writ of attachment, under Code Civ. Proc. 1902, § 248, where the complaint states a cause of action for breach of contract as set forth in the affidavit, though the facts are mixed up with allegations appropriate to a different cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 840.]

Appeal from Common Pleas Circuit Court of Greenville County; Watts, Judge.

Action by Jane Fleming and Mollie Miller against T. M. Byrd and others. From an order dissolving an attachment, plaintiffs appeal. Reversed.

J. J. McSwain, for appellants. Haynesworth, Patterson & Blythe, for respondents.

GARY, A. J. This is an appeal from an order setting aside an attachment. On the 9th of June, 1906, the plaintiff filed the following affidavit with the clerk of the court, on which an attachment was issued and levied upon certain real property, belonging to the defendant, T. M. Byrd, in Greenville county: "Personally comes Sarah Jane Fleming, who upon oath says that she is the plaintiff in this action, and that a cause of action exists in her favor against the defendant, T. M. Byrd, on account of breach of contract made by said T. M. Byrd with plaintiff and her deceased husband, L. H. Fleming, to the effect that said T. M. Byrd would support and care for plaintiff and her husband, so long as both should live, upon a certain tract of land in Spartanburg, which was conveyed by deed to said T. M. Byrd upon consideration of said agreement, and said T. M. Byrd has breached and failed to comply with said agreement, and has sold said tract of land to Garvin McMakin, and has himself removed from the state and is now a resident of Gainesville, Ga., and is not a resident of South Carolina, and the damages sustained by plaintiff under and by vir-

tue of said breach is \$1,000, and that said T. M. Byrd has real estate in Greenville city, said county and state, which plaintiff is informed and believes that said T. M. Byrd is undertaking to sell and dispose of, and the same is subject to attachment and levy at instance of plaintiff. \* \* \* The defendant made a motion to dissolve the attachment on the grounds that it was irregularly issued, "in that this action is not one wherein attachment may issue under the provisions of the Code, and in that this section is not for the recovery of damages, as stated in the affidavit upon which said attachment is founded, and the affidavit is insufficient." On hearing the motion his honor, the circuit judge, granted the following order: "This was a motion to dissolve the attachment herein on the ground that it was irregularly issued, in that the Code does not authorize the issue of attachment in actions of this character. In my opinion the point is well taken. It is therefore ordered that the attachment be, and is hereby, vacated." The plaintiff appealed, and the exceptions, in different form, assign error in the said ruling.

Section 248 of the Code of Civil Procedure of 1902 provides that in any action arising for the recovery of money against a defendant who is not a resident of this state the plaintiff at the time of issuing the summons, or any time afterwards, may have the property of such defendant attached, etc. By reference to the affidavit, it will be seen that it sets forth the fact that she is the plaintiff in an action against the defendant for breach of a certain contract, by which she sustained damage to the extent of \$1,000, and the fact that the defendant is not a resident of this state. These facts, standing alone, would show that the plaintiff was entitled to the writ of attachment. The appellant's attorneys, however, contend that the affidavit should be read in connection with the complaint, when it will be seen that the attachment was irregularly issued. The complaint was not verified, and was not made part of the affidavit. It is true that, when the motion to dissolve an attachment is on the ground that the affidavit is not sufficient to sustain an attachment, the plaintiff cannot supplement the defective affidavit by facts stated in the complaint, unless it is verified and made a part of the affidavit. *Addison v. Sujette*, 50 S. C. 192, 28 S. E. 948; *Chitty v. Railroad*, 62 S. C. 526, 40 S. E. 944.

But a different question is presented when the motion to dissolve is on the ground that the cause of action set forth in the affidavit is not the cause of action alleged in the complaint. The former is an attack upon the regularity of the attachment proceedings, and must be tested by the papers before the clerk when he issues the writ. The latter is an attack upon the truth of the affidavit, and is therefore a motion to dissolve on the ground that it was improvidently issued, in which

case the defendant may rely upon the complaint for the purpose of showing that the cause of action stated in the affidavit is not the true one. As an attachment is only incidental to and in aid of the action set out in the complaint, it would be an anomaly to sustain an attachment based upon a cause of action wholly distinct from that stated in the complaint. His honor, the circuit judge, therefore properly considered the complaint in determining the motion. An examination of the complaint, however, will show that it states facts which, by a literal construction, will support a cause of action for damages for breach of contract as set forth in the affidavit, although such facts are mixed up with other allegations appropriate to a different cause of action. Such defects may be cured by a motion to amend.

It is the judgment of this court that the order of the circuit court be reversed.

(78 S. C. 120)

#### SMITH v. ELLISON et ux.

(Supreme Court of South Carolina. Sept. 10, 1907.)

##### 1. JUDGMENT—REVIVAL—LIMITATIONS.

Under Code Civ. Proc. 1902, § 309, providing that a final judgment may be revived within 10 years from the original entry, a summons to show cause served after 10 years is too late.

##### 2. SAME—RETURN TO SUMMONS.

A return to a summons in an action to revive a judgment that the time within which the judgment could have been revived has long since expired is a sufficient plea of the statutory bar.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Pickens County; Gary, Judge.

Summons by John A. Smith, executor of H. Glenn Smith, against James M. Ellison and Martha J. Ellison, to revive and execute a judgment. From an order reviving the same, defendants appeal. Reversed.

Blythe & Blythe, for appellants. Julius B. Boggs, for respondent.

POPE, C. J. This was a summons issued on December 23, 1906, by the plaintiff, John A. Smith, executor of H. Glenn Smith, to the defendants, James M. Ellison and Martha J. Ellison, requiring them to show cause, if any they could, why a judgment entered up against them on the 27th day of September, 1890, should not be revived. The return and answer of the defendants denies that any judgment was ever lawfully entered against them, and alleges that, if it has, as is alleged in the summons, the time within which the same could have been revived has long since expired. Judge Ernest Gary, in an order of March 5, 1907, ordered the judgment revived. Defendants appeal.

Section 309 of the Code of Civil Procedure of 1902 provides: "A final judgment may be revived at any time within the period of ten years from date of original entry thereof

by the service of a summons upon the judgment debtor \* \* \* to show cause, if any he may have, why such judgment should not be revived; and if no good cause be shown to the contrary, it shall be decreed that such judgment is revived." The meaning of the term, "date of the original entry," is too plain to require a consideration of its meaning. A period of 10 years following can mean nothing but the succeeding 10 years following the original entry. The words of the statute are plain that a summons, to revive, must be issued within this period; otherwise the privilege of renewal will be denied. The revival thus obtained will give life to the judgment for 10 years following the 10-year period from the date of the original entry of the judgment, thus making a period of 20 years, the entire time a judgment is allowed to constitute a lien on property. This statute is then one of limitation, and according to well-settled authority must be pleaded. This is the ground on which the respondent seeks to have the judgment sustained. He would show that appellants have not properly pleaded the statute. This contention, however, we cannot sustain. The plaintiff, in his summons, stated the fact that the judgment was entered in September, 1890. The revival proceedings were not begun until December, 1906. The defendants denied the judgment, but contended that should the judgment be held valid, as it alleged in the summons, that then, according to the face of the summons itself and the facts set forth thereon, the revival was barred by the statute. The facts of the case are really in issue, thus distinguishing this case from those relied upon by the respondent where the defendant claimed the benefit of the statute without stating any grounds upon which to base his claim. In this view, we think the pleadings are sufficient.

It is the judgment of this court that the judgment of the circuit court be reversed.

GARY, A. J. (dissenting). This is a proceeding to renew a judgment by summons commenced on the 22d of December, 1906, in which it is recited that the original judgment was recovered against the defendant on the 17th of September, 1890. The defendants made return to the summons, and showed cause as follows why the judgment should not be renewed: "(1) They deny that any judgment was ever lawfully entered against them. (2) That if any judgment has ever been rendered against them, as alleged in said summons, the time within which the same could be renewed has long since expired." His honor, the circuit judge, upon hearing the issues, filed an order that the judgment be renewed, and that the plaintiff have leave to issue execution thereon, from which order the defendants appealed.

Section 309 of the Code of Civil Procedure for 1902 contains the following provisions:

"(1) A final judgment recovered in any court of record in this state, subsequent to the 25th day of November, A. D. 1873, shall constitute a lien upon the real estate of the judgment debtor, in the county where the same is entered, for a period of ten years from the date of entry thereof. \* \* \* (2) A final judgment may be revived at any time, within the period of ten years from the date of the original entry thereof, by the service of a summons upon the judgment debtor, as provided by law \* \* \* to show cause, if any he may have, why such judgment should not be revived; and if no good cause be shown to the contrary, it shall be decreed that such judgment is revived; and such judgment shall thereupon constitute a lien upon the real estate of the judgment debtor, then owned or hereafter to be acquired by him, in the county where the judgment is entered, for a period of ten years from the entry of such decree; but such lien shall not revert to the date of the original entry of such judgment." Section 311 of the Code is as follows: "Nothing in the two preceding sections shall be construed to prevent an action upon a judgment, after the lapse of twenty years from the date of the original entry thereon, in case it shall be established by competent and sufficient evidence that said judgment, or some part thereof, remains unsatisfied and due. \* \* \* These sections must be construed together. The words, "but such lien shall not revert back to the original entry of such judgment," clearly show that section 309 of the Code contemplates proceedings to renew the judgment, even after the expiration of 10 years from the original entry thereof; for otherwise they would be meaningless. The fact, too, that nothing contained in section 311 was intended to prevent an action upon the judgment, even after the lapse of 20 years from the date of original entry, in case it was established that the judgment, or some part thereof, remains unsatisfied, shows that section 311 contemplated such proceedings on the part of the judgment creditor as were necessary to protect his rights before the lapse of 20 years from the date of the original entry, otherwise we would have the anomalous situation of a statute affording relief to the judgment creditor after a certain time which it would not accord to him prior to that period. The proceedings for the renewal of a judgment are in the nature of an action. *Adams v. Richardson*, 32 S. C. 139, 10 S. E. 931; *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787; *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561. Furthermore, the defendants did not interpose any objection to the form of the proceeding by which the plaintiff sought to have the question determined whether the judgment or any part thereof remained unsatisfied. The cases of *Anderson v. Baughman*, 60 S. C. 39, 48 S. E. 38, *Gregory v. Perry*, supra, and *Brantley v. Bittle*, supra, indicate that the

judgment may be renewed at any time, within 20 years from the date of original entry.

For these reasons, I dissent.

(78 S. C. 115)

**ROBERTS v. HERRON et al.**

(Supreme Court of South Carolina. Sept. 10, 1907.)

**1. WILLS—CONSTRUCTION—VESTED REMAINDERS.**

Testator devised to his wife certain pieces of property, to hold until his two children became of age, then to be divided "in equal shares between my wife and my two children above named, and to share and share alike." *Held*, that the children took vested remainders, and, on their deaths before attaining majority, their interests passed to their heirs at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1467.]

**2. PARTITION—WHEN RIGHT ACCRUES.**

Where testator gave to his wife certain property, to hold until his children became of age, and then to be divided, and the children died before attaining majority, the wife, when the children would have attained their majority, is entitled to partition.

Appeal from Common Pleas Circuit Court of Charleston County; Watts, Judge.

Action by Catherine Roberts, in her own right, and as administratrix, against Mary Ella Herron and another, executors of William A. Herron. Decree for plaintiff, and defendants appeal. Affirmed.

Jno. B. Edwards, for appellants. Bulst & Bulst, for respondent.

**GARY, A. J.** This is an action for partition, and involves the construction of a will.

William A. Herron died on the 3d of November, 1893, leaving of force his last will and testament, which contained the following clauses: "1st. I give, devise and bequeath to my wife, Mary Ella Herron, the following pieces of property, to wit: House and lot, No. 84, north side of Morris street; house and lot, No. 82, north side of Morris street; house and lot, No. 80, north side of Morris street; houses and lots, Nos. 1 and 2, De Reef's Court. To have and to hold the same until my two children, Mary and William, shall become of age, then to be divided in equal shares between my wife and my two children named above, and to share and share alike. \* \* \* 3d. House and lot, No. 80 Morris street, now occupied by Mrs. Vanderhost, I desire her to remain during her lifetime, and after her death then to revert to my wife, Mary Ella Herron, and to my two children, Mary and William." The facts are thus stated in the report of the master: "That the said William A. Herron left surviving him, as his only heirs at law and distributees, his widow, the defendant, Mary Ella Herron, who was his second wife, and his two children, Mary Crum Herron and William Herron, whose mother, Almona Isabel Herron, who was the daughter of the plaintiff herein, was the first wife of the

said William A. Herron. Mary Crum Herron died intestate, unmarried, under age, and without issue, on or about the 1st day of February, 1901, leaving as her only heir at law and distributee her brother, the said William Herron. On the 22d day of October, 1904, the plaintiff, Catherine E. Roberts, who was the grandmother of Mary Crum Herron and William Herron, was duly appointed administratrix of the estate of Mary Crum Herron by the judge of probate for Charleston county, and took upon herself the burthen of the administration of the said estate. William Herron died intestate, unmarried, under age, and without issue, on or about the 18th day of June, 1904, leaving as his only heir at law and distributee his grandmother, the plaintiff Catherine E. Roberts. On the 22d day of October, 1904, the said Catherine E. Roberts was duly appointed administratrix of the estate of William Herron, deceased, by the probate judge for Charleston county, and took upon herself the burthen of the administration of the said estate." The master ruled that the children of the testator—Mary Crum Herron and William Herron—took vested remainders under the will, and his report was confirmed in all respects by his honor, the circuit judge.

There are several exceptions, but they are all dependent upon the determination of the question presented by the first exception, which is as follows: "Because the said master erred in finding and reporting that 'the two children of the testator, Mary Crum Herron and William Herron, took vested remainders in the fee in the premises named, which upon their deaths passed to their distributees or legatees,' when he should have found and reported that the said children took no estate in said premises since they failed to reach their majority, which was the contingency, upon which they were to take; and his honor, the presiding judge, erred in not so holding." The rule for determining whether remainders are vested or contingent is thus stated in the case of *Faber v. Police*, 10 S. C. 376, 387: "According to the elementary writers, a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a person not in being or not ascertained; or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in the one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate, as well as the right to the possession of such estate, is not only

deferred to a future period, but is dependent upon the happening of some future contingency. As it has been well expressed, 'It is not the uncertainty of the estate in the future, but the uncertainty of the right to such enjoyment, which marks the difference between a contingent and a vested remainder.' Our construction of the will is that the testator had in view two objects: (1) It was his intention that the land in dispute should be divided, share and share alike, between his widow and his two children; and (2) that the widow should have the right to the possession of the land until the children attained their majority, at which time the division was to take place.

The appellant's attorney in his argument says: "The testator did not contemplate the death of his two children, before they reached their majority, and therefore made no provision for such an event, and the court cannot undertake to supply such an omission." This is correct, but we are unable to discover in the will a single expression which tends to show that the right of the children to the estate was uncertain, but that the uncertainty related to the time the widow was allowed to hold possession of all the land before the division could take place. As the widow, under the terms of the will, was only entitled to one-third of the land, and the possession of all until the children became 21 years of age, and as the time has expired within which the children would have attained their majority, we fail to see by what right she can claim to be the owner of all the land. We recognize the principle announced in all the authorities relied upon by the appellant's attorney, that when the right of a devisee is dependent upon the contingency of his living until he becomes 21 years of age, and he dies before that time, his contingent interest is defeated, and cannot be transmitted to his representatives. But, as we have said, this case does not fall within that principle. *Cole et al. v. Creyon*, 1 Hill's Ch. 320, 26 Am. Dec. 208; *Bankhead, Adm'r, v. Carlisle, Adm'r*, 1 Hill's Ch. 358; *Bently v. Long*, 1 Strob. Eq. 44, 47 Am. Dec. 523.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 73)

**EDGEFIELD MFG. CO. v. MARYLAND CASUALTY CO.**

(Supreme Court of South Carolina. Aug. 31, 1907.)

**1. EVIDENCE—BEST AND SECONDARY.**

In an action on an indemnity policy of insurance, where plaintiff showed that it had been insured in defendant company for several years, taking a renewal policy at the expiration of each term of insurance, and proved that after a thorough search among its papers the policy could not be found, and offered in evidence the policy of the preceding year as a copy, except as to dates, such copy was admissible, though no search had been made among the

private papers of the officers of plaintiff corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 605-637.]

**2. INSURANCE—INDEMNITY POLICY—CONSTRUCTION.**

Where an indemnity policy provided that no action should lie against the insurance company as to any loss under the policy, unless brought by the insured to reimburse himself for loss actually sustained and paid in satisfaction of a judgment within 60 days from its date, payment must be made of any judgment in favor of an employe for personal injuries within 60 days from the date of the judgment.

**3. SAME—NOTICE OF ACCIDENT—ACTION—NOTICE—WAIVER.**

In an action against an indemnity company, the policy stipulated that the insured should give immediate notice of the accident, and, if any suit is brought against the insured, he shall immediately forward to the company any summons or other process as soon as served on him, and the company will defend against such proceeding, unless it shall elect to pay the indemnity provided for. The indemnity company participated in a defense after notice that all questions as to the failure of the insured to give prompt notice of the injury sued for were reserved. *Held* to show no waiver of this requirement of the policy.

**4. DEPOSITIONS—ADMISSIBILITY.**

Testimony de bene esse taken in typewriting is good without a certificate of notary that it was written by the witness or read over to him.

**5. INSURANCE—INDEMNITY POLICY—NOTICE OF ACCIDENT—EXCUSE FOR DELAY.**

An indemnity policy stipulated that notice of an injury to an employe of the insured should be immediately given, and any summons of process served on the insured shall be immediately sent to the company. The evidence showed that the vice president in charge of the mill was in ill health when the accident happened to an employe, and shortly thereafter died; that a month later a temporary successor learned for the first time of the casualty insurance, and immediately gave the company notice, and offered to send the summons served against the company on behalf of the injured employe. The vice president and most of the people in the office had been sick with small-pox, and the office closed therefor and quarantined. *Held* sufficient to justify a jury in finding that the delay in giving notice under the policy was excusable.

Appeal from Common Pleas Circuit Court of Edgefield County; Memminger, Judge.

Action by the Edgefield Manufacturing Company against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden and E. H. Folk, for appellant. Tompkins & Wells and N. G. Evans, for respondent.

WOODS, J. The Edgefield Manufacturing Company obtained a policy of insurance for \$3,500 in the Maryland Casualty Company to protect it against claims for accidents to its employes. In the case of *Jennings v. Edgefield Manufacturing Company*, 72 S. C. 411, 52 S. E. 113, the plaintiff recovered a judgment of \$3,500 for personal injuries. After payment of the judgment, Edgefield Manufacturing Company brought this action on the

insurance policy to recover \$1,500; the insurance being limited to that amount for the death or injury of anyone person. The plaintiff recovered judgment for the amount claimed, and the defendant appeals. The plaintiff had been insured in the defendant company for several years, taking a new or renewal policy at the expiration of each term of insurance. At the trial, after proving that a thorough search had been made through the company's papers for the policy without finding it, the plaintiff offered in evidence as a copy, except as to dates, the policy issued for the preceding year. The defendant contends this paper should have been excluded for lack of evidence that a search had been made among the private papers of those who were officers of the company when the policy was in force, and for lack of sufficient evidence of the terms of the old policy being the same as the new.

1. The law requires search in the place where the paper is presumed to be. *Culpepper v. Wheeler*, 2 McM. 66; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797. According to the proof here, the insurance policies were kept in the vault of the plaintiff company, and there is no presumption that they were taken out and placed among the private papers of its retiring officers. There was ample evidence from defendant's own agent of the policy introduced being identical in terms with that sued on. It is evident the old policy was properly admitted. It is equally evident its exclusion would have been far from aiding the defense. The complaint alleged an insurance policy without mentioning any condition, except plaintiff's agreement "to give the defendant due and reasonable notice of any accident or any suit for damages arising from the same." The answer admits this allegation, "But for greater certainty prays reference to the said policy of insurance," sets up certain conditions not referred to in the complaint, and alleges plaintiff's failure to comply with them. Actual proof of the policy, therefore, was not requisite to make out the cause of action. The admission of the copy was of no consequence to the plaintiff, but was essential to the defense in proving the conditions set up in the answer.

3. The next question arises under the following clause of the answer: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within 60 days from the date of such judgment, and after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured

within 60 days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy." The policy covered the year beginning May 6, 1903, and ending May 6, 1904. Jennings received his injury October 21, 1903, brought his action January 6, 1904, and recovered judgment in November, 1904. The remittitur from the Supreme Court was sent down October 19, 1905. The plaintiff paid the judgment October 24, 1905, and brought this action January 23, 1906. The suit was not brought within 60 days after the final judgment, and the defendant contends this is fatal. The circuit judge construed the first sentence of the condition of the policy, above quoted, to mean payment must be made by the assured of any judgment in favor of an employé for personal injury within 60 days from the date of the judgment. Nothing about this section of the policy is clear except the obscurity. The language will fairly bear the construction placed on it by the circuit judge. The insurer framed the clause as a condition of its liability, and obscurity and ambiguity will be solved against it. *Sample v. Insurance Co.*, 46 S. C. 491, 24 S. E. 334, 47 L. R. A. 696, 57 Am. St. Rep. 701; *Moulor v. Am. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447. On this principle, the charge of the circuit judge on this point must be sustained. Inasmuch as the record in the clerk's office showed the payment of the judgment in less than 60 days after the final judgment of the Supreme Court, this stipulation of the policy disappears as a defense, and the giving or refusing an instruction as to the validity of such conditions could be of no consequence.

3. The defendant submits, in the next place, it was relieved from liability by failure of the plaintiff to comply with the first of these additional stipulations in the policy: "The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time to the home office of the company at Baltimore, Md., or to its duly authorized agent. He shall give like notice, with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power. (2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay the assured the indemnity provided for in clause A of special agreements as limited



therein." There was no evidence of waiver by the defendant of the requirement as to notice of the accident. It is true the Maryland Casualty Company participated in the defense of the suit of Jennings, but it did so after explicit notice by letters to the Edgefield Manufacturing Company that all questions as to the alleged failure to give prompt notice of the injury to Jennings were reserved; and to this express reservation the plaintiff made no objection. The letters introduced expressed explicit refusal to waive this requirement of the policy, and the circuit court erred in not having so interpreted them to the jury. *Toale v. Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Baker v. Tel. Co.*, 75 S. C. 97, 55 S. E. 129; *Matthie v. Ins. Co.*, 174 N. Y. 489, 67 N. E. 57; *Donogh v. Farmers' Ins. Co.*, 104 Mich. 508, 62 N. W. 721.

4. The defendant offered evidence, taken *de bene esse*, showing the date when the notice of the accident to Jennings and of his suit was received from the plaintiff, its refusal to waive the stipulation, and the importance of prompt notice of the accident and of the suit. The depositions were ruled out because there was nothing to show the testimony was reduced to writing by the officer himself, or by the witness in his presence, and because the typewritten pages were not initialed. We do not think these were sound objections to the admission of the depositions. The court cannot presume the testimony to have been taken by a stenographer and afterwards typewritten, and therefore requiring a certificate that it had been read over to the witness. In taking testimony *de bene esse* typewriting is as any other writing. *Stoddard v. Hill*, 38 S. C. 890, 17 S. E. 138. Typewriting is common, and there is no presumption against its use by the officer or witness in reducing the testimony as required by the statute. Rule 12 of the circuit court (33 S. E. viii) lays down certain requirements as to the size and minimum weight of paper to be used for typewriting "original pleadings and other proceedings," and also as to initialing the pages. In a broad sense, the term "proceedings" used in the rule would embrace the taking of testimony *de bene esse*. The object of the rule is to prevent mistake or imposition, and, as to other pleadings and proceedings, there is no safeguard prescribed by statute. But the statute lays down with particularity the safeguards to be used for preserving the integrity of testimony taken *de bene esse*. These seem quite adequate; and the reasonable view is that the judge meant to safeguard such proceedings as the General Assembly had not already safeguarded by statute. This conclusion is strengthened by the consideration of the inconvenience that would arise from requiring observance of excessive formalities by officers outside of the state unfamiliar with our rules of court. The testimony taken *de bene esse* should have been admitted.

3. The final question is: Did the refusal

to charge there was no evidence of waiver, and the rejection of the evidence taken *de bene esse*, so prejudice the defendant as to warrant this court in ordering a new trial? The stipulations that the insured should give immediate notice of an accident and full information concerning it, and send the summons immediately to the insured company, means that these things should be done with reasonable promptness under the circumstances, not that they should be done literally without the lapse of any time. The numerous authorities on this point are collated in 21 Cyc. 1731, 1732. What is reasonable promptness under such stipulation is usually a question of fact for the jury. There was evidence that Price, vice president and treasurer in charge of the mill, was in extreme ill health, though trying to attend to the duties of his office, when the accident happened to Jennings, and grew worse until his death in February, 1904. Mr. A. S. Tompkins then took charge of the offices of the mill, as temporary successor to Price. In March, 1904, Mr. Tompkins was made aware for the first time that his company had casualty insurance by finding the policy among the papers of the company, and on the same day gave the casualty company notice of the accident, and offered to send it the summons served on behalf of Jennings. Mr Tompkins thus sums up in his evidence the reasons for the delay: "That is when I found the policy. Not only had Mr. Price been sick, but the balance of the people in the office nearly all had smallpox. The entire office had three or four months' vacation by Mr. Price being in a dying condition; quarantined on account of smallpox. That was the condition of things at the time this accident occurred and shortly after. We had these conditions to contend with. The mill was almost entirely at a standstill." All this evidence was undisputed, and there is no suggestion against its credibility. The testimony taken *de bene esse* proves nothing more than the delay in giving the notice of the accident and in sending the summons, and the importance to the company of promptness in these matters.

In view of these facts, it is evident a jury could not reasonably reach any other conclusion than that the delay was excusable, and the notice given and the summons sent with all promptness to be fairly expected and exacted. We do not say there was not a scintilla of evidence supporting the defense; and, if the verdict had been for the defendant, the scintilla would have prevented this court from ordering a new trial for lack of facts to sustain the defense. But this court should not order a new trial where from an examination of the record it has no doubt the verdict of any fair jury would have been the same, even if no error had been committed. In such a case the errors should be regarded not prejudicial.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 108)

**CLOY et al. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. Sept. 9, 1907.)

**1. TELEGRAPHS—DELAY IN DELIVERY—NOTICE TO COMPANY.**

A telegram from a husband to his wife, "We got left, go to your father's tonight, will be on next train"—would not carry the information to the company that a failure to deliver before night would cause the wife to be at home without protection a part of the night, and drive from her home in the night to that of her father alone through a forest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 69.]

**2. SAME—VOLUNTARY ACT.**

Where a wife received a delayed telegram that her husband would not return that night, and to go to her father's, the court cannot say that her driving through the forest with her infant at night to her father's home was a voluntary act.

**3. SAME—DAMAGES.**

Where, in an action for delay of a telegram, there was uncontradicted evidence of an effort to deliver, and no evidence that the agent of defendant could have secured an earlier delivery by using all the fee charged for that purpose, a verdict for \$850 was excessive as including punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 74.]

Appeal from Common Pleas Circuit Court of Barnwell County; Gage, Judge.

Action by Lois Cloy and D. R. Cloy against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Jno. R. Bellinger, for appellant. Davis & Best, for respondent.

POPE, J. This case was tried at the fall, 1906, term of court for Barnwell county. It appears that D. R. Cloy, one of the plaintiffs herein and husband of Lois E. Cloy, having been on a trip to Savannah, wished to return to his home near Estell, S. C., on the 25th day of September, 1906, but was left by the train. Knowing that Mrs. Cloy would be expecting him, he telegraphed her the following message, which arrived at Estell about 2:30 o'clock: "We got left, go to your father's tonight, will be on next train." Plaintiffs lived seven or eight miles from Estell, and, in order to secure a prompt delivery of the message, plaintiff D. R. Cloy, in addition to the regular charge, paid the defendant company \$1, the amount demanded by the agent for delivery. The message was not delivered until about 8 o'clock that evening. The complaint alleges that the delay was willful and wanton, and as a result thereof "the plaintiff Lois E. Cloy was left at home alone with her infant child, in the country, isolated from friends or any one near enough to protect her, whereby she was frightened and worried to such an extent that she was compelled to leave her home and drive three miles in the dark alone with her infant child to the house of her father through the forest; and by rea-

son of all the facts hereinbefore set forth the said Lois E. Cloy suffered great bodily pain, fear, mental anguish and anxiety, to her damage \$1,950." A motion was made to strike out this language from the complaint, on the grounds that such results were not in the contemplation of the parties. The motion was refused; Judge Gage holding that the language, "Go to your father's tonight," was at least sufficient to warn the company that such results would follow from a failure to deliver the telegram. A motion for a nonsuit as to punitive damages was likewise refused. The jury found a verdict of \$850 for the plaintiff. The defendant appeals.

1. The first six exceptions relate to the refusal to strike out. We are of the opinion that it was not error to refuse to strike out the language above quoted. It might have been proper to have stricken out that portion of the allegation which related to plaintiff's child had the motion been so directed, but as defendant sought to strike out the whole allegation, some of which was proper, it was not error to refuse the motion as a whole. The telegram containing the words, "Go to your father's tonight," put it clearly within the contemplation of the parties as one of the objects of the telegram that plaintiff would on receipt of the message seek the protection of her father's home as bidden by her husband. Hence the propriety of the allegation that, in consequence of the delay in delivering the telegram, plaintiff was compelled to leave her home and drive in the dark to the house of her father. The fact that the drive was to be in the night was to be anticipated as a natural result of the failure to deliver the message before night, and the defendant's knowledge that plaintiff was expected to go to her father's house that night necessarily included knowledge that she must go the necessary distance and along the proper road lying between the points indicated. Going through the forest along the road was but a necessary incident of the journey contemplated by the message. Moreover, the complaint, in the portion sought to be stricken out, alleged that by reason of the failure to deliver the message promptly plaintiff was compelled to spend a part of the night alone, isolated from friends or any one near to protect her, which caused her mental suffering; in other words, that a reasonable delivery of the message as contemplated would have enabled her to reach her father's house before night, and thus have relieved her of the fear and anxiety involved in being in her home in the country at night without protection. Speaking generally, whatever injury or mental suffering naturally and proximately resulted to the plaintiff by reason of the delay in delivering the message was a proper matter for allegation and proof. To strike out the allegations in question would deprive plaintiff of any right to recover for mental anguish.

2. As regards the second question raised, we do not think this court can as a matter of

law say that plaintiff's drive through the forest in the dark alone with her infant was her own voluntary act, and that her fear and anguish arising therefrom was the result of her own conduct, for which the defendant is not responsible. It is the duty of one affected by the negligent act of another to exercise ordinary care in using reasonable means at hand for the purpose of minimizing or averting the consequences of such negligence. But in this case it is not a necessary inference from the undisputed facts that plaintiff negligently failed in this regard. Plaintiff's father, living three miles distant, was her nearest natural protector, and, in addition to the filial instincts prompting her to go to him, was the direction of her husband to go there. It is true that Mr. Paul Allen lived at a distance by road from her house, variously estimated by the witnesses as from a half mile to a mile, thought by plaintiff to be a mile, and sent word by a negro boy named Tillman, bearing the telegram to let him know if there was anything he could do for her; but plaintiff's husband had been living in the community only a short while, and there is no evidence (beyond the inconsequential testimony that Allen and Cloy sometimes brought each other's mail from the post office at Seminole) tending to show such confidence and friendship between herself and husband and Mr. Allen as beyond question should have induced her to go to his home or accept his company or escort with the uncertainty and anxious delay involved in any event, in preference to setting out alone without delay for her father's home. The night being dark, she provided herself with a lantern. She probably knew the way well. The road was good and the weather propitious, so it was not unreasonable for her to suppose that she could reach her father's home in about an hour, and that it would be the best course to go at once and alone. At any rate, it was for the jury to say under all the circumstances whether in the dilemma brought upon her by the delay of delivering the telegram she negligently failed to minimize or avert the consequences of such delay.

3. As it is not disputed that there was some evidence tending to show negligence on the part of the defendant, and as there was some evidence tending to show a few hours' mental anxiety and suffering on the part of the plaintiff in consequence of such negligence, a verdict based upon the idea of a fair and just compensation for the injury would have been unassailable in this court under the exceptions. But the verdict for \$850 is manifestly largely punitive, and several exceptions involve the question whether there was any evidence tending to show willful misconduct on the part of the defendant. We look in vain for anything in the testimony tending to show a reckless or wanton disregard of duty on the part of the defendant. The plaintiff testified that the message was delivered to defendant's agent at Savan-

nah between 12 and 1 o'clock on September 25th. It appears that some time was consumed in an effort to find out if the agent at Estell could procure a messenger to deliver the telegram at plaintiff's home, about eight miles in the country, and, after hearing from the Estell agent, the Savannah agent agreed to deliver the message for \$1 in addition to the ordinary rate for delivery at Estell. A memorandum on the message blank stated that it was received at the Savannah office at 2:30 p. m. The agent at Estell applied to Mr. Peeples, who conducted a livery business, to deliver the message, but he could not, as his horses were all out. The Estell agent was informed by Mr. Peeples that the quickest way to get the message out would be by the mail boy. There was also no testimony that any other means of delivery was available. The defendant's agent employed Wallace Hays, the mail boy, to carry the message and deliver it to Mr. Dickenson, postmaster at Seminole, which was six or seven miles from Estell, with one intervening office to serve, with request that he get it out to Cloy's with his mail. The mail boy arrived at Seminole a little before sundown, and delivered the telegram to the postmaster. About half an hour afterwards the postmaster delivered the telegram to Mr. Solomons, who carried it to Mr. Allen's, and, being unwell, he stopped there, and Mr. Allen sent the telegram on by a negro boy, who delivered it to the plaintiff at about 8 o'clock. Here certainly was undisputed evidence of some effort to deliver, and the case clearly does not fall within that class of cases which permits an inference of wantonness from long delay without explanation or effort to deliver. The fact that defendant's agent paid the mail boy only 25 cents for his services, when the company charged \$1 for the special delivery, is referred to by respondent as a circumstance showing wantonness in failing to deliver in time, but it must be remembered that the delivery was not to be completed by the mail boy, for, after the message reached Seminole, it remained to be sent on by others acting for the company for whom compensation would have to be provided by the company if demanded. The mail boy regarded 25 cents as adequate compensation for his services, no doubt, because he was going to Seminole anyway, and could carry the message that far with little or no inconvenience. There is no foundation in the testimony for the suggestion that defendant's agent willfully misappropriated the remaining 75 cents, and there is nothing to show that, if the whole of the \$1 had been paid to the mail boy, the message would have been delivered more promptly. When the company made the charge of \$1 for the special delivery, it was doubtless in contemplation that a team would have to be hired, as the effort to get a conveyance from the livery stable keeper showed. We fail to see how this circumstance could affect the question of willful-

ness with respect to the delivery of the message. There was no evidence that defendant's agent had opportunity to secure a speedier delivery of the message by using the special fee for that purpose and wantonly failed to do so. We therefore sustain the exceptions raising this question.

It is the judgment of this court, that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(78 S. C. 88)

#### STATE v. EMERSON.

(Supreme Court of South Carolina. Sept. 6, 1907.)

#### 1. HOMICIDE—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

On trial for murder for killing a father in the bedroom of his daughter, into which accused had gone under a plea of self-defense, exclusion of evidence offered to show estrangement between the father and his daughter was harmless, where that fact was testified to by the same witness in chief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 714.]

#### 2. SAME—EVIDENCE.

Where the only evidence of illicit intercourse between accused and the daughter of deceased was an occurrence 10 years previous, it is not competent to show the father had knowledge of such relation to show the attitude of the deceased toward the defendant at the time of the homicide, where the defense was self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 398.]

#### 3. WITNESSES—IMPEACHMENT.

When accused is advised of a particular conversation with one person, and gives his version of it in reply, he may be contradicted by another, who says he heard the conversation, though his name was not given by defendant on his examination as being present at the time.

#### 4. HOMICIDE — MANSLAUGHTER — SELF-DEFENSE.

It would be manslaughter to kill a man found in the house for purposes of illicit intercourse with the owner's daughter, but such wrongful act on the part of the person entering the house will deprive him of any right of self-defense should he kill the owner of the house who attacks him on the spot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 145, 146.]

#### 5. SAME—MURDER.

Where there was evidence that accused armed himself with a pistol in anticipation of some interference with his purpose in entering the house of deceased, and with the intent to take the life of such owner, should it be necessary to save his own in the course of such interference, such formed design rendered defendant guilty of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 14.]

#### 6. CRIMINAL LAW—INSTRUCTIONS.

Failure to give instruction already covered by the instructions given is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

Appeal from General Sessions Circuit Court of Anderson County; Gary, Judge.

J. A. Emerson was convicted of murder, and appeals. Affirmed.

Bonham & Watkins and Cothran, Dean & Cothran, for appellant. J. E. Boggs, Sol. Martin & Earle, G. C. Sullivan, and Paget & Watkins, for the State.

JONES, J. The appellant was indicted for the murder of Thomas F. Drake, and, upon being convicted with a recommendation to mercy, was sentenced to life imprisonment, from which appeal is taken upon numerous exceptions. The homicide occurred on the night of August 12, 1906, in the home of the deceased in Anderson county. Mrs. Belle Bailey, a married daughter of the deceased, about 31 years old, was living in the home of her father, with her child, Mary, about 13 years old, and her brother, Ralph Drake. The defendant, a sergeant of the county chain gang, left camp some 14 miles from Drake's for the purpose of visiting Belle Bailey in her bedroom. Hitching his mule in the woods near the house, he went to the open window of the bedroom, and, discovering a knot in the curtain, the signal agreed upon between them, he entered through the window. He placed his coat and pants upon the floor and his pistol on top in reach from the side of the bed and got in bed with Belle Bailey. The deceased occupied a room just across the hall and nearly opposite Belle Bailey's room. Deceased got up during the night and set a lighted lamp in the hall on a table standing almost opposite Belle Bailey's room door, which stood slightly ajar. Belle said to her paramour: "There is a light, Allen." He then got out of bed and started towards the door. She testified that her father pushed the door open before she reached it; that she asked him what he wanted, and he said, "I want to hear a fuss"; that he had a pistol in his hand; that she heard Allen say, "Don't shoot"; that her father immediately fired towards Allen; that Allen shot his pistol; that her father immediately started to shoot again, when Allen shot the second time and her father fell away from the room door into the hall. The deceased was shot through the heart and died immediately. The defendant testified that when Belle punched him in the side and said, "There is a light, Allen," he raised up in bed and saw the door open and Drake with a pistol in hand; that he said to Drake, "Don't you shoot me," and bent over in bed to get his pistol, and while in that position Drake fired, the ball grazing and cutting the skin on his back; that he (defendant) then fired into the ceiling above to ward him off and get a chance to get out of the room; that Drake was about to fire again when defendant fired as quick as he could and Drake disappeared; that he then left the room without his clothes and went to where his mule was hitched; and that Belle brought the clothes to him there. The defendant and Belle went off together to Anderson, the defendant voluntarily surrendered to the sheriff, and Belle went to At-

lanta. The defendant set up the plea of self-defense, and the real struggle in the case was on the point whether defendant was without fault in bringing on the difficulty. On this issue defendant sought to show the cause of Belle Bailey's marriage with William Bailey, some 13 years before the homicide; that her father knew of her unchaste character and her previous relations with the deceased; that he was estranged from his daughter by reason of her conduct; that he never spoke to her or entered her bedroom; that defendant knew of this relation, and therefore did not expect to encounter the father on his visit to the daughter.

1. The first exception assigns error in the court's refusal to allow defendant's counsel to ask the witness Ralph Drake: "Do you know the immediate cause of her marriage at that time? Why was it she got married just at that time?" The object was to show that the marriage was forced because Belle was with child by William Bailey. This was properly excluded as too remote and as not throwing any light upon the homicide occurring 13 years afterwards, and there being nothing to connect the circumstances of that marriage with the defendant or the homicide. If the purpose of the testimony was preliminary to showing an estrangement between Belle Bailey and her father because of her unchaste conduct and the improbability of the defendant encountering the father in her bedroom, the ruling was harmless, as it was an undisputed fact in the case established by the state's witness Ralph Drake, at folios 25, 26, that the relation between Belle and her father was not friendly, that he had not spoken to her for 10 or 12 years, and that he never entered her room.

2. The basis of the third exception is the alleged refusal of the court to allow the witness Belle Bailey to answer the question, "Did you make it known to him (defendant) that your father did not communicate at all with you?" The case, at folio 74, shows the following in the examination of Belle Bailey: "Q. You need not state what you said to Allen Emerson, but I will ask you this question, whether or not you made it known to him that your father, never, under any circumstances, came into your room? A. I have. Q. You told him that? A. Yes, sir." After this, when the question referred to in the exception was asked, objection was made by the solicitor, and the court sustained the objection. This cannot constitute reversible error, if it be conceded that the testimony was competent, for the question, in so far as it relates to whether Drake ever entered her room, had previously been answered without objection and remained as testimony in the case. Moreover, the defendant, at folio 149, testified that he knew Drake never had any communication with Belle and never visited her room, and that

he had no reason to expect to meet Drake in that room. It is not reversible error to exclude testimony as to matters already in evidence and undisputed. The fact that Drake did not speak to his daughter or visit her room was proven by the state, as already remarked, and was not a matter of dispute.

3. The second and fourth exceptions charge error in refusing to allow the following questions to be propounded to the witness Belle Bailey: "Do you know whether or not your father was aware of this relation between yourself and Allen Emerson?" "I wish you would state to the jury whether or not your father had knowledge of the fact that there had been illicit relations between you and Allen Emerson, the defendant." The witness Belle Bailey had just previously testified that 10 years before she gave birth to a child, and that the defendant was its father, but there was at that stage in the case no testimony of any other improper relation between the parties up to the night of the homicide. So that we are bound to assume that the purpose of the question was to ascertain whether the deceased knew of the illicit relation which had existed between his daughter and the defendant 10 years previously. The circuit court ruled that the testimony might be relevant and admissible if Drake, the father, had on this occasion killed the defendant and was on trial for the same, but that it was not relevant to the issue in this case. The appellant contends that the father's knowledge of the unchaste relation between defendant and his daughter would be a material and relevant circumstance in determining whether the father's attack upon defendant was in revenge for past wrong, and therefore malicious, or was the result of heat and passion aroused by suddenly discovering the adulterer in his house in the bed with his daughter; that, if Drake would have been guilty of murder had he killed defendant, the defendant had the right to defend himself against such malicious attack; and that if the deceased knew of the unchaste relations of his daughter with defendant, and had ceased to communicate with her, defendant could not reasonably have anticipated an encounter with the deceased, and therefore was without fault in bringing on the difficulty. This contention is plausible, but not sound. It will be observed that the question was not so framed as to indicate to the court that it was intended to show that the defendant was aware that the deceased had knowledge of his previous illicit relation with his daughter; on the contrary, the plain import was merely to show the knowledge of the deceased. If defendant was not aware that deceased had such knowledge, the fact of the deceased's knowledge could have no influence in prompting or explaining the conduct of the defendant.

Is the testimony competent as tending to show the attitude of deceased towards the accused at the time of the homicide? To be

so it must fall within the rule governing the admission of evidence of previous quarrels, ill feeling, or hostile acts between the parties. The rule on that subject is thus stated in 21 Cyc. 962: "Where there is a claim supported by some evidence of self-defense, or, as it has been well stated, where the proof justifies the giving of a charge on the law of self-defense, defendant may for the purpose of showing deceased to have been the aggressor, and the killing to have been necessary in self-defense, introduce evidence tending to show that deceased entertained hostile feelings towards him. Thus he may show that there had been previous difficulties or quarrels between himself and deceased, or that previous to the killing deceased had been guilty of acts and conducts evincing hostility towards defendant. Defendant may show that on former occasions deceased assaulted or attacked, beat, waylaid, or shot at him. There must, however, be some connection between the previous difficulties and the homicide. Defendant cannot go back to a remote period and prove a particular quarrel or grudge unless he also proves a continued difference flowing from that source; but, where there has been a series of difficulties down to the time of the killing, defendant may introduce evidence of previous affrays, difficulties, and attacks, although remote in time and place, their weight being for the jury." In *State v. Faile*, 48 S. C. 62, 20 S. E. 798, it was held competent to give in evidence uncommunicated threats by the deceased against the accused made two weeks before the homicide, and in *State v. Thrailkill*, 71 S. C. 142, 50 S. E. 551, it was held competent to show that the deceased approached the scene of the difficulty armed with a gun with knowledge that the accused had just previously killed his brother. This and similar rulings are upon the ground that the evidence reasonably tends to show a hostile attitude by the deceased against the accused at the time of the homicide and to illustrate or interpret his action. But in this case the attempt is not made to show any previous threat or hostile demonstration by the deceased, but mere knowledge by the deceased of defendant's former conduct. The remoteness of the act sought to be put within the knowledge of the deceased, and the failure to offer or attempt to connect it with the homicide justified the circuit court in excluding the evidence. *Daniel v. State*, 103 Ga. 202, 29 S. E. 767. In judging the mental attitude of the deceased at the time of the homicide, it would be absurd to attribute his conduct to ill feeling engendered by information of an old wrong, the continued existence of which had not been manifested by any hostile word or deed, rather than to the overwhelming indignation and injury engendered by another similar wrong just perpetrated or about to be perpetrated under his roof. *State v. Johnson*, 47 N. C. 247, 64 Am. Dec. 582. Moreover, the defendant, instead of showing the con-

tinued existence of ill feeling by the deceased caused by his former conduct, testified to the contrary, for at folios 167, 183, 184, 191, and 192, he testified to the effect that his relations with the deceased were not unfriendly; that some eight or ten years before the homicide he made explanation of his relations with Belle to her relatives, Jesse Drake, John Drake, and the deceased, Jesse Drake being spokesman for the party; that Jesse Drake was satisfied with his explanation; and that deceased never complained after such explanation. This testimony was not disputed. These exceptions must therefore be overruled.

The fifth exception assigns error in permitting the introduction of a note written by Emerson to Mrs. Bailey about a year before the homicide. As neither the note nor a statement of its contents appears in the "Case," we are unable to consider the exception.

4. A witness for the state, F. D. Suber, testified that on the day after the homicide he heard a conversation in the jail between defendant and William Bell, in which defendant said: "There was a light burning in the hall, and the door opened, and Mr. Drake made a dark place between him and the door, and he was the best target he ever had to shoot at." The defendant, when examined, denied having made such a statement, and testified that what he said was: "When the door opened it blinded me, and the light shined on me and made the best target out of me for him to shoot at I ever saw." In reply, the witness C. B. Prince, over objection, was permitted to testify that he was present during the said conversation in the jail, and in answer to the question, "Did you hear defendant say that Drake was the best target he ever shot at?" the witness answered, "Yes." The defendant's counsel then requested that the witness be asked to state the exact language, whereupon the court sustained the solicitor's contention that it was not necessary to give the exact language used, but that it would be sufficient to state the substance of the conversation.

The sixth exception alleges error in the following particulars: (1) The defendant had not been asked as to any conversation to which Prince was a party and had no opportunity to deny it; (2) defendant had the right to have witness repeat the exact language in order to test the accuracy of his memory; (3) in the form in which the question was put, witness was made to simply repeat Suber's statement. Statements or declarations of the accused relative to matters in issue may be given in evidence, whether he goes on the stand as a witness or not, and therefore, if he testifies, it is not essential that he be advertised of the purpose to give his declarations in evidence. *State v. White*, 15 S. C. 391; *State v. Freeman*, 43 S. C. 107, 20 S. E. 974. The accused in this case was particularly advised of the particular conversation and

gave his version of it. It was competent in reply for the state to corroborate the testimony of Suber by the testimony of another witness who was present at the time. When it is desired to give the declaration of the accused in evidence, it is proper, when it is possible to do so, to give his exact words; but, if the witness cannot state with certainty the exact words, it is competent to state the substance of the declaration, and the accuracy and truth of the witness may be tested under cross-examination. When the particular form in which the question is put is the point of exception, timely objection should be made so as to give the court an opportunity to see that the question is in proper form before answer, which was not done in this case. We, however, see no ground for reversal on account of the form of the question under the circumstances.

5. In the course of the charge to the jury, the court read the case of *Dabney v. State*, 113 Ala. 38, 21 South. 211, 59 Am. St. Rep. 92, 94, and declared that such is the law of South Carolina, and this charge is the basis of the seventh, eighth, ninth, eleventh, and fifteenth exceptions. In that case Faulkner, on the night of the homicide, discovered Dabney in the room of Faulkner's wife under circumstances indicating preparation for adultery. Faulkner demanded admittance, and on being refused proceeded to break down the door, and upon entering was shot by Dabney after Faulkner had stated that he had come to kill both of the parties and was advancing with pistol drawn and pointed at Dabney, who had no means of escape except through the door. Dabney having appealed from a conviction of murder in the second degree the Supreme Court of Alabama rendered an opinion containing the following extracts which were read to the jury by Judge Gary on the trial of this case: "It is, and always has been, an elementary principle of criminal law, so familiar as not even to require a citation of our own numerous adjudications upon it, that one who provokes a difficulty, who by his own wrong contributes to a situation out of which arise a necessity to take the life of another to preserve his own, cannot invoke the doctrine of self-defense to justify the homicide he commits in such difficulty—cannot plead a necessity to kill which arose from his own wrong. Sexual intercourse with the wife of another is such a wrong, so obviously calculated to bring on a difficulty with the husband, as that the law itself recognizes it as provocation sufficient to reduce the killing of the adulteress and her paramour by the husband, upon detecting them in the act, to manslaughter; a wrong which is an adjudged provocation to homicide on the part of the husband. If, as in the case at bar, the paramour, in order to save his own life from the consequences of the deadly passions of the husband, excited by the wrong of the former, slays the husband, he can in no sense be said to have been free from fault in bringing

about the mortal encounter. The fatal result, to the contrary, is traceable directly to his own wrong, and he cannot justify his act by an invocation of the doctrine under which one free from fault and unable to retreat is authorized to save his own life by destroying that of another. It is also a too elementary and familiar principle of law to need discussion or reference to authorities that if one, entering upon the commission of a wrongful act has in contemplation that another will or may interfere with his enterprise, arms himself with a deadly weapon with the intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the person so interfering in pursuance of such intent, is guilty of murder in the first degree; the intent to kill under the conditions contemplated constituting the 'formed design' sufficient and necessary in murder, when the circumstances of the act do not justify the design, and the wrongfulness of the act in which the slayer was engaged at the time, the necessity to strike arose, precluding all justification of the design."

Error is assigned to this charge in the following particulars: (1) It was inapplicable to the facts of this case and tended to excite the jury against the defendant; (2) it is not an adjudged provocation to homicide if a father find one in cohabitation with his daughter of known immoral character whose immorality had so estranged him that he ceased to treat her as a daughter; (3) that it erroneously conveyed to the jury as the opinion of the court that the defendant had precluded himself from setting up the plea of self-defense, and that it was lawful for Drake to kill Emerson because of his cohabitation with the daughter of deceased; (4) there was no evidence that defendant in this case "armed himself in anticipation that any one might or would interfere in his purpose and with intent to take the life of the other should it become necessary to save his own in the course of such interference, etc."; (5) that having charged at defendant's request that one who knows the unchaste character of a female will not be excused for assaulting one found in cohabitation with her to the same extent as would one who had no previous knowledge of the woman's lack of virtue, it was error to give to the jury the facts and law of the Alabama case, the two propositions being diametrically opposed. There is no doubt that the common-law rule prevails in this state that, if a husband discovers one in the act of adultery with his wife, and immediately kills him, he is guilty, not of murder, but of manslaughter, upon the ground that the adulterous act is an act of aggression against the husband constituting in law a sufficient provocation to engender the heat and passion which negatives malice. In 4 Bl. Com. (Sharswood Ed.) p. 190, we find: "So if a man takes another in the act of adultery with his wife

and kills him directly upon the spot, though this was allowed by the law of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband's own house) and also among the ancient Goths, yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and therefore, in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation." In *State v. Chiles*, 58 S. C. 49, 36 S. E. 496, this court approved as correct a charge that it would be manslaughter for a husband to kill one while in the act of adultery with his wife. The same principle should apply where a father kills one who he detects in illicit intercourse with his daughter, especially if she be a member of his household and under his roof, as the cases stand upon the same footing of reason and justice. 21 Cyc. 733; *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553. If such a provocation be sufficient to mitigate a killing of a paramour by the father to manslaughter, it is surely a wrongful act reasonably calculated to stir the passion of the father and provoke an attack by him, such as would deprive the paramour of any right of self-defense should he kill the father who attacks him on the spot. The law of self-defense, as repeatedly declared in this state, requires that the slayer shall be "without fault" in bringing on the difficulty. One is not "without fault" who does that which a reasonable man would expect to bring on a physical encounter and which did actually contribute to bringing it on. *State v. Rowell*, 75 S. C. 510, 56 S. E. 23. If we concede that defendant had no reasonably safe means of escape and shot Drake to save his own life, his plea of self-defense is unavailing, because by his own guilty act he brought on the necessity to kill.

6. Hence the principle of the Alabama case as given to the jury on the subject of self-defense was sound and applicable, unless it be true, as contended by appellant, that the knowledge by the deceased of his daughter's former acts of unchastity and the estrangement between them because of such conduct and the fact that defendant knew of the estrangement and of the father's habit not to visit his daughter's room are circumstances which have some tendency to show that defendant was without fault in bringing on the difficulty. We are clearly of the opinion that these circumstances cannot have such effect. The fact that Drake did not visit his daughter's room for communion and companionship as a father furnished no sort of reason for believing he would not as master of his home go there to eject an invader of its sanctity. Emerson's visit was admittedly clandestine, so far as Drake was concerned, and there is no foundation in the evidence for a suggestion that Emerson was there by the acquies-

cence or implied invitation of Drake, or that Drake had set a trap for him with a view to kill him. Hence the doctrine of *Wilkinson v. State*, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63, has no application. In the case of *Varnell v. State*, 26 Tex. App. 56, 9 S. W. 65, much relied upon by appellant, the defendant and a daughter of deceased were guilty of illicit intercourse 30 or 40 yards from the house and away from the deceased, who, after being informed of what had happened, went to the place, his daughter having fled to the house, and there attacked defendant with an axe and was killed by him. The court held that upon these facts the defendant had not lost his right of self-defense. This was manifestly on the theory that the deceased attacked the defendant in that case in revenge for what had occurred out of his presence, and the case is distinguishable from the case at bar. In *Varnell's Case*, the deceased attacked upon information of a completed act done out of his presence; in the case at bar, the deceased attacked for an act in progress under his roof and in his sight. Drake, being in his own home, had a perfect right, on hearing a noise, to arm himself, place a light on his table, and approach the door of his daughter's room, which stood ajar, and ascertain the cause. If he had reason to believe a man was in his daughter's room for an unlawful purpose, he not only had a right to push open the door and use whatever force was necessary to eject the invader of his home and family honor, but it was so natural and probable that any father would do so under such circumstances that it would be unreasonable, indeed foolhardy, for the trespasser not to expect a possible encounter with the father. The law will not give immunity or amelioration from the natural consequences of doing a criminal act in proportion to the secrecy and frequency with which it is committed. The law will not heed Emerson when he says: "I have entered Drake's home before for immoral purposes without discovery. I have reliable information that Drake never enters his daughter's room. I do not therefore expect to meet him on my secret and noiseless visits there at night. If I should happen to meet him, and, contrary to my expectation, he assaults me during my criminal act in his home, the law of self-defense will protect me if I kill him to save my own life, because I am without fault, having done nothing reasonably calculated to bring on a difficulty." The bare statement shows how untenable is the contention based upon the alleged belief of Emerson that he would not encounter Drake that night. It is sufficient to know that he did encounter Drake in his home, where he had a right to be, and where Emerson had no right to be. But it is said the testimony supports a theory that the father had knowledge of his daughter's unchastity, and because of this was so estranged from her as to have abandoned her and lost all concern about her con-



duct and welfare, and that therefore he did not attack defendant in sudden heat and passion upon a new provocation, but in revenge for past wrong, which clothed defendant with the right of self-defense. No reasonable view of the testimony warranted an inference that the father had so abandoned his daughter to a life of shame as not to be naturally moved to ungovernable wrath by witnessing her further pollution. It is true, Emerson testified that he had been making similar visits to the room of Belle Bailey once or twice a month during 1906, but there was no attempt to show that Drake acquiesced in it, or that he was aware of it. Drake undoubtedly knew of the daughter's downfall many years before, and his proud heart was so stung and humiliated by it that he did not entirely forgive her, yet the undisputed testimony is that by his wish she was living under his roof as a member of his household. She kept the house and did the cooking, but there was nothing unusual or degrading in that. Her sister Kittle did the same thing until she married. She ate at his table and entertained her friends in his home. She received support for herself and child from her father's means and had her own pocket money from the farm produce. She had the friendship of her brother and the companionship and love of her innocent child in the old home. The father's grief for her former lapse forbids the thought that he had lost concern for her as his daughter, and the denouement shows that she could have relied on his protection from further dishonor at any cost. We do not hesitate to say that there is nothing in the testimony to warrant an inference that the relation between father and daughter was such that defendant was without fault in bringing about the necessity to kill. At request of appellant, the court instructed the jury: "That the illicit intercourse of one with a female of well-known unchaste character, with her consent, is not such provocation, if her want of chastity be known to her male relatives, as would reduce the homicide of the man by the relative to manslaughter. And one found in intercourse with such woman under such circumstances, if assaulted by her relative under the facts herein supposed to exist, may defend himself from assault to the extent of taking human life, if it be necessary to protect his own life, or to protect his person from serious bodily harm, provided he did nothing more than this to bring on the difficulty, and there was no other safe means of escape, and provided the jury believe a reasonably firm person under the same circumstances would come to the same conclusion." Whether this was a correct charge was not involved in the appeal. Certainly it was as favorable to appellant as he could possibly expect, in so far as his contention rests upon the unchaste character of Belle Bailey, and should be fairly construed as a qualification of the rule stated in the

Alabama case in accordance with appellant's view.

7. It remains to inquire whether the charge based upon the Alabama case was inapplicable for want of evidence tending to show that defendant armed himself with a deadly weapon in anticipation that any one might or would interfere with his purpose, and with intent to take the life of another should it be necessary to save his own in the course of such interference. A brief reference to the testimony will be sufficient to show that this contention is incorrect. Reference has already been made to the fact that Emerson placed his pistol that night on top of his clothes in reach from the side of the bed where he was. Emerson, in explanation of his being armed with a pistol, stated that as sergeant of the county chain gang he usually carried a pistol, and that he had it with him on this occasion, in anticipation that he might come across an escaped convict, and that he did not carry it in anticipation of interference with his visit to Belle Bailey. It was, however, for the jury to determine whether this was a satisfactory explanation of Emerson's having the pistol in Drake's house when not on duty, and of the apparently careful placing of it for quick use. Mary Bailey, in contradiction of her mother, testified that shortly after the homicide that night her mother said in her presence that she heard her father when he got out of bed and begged Emerson to leave. If warned to leave in time to make his escape, did he remain with purpose to shoot his way out later, if necessary? Mention has been made of the witnesses who testified that Emerson, after the homicide, declared that Drake was the best target he ever shot at. Earle Mayfield testified that, two weeks after the homicide, Emerson told him that he had been warned to stay away from Drake's house, and that he knew he ought not to have gone there, and further said: "Mr. Drake appeared in the door again, and then, God damn him, I meant to kill him." Also: "I had the advantage of him, as he was between me and the light." Ralph Drake testified that Belle Bailey told him that night that Allen Emerson had not been there but twice, and that he said he would come if it cost him his life. Furthermore, an issue was raised in the testimony whether Drake fired his pistol at all that night. There was testimony that after careful search in the room and on the ground about the window no bullet marks, other than those made by balls from Emerson's pistol, could be found, and no bullet from Drake's pistol could be found, and there was a conflict of testimony as to whether the pistol of Drake, found by his side with one empty shell, appeared to have been recently discharged. The foregoing certainly constitutes some evidence tending to show that Emerson entered Drake's home for an unlawful purpose, and with the intention to use a deadly weapon

against any one interfering with its accomplishment. If Emerson killed Drake pursuant to such formal design, it was murder.

8. The tenth exception assigns error in charging the jury: "If the evidence fails to show you by the preponderance of the evidence that he was without fault in bringing about the difficulty, then his plea of self-defense fails, and you will say what offense he is guilty of—guilty of murder or guilty of manslaughter." It is contended that such charge was faulty, in eliminating the principle that one may not be without fault in bringing on a difficulty, and yet his right of self-defense survives if he shows an intention and desire to abandon the conflict, and, further, that it eliminates the doctrine that defendant was entitled to an acquittal if there was a reasonable doubt of his guilt, although the evidence fails to establish the plea of self-defense. There was nothing in the testimony calling for a statement of the law touching the right of self-defense when one originally at fault withdraws from the difficulty in good faith; but, conceding there was such testimony, the point was covered by charging appellant's fifth request to charge. So, also, in giving to the jury appellant's fourth request to charge the jury were fully instructed to acquit the accused if there was a reasonable doubt on any material point. *State v. Way*, 38 S. C. 346, 17 S. E. 39; *State v. Way*, 76 S. C. 94, 56 S. E. 653.

9. The twelfth and thirteenth exceptions allege error in the failure to charge appellant's request: "That one is not obliged to retreat if thereby he increases his danger, provided he has not forfeited his right to self-defense in other respects." The court, doubtless, did not deem it necessary to give this charge because he had previously, at request of appellant, instructed the jury that "the law, recognizing the imperfections of human nature, does not require that one charged with homicide should show that there was no other possible means of escape when he struck the fatal blow; but he is only called upon to satisfy the jury that, under all the circumstances by which he was surrounded, he readily believed that there was a necessity for taking the life of his adversary in order to preserve his own, and that, in the opinion of the jury, these circumstances were such as to justify such a belief in the mind of a person of ordinary firmness and reason." The charge given was more favorable to the appellant than the charge refused, and more fully and clearly covered the point sought to be made. The request refused made the right not to retreat under certain circumstances depend upon whether retreat would actually increase the danger, and was coupled with a proviso so extensive as to cloud the point in the mind of the jury; whereas, the charge given only imposed upon the defendant the duty of showing that he believed there was a necessity to kill, which involves the absence of rea-

sonable safe means of escape or retreat, and that the circumstances justified such belief in an ordinary person.

The fourteenth exception imputes error in charging the jury: "If you conclude that the defendant was a trespasser in that house, and the trespassing was such as would be reasonably calculated to precipitate a conflict, then such trespasser could not be said to be without fault, and in that event such trespasser could not invoke the plea of self-defense"—the error assigned being that the charge implied the right on the part of the deceased to assault the defendant with a deadly weapon and seek to kill him because he was a trespasser. This is an incorrect view of the charge. The court did not use the term "trespasser" in the sense of one committing a simple trespass upon real property, as contended by appellant, but a trespasser in the sense disclosed by the evidence, and already discussed, and he left it to the jury to say whether such a trespass was committed by Emerson as was reasonably calculated to precipitate a conflict with the deceased in his home. The charge was correct and in accordance with the views heretofore announced.

After careful consideration of every exception, we find no ground for reversal.

The judgment of the circuit court is therefore affirmed.

(78 S. C. 374)

# DRAWDY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 12, 1907.)

## 1. RAILROADS—ACCIDENTS AT CROSSINGS—VIOLATION OF SIGNAL STATUTE.

Where a railroad fails to comply with the signal statute when approaching a crossing, and a person is killed there by the train, the non-compliance is presumed to be the negligence which caused the death, unless it is shown to have been caused in some other manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1120.]

## 2. SAME—CONTRIBUTORY NEGLIGENCE—NON-SUIT.

A person who knew that a train was approaching a crossing, and had ample opportunity to observe its proximity, speed, and the extreme hardness of attempting to cross in front of it, nevertheless made the attempt and was killed. Held, that he was guilty of contributory negligence warranting a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1026.]

Appeal from Common Pleas Circuit Court of Colleton County; R. O. Purdy, Judge.

Action by W. P. Drawdy, executor of M. A. Drawdy, against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

See 55 S. E. 444.

Griffin & Padgett, Howell & Gruber, and O. C. Tracy, for appellant. W. Huger Fitzsimons, T. M. Mordacai, Peurifoy Bros., and P. A. Wilcox, for respondent.

WOODS, J. M. A. Drawdy was killed by defendant's train while attempting to cross its track at Green Pond, where the public road intersects the railroad; and the plaintiff, as administrator, brought this action to recover damages for his death. The judgment of the circuit court overruling a demurrer to the complaint was affirmed by this court. 75 S. C. 308, 55 S. E. 444. The former appeal decided it was not per se such negligence as will prevent a recovery for personal injuries or death for one to undertake to cross a railroad track at a crossing after he has heard one blast of the whistle of the approaching train. The particulars of the accident as they appeared in the complaint were held not to show on their face gross or willful negligence preventing a recovery under the statute which makes a railroad company liable when it fails to give the statutory signals, unless the person killed or injured was guilty of willful or gross negligence. When the case came on for trial, the circuit judge held the particulars of the accident developed by the evidence on behalf of the plaintiff to show plainly the gross negligence of Drawdy in attempting to cross the track in front of the train contributed to his death as a proximate cause, and granted an order of nonsuit. The appeal is from this order.

The deceased, M. A. Drawdy, and his wife, Elizabeth Drawdy, on their journey from Walterboro to Beaufort, had to stop off and change cars at Green Pond. They had left home without breakfast, and, while waiting for their train, Drawdy left his wife in the station, and went across the track for the purpose of buying lunch at a store nearby. On his return, he was struck and killed by a through train not scheduled to stop at Green Pond. There was evidence that the train was running at a high rate of speed, but not faster than the fast trains usually ran by; and that there was an embankment which for a part of the way would obstruct Drawdy's view of the approaching train on his return; and some of the witnesses testified they heard one sharp blast of the whistle at the usual place about 500 yards distant, but did not hear the continued signal required by the statute. The statute provides that, if the continued signal prescribed is not given, "the corporation shall be liable for all damages caused by the collision, \* \* \* unless it be shown that in addition to mere want of ordinary care, the person injured or the person having charge of his person or property was at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury." The court held in *Strother v. Railroad Co.*, 47 S. C. 381, 25 S. E. 273: "The failure on the part of defendant's servants to ring the bell or sound the whistle in the manner provided by the

statute was negligence per se. When the defendant violates the requirements of the statute as to ringing the bell or sounding the whistle, and a person is injured by its locomotive while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the injury, unless the testimony shows that the injury was caused in some other manner, which was not done in this case." There was evidence that the crossing at Green Pond was a much frequented and traveled place, and plaintiff contended on the authority of *Risinger v. So. Ry. Co.*, 59 S. C. 429, 38 S. E. 1, that, it was for the jury to decide whether the rate of speed at which the train was run by such crossing was negligence. The remarks in the *Risinger Case* were applied to the rate of speed through the town or Leesville, and we do not think there is good ground to extend the principle to an ordinary crossing merely because it is frequented, for the reason that as to mere crossings the statute has prescribed the precautions to be taken.

But the point is not material here, for under the case of *Strother v. Ry. Co.*, supra, noncompliance with the signal statute is presumed to be the negligence which caused personal injury or death of a person injured or killed by the train at a crossing. As there was some evidence from which it might possibly be inferred that the continued signal prescribed by law was not given, the consideration of the appeal from the nonsuit must begin with the assumption that the negligence of the defendant was a proximate cause of the death of Drawdy. The inquiry, then, is whether there was gross negligence on the part of Drawdy contributing to his death as a proximate cause. We think that no other than an affirmative answer is possible under the evidence offered by the plaintiff. Drawdy went across the track to the store of either Welch or Boynton. Those stores were opposite each other on the public road, not more than 30 feet from the track. G. S. Arnett, the only eyewitness of the accident, testified to these facts: He was standing between Boynton's store and the railroad, 15 or 20 feet from the track. Drawdy passed him, going towards Welch's store. A few minutes afterwards the witness heard a sharp blast from the approaching train at about 500 yards distant. It does not appear that he knew where Drawdy was at this moment. After a lapse of 10 or 15 minutes from the time he crossed the track, and after the blast of the whistle, Drawdy passed the witness at a run in the effort to recross the track in advance of the train. From his position when Drawdy passed him the witness saw and heard the train, and knew the impossibility of making a safe crossing. It is manifest from the evidence that Drawdy had heard the signal, knew the train was approaching, and was running a race with it in his anxiety to get to the station. Had he

taken the slightest precaution to use his eyes or ears, he could not have failed to see how near the train was, how rapidly it was running, and how reckless would be the attempt to cross in front of it; for he passed the very spot where all these things were obvious to Arnett. It seems the train was so near when he passed Arnett that he was not able to go 10 steps to the railroad before the locomotive came, for the position of the body indicated he did not have time to get in front of the train. This is Arnett's account in his own language: "Q. You say Mr. Drawdy was running towards the railroad? A. Yes, sir. Q. How far was he from the railroad when he passed you? A. At whatever distance I was, I would say 20 to 25 feet. Q. Eight or ten steps? A. Yes, sir; it was 10 steps. I am sure it was that far. Q. What happened after that? Just describe it in your own way. A. Well, he tried to apparently—As he passed by me in such a rush, I looked around, and seen he was trying to get across the railroad, and the train was so near at hand I watched him, and seen there was going to be a collision; that he could not get across, and closed my eyes for a moment to keep from seeing him, and, as quick as the engine passed, I opened them and stooped down, and looked underneath the cars to see if I could see his feet on the other side, to see if he had got across, and I could not see it, and as quick as the train passed I rushed to the track and looked up it to see if I could see him, and I did see him by the track." On the cross-examination he testified: "Q. While you were standing there you heard a train blow, didn't you? A. Yes, sir. Q. You knew a train was coming, didn't you? A. I was expecting it. Q. You heard it and knew it was coming? A. Yes, sir. Q. Mr. Drawdy at that time was on the south side of you? A. Yes, sir; he passed me. Q. So, when he got to you, if he had any hearing at all, he must have known the train was coming? A. Well, I think so. \* \* \* Q. Tell me why it was that you shut your eyes when you saw him going to that train? A. To keep from seeing a position. Q. Why was it? A. I saw the speed he was going, and the speed the train was going. Q. You knew it was impossible for him to cross first? A. Yes, sir. Q. Are you sure Mr. Drawdy got on the track? A. Yes, sir. Q. Didn't you shut your eyes? A. I don't know whether he got on the track or not. I seen the way he was going, and that he was going to try to get across. Q. Didn't you see he couldn't get on the track in

front of that engine? A. I didn't know whether he was going on or not. I seen there was going to be a collision."

In *Bamberg v. Railroad Co.*, 72 S. C. 393, 51 S. E. 989, "the plaintiff testified she had already crossed the track 30 or 40 yards from the place where she was injured; and there looked for the train, but did not see it, walked rapidly on, and, hearing no whistle or bell, undertook to cross a second time without looking again. Under this proof, it was for the jury to say whether the plaintiff's failure to look and listen constituted contributory negligence." But in that case the court says: "No doubt the failure to look and listen before going on the railroad track under some circumstances would be held to admit of no other inference than that the person injured was guilty of contributory negligence, and in such cases the court would grant a nonsuit on the principle announced in *Jarrell v. Railway Co.*, 58 S. C. 491, 36 S. E. 910. This case is clearly of that character. Its facts are not even analogous to those in the *Bamberg Case*, and are very different from those in *Osteen v. Railroad Co.*, 76 S. C. 368, 57 S. E. 196, where the verdict was allowed to stand only because of a doubt as to whether the plaintiff's negligence was a proximate cause of the injury. Here Drawdy knew the train was approaching, and very near the crossing. He had ample opportunity to observe how near it was, and its speed; and, if he had observed it at all, he would have seen the extreme hardihood of attempting to cross in front of it. The fact made out a case of gross negligence by the deceased as the proximate cause of the accident at least as strong as was made in *Barber v. Railroad Co.*, 34 S. C. 451, 13 S. E. 630, where the plaintiff was nonsuited because he undertook to cross in front of a train which he knew to be approaching and near at hand. The continued statutory signal could not have given Drawdy more complete warning than he had; and therefore it was not the failure to give the signal, but the neglect of the deceased to heed the notice he had of the near approach of the train, that was the proximate cause of his death. The case is an illustration of that mysterious mental condition into which men sometimes fall, where the facts present to the senses the most urgent alarm of danger, and yet the mind either fails to receive the impression, or from confusion loses control of itself and of the body.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 43)

## VENNING v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 31, 1907.)

## 1. COMMERCE—INTERSTATE COMMERCE—CONNECTING CARRIERS.

24 St. at Large, p. 1, makes each carrier the agent of its connecting carrier from whom it receives freight, and makes each liable for any freight lost, damaged, or destroyed by the connecting carrier. *Held*, an infringement of the interstate commerce clause of the federal Constitution.

## 2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

24 St. at Large, p. 1, making each carrier the agent of its connecting carrier from whom it receives freight, and liable for neglect of its connecting carrier, is not a violation of Const. U. S. Amend. 14, or Const. S. C. art. 1, § 5, as denying to the carrier the equal protection of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 702.]

## 3. CARRIERS—LOSS OR DAMAGE TO FREIGHT.

24 St. at Large, p. 81, providing a penalty for failure to pay loss or damage to freight in a given time, applies only to loss or damage to freight occurring on line of carrier sued in the state.

## 4. SAME—INFORMATION AS TO LOSS.

24 St. at Large, p. 81, § 2, providing for the recovery of loss or damage to freight, does not impose on one connecting carrier liability for the default of another, unless such carrier obtains and gives information, or uses due diligence, as provided by Civ. Code 1902, § 1710, by furnishing information as to when the loss or damage occurred.

Appeal from Common Pleas Circuit Court of Clarendon County.

Action by S. R. Venning against the Atlantic Coast Line Railroad Company. From circuit judgment affirming judgment of the magistrate, defendant appeals. Reversed.

The following are the statutes referred to and considered in the opinion:

Civ. Code 1902, § 1710:

"When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: Provided, that if such initial,

terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be excused from liability under this section."

24 St. at Large, p. 1:

"An act to further define connecting lines of common carriers and to fix their liabilities.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that all common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this State, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them.

"Sec. 2. For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the losses, damage or injury sustained, together with costs of suit.

"Sec. 3. That this act shall take effect immediately upon its approval by the Gov-

ernor, and all acts and parts of acts inconsistent with this act are hereby repealed.

"Approved the 13th day of May, A. D. 1903."

24 St. at Large, p. 81:

"An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss or damage to freight.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that from and after the passage of this act, all common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading: Provided, the rate therein stipulated be in conformity with the classification and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this state, and with those of the railroad commissioners of this state, in case of shipments wholly within this state; by which classification and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment and tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications and rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any

court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902.

"Sec. 3. That any common carrier, upon complying with the provisions of this act, shall have all the rights and remedies herein provided for against the common carrier from which it received the freight in question.

"Sec. 4. That causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for, may be united in the same complaint.

"Sec. 5. That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

"Approved the 23d day of February, A. D. 1903."

P. A. Willcox, Henry E. Davis, and Wilson & Du Rant, for appellant. W. C. Davis, for respondent.

WOODS, J. The Belknap Hardware Company, in January, 1905, delivered to the Southern Railway Company at Louisville, Ky., a steel range and warming closet, consigned to the plaintiff at Manning, S. C. The defendant, Atlantic Coast Line Railroad Company, the terminal carrier, delivered to the plaintiff the warming closet only, and this action was brought in a magistrate's court to recover \$21 for failure to deliver the range and \$50, the statutory penalty for failing to adjust and pay the claim within 90 days. The allegation of the complaint is that the Southern Railway Company undertook carriage and delivery of the goods to Manning, S. C., for itself and the defendant, its connecting line. But the bill of lading expressly provides: "No carrier shall be liable for loss or damage not occurring on its portion of the route." The defendant's clerk, whose duty it was to check the contents of cars turned over by the Southern Railway to the Atlantic Coast Line Railroad at Columbia, testified the range was marked short on his book and was never received by the Atlantic Coast Line Railroad. The magistrate rendered judgment in favor of the plaintiff for \$21 for failing to adjust and pay the claim in 90 days, and on appeal the circuit court affirmed the judgment.

1. It was held in *Willett v. Railway Co.*, 66 S. C. 477, 45 S. E. 93, that when property received by the initial carrier in good condition is delivered by the terminal carrier in damaged condition, the burden is on the

terminal carrier to show the damage did not occur on its own line. The same principle was held to apply to the loss of a part of a car load of goods in *Walker v. Railway Co.*, 76 S. C. 308, 56 S. E. 952, and in *Bradley v. Railway Co.* (recently filed) 57 S. E. 1101, it was held to extend to the loss of a part of several articles shipped under one bill of lading. Applying this last case, the defendant's delivery of the warming closet cast upon it the burden of showing that it had never received the range. The credibility of the testimony that the range had not come into the possession of the defendant was for the magistrate and the circuit court to pass on, and, had the record disclosed that this evidence was disbelieved on any reasonable ground, the judgment would be affirmed, because this court could not disturb a finding of fact that the presumption of loss by the terminal carrier had not been refuted by credible testimony. The record makes it clear, however, the judgment was not upon this ground, but on the statute of 1903 (24 St. at Large, p. 1), under which the defendant as one of the connecting carriers would be liable without respect to whether the range was lost on its line or on that of another carrier. If the act of 1903 is a valid statute, the evidence that the range was never delivered to the defendant carrier would be immaterial, and it was no doubt so regarded by the circuit court. The vital question therefore is whether this act of May, 1903, must be held unconstitutional as an attempt to regulate interstate commerce. In *Skipper v. S. A. L. Ry. Co.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, an exception raising the question of the constitutionality of this act was overruled, but the main question considered in that case was the constitutionality of sections 1710 and 2176 of the Civil Code of 1902. We propose now to consider the question of constitutionality of the act of May, 1903, as if it had not been heretofore made.

2. The statute was intended to make radical changes in the law as to the liability of carriers for losses or damage occurring on connecting lines. The extent of the changes contemplated will be made evident by viewing the state of the law as it appears from the adjudications of the Supreme Court of the United States and the Supreme Court of this state, with respect to the relations of connecting lines with each other, and to the owners of goods in course of transportation, and with respect to the right of such carriers to contract, before the enactment of the statute, in contrast with the law as it would be under the statute. The Supreme Court of the United States held, in *Michigan Central R. R. Co. v. Mineral S. M. Co.*, 83 U. S. 318, 21 L. Ed. 297, that, in the absence of a contract to the contrary, the liability of a common carrier ended with its prompt delivery of the property in good order to the next con-

necting carrier. This rule was recognized and followed by the same court in *Railroad Co. v. Pratt*, 89 U. S. 129, 22 L. Ed. 827, and *St. Louis Ins. Co. v. S. L. R. R. Co.*, 104 U. S. 146, 26 L. Ed. 679, and other cases. The law was held to be the same in this state in *Piedmont, etc., R. R. Co. v. C. & G. R. R. Co.*, 19 S. C. 353; *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; *Hill v. Railroad Co.*, 43 S. C. 461, 21 S. E. 337. Under these cases it is obvious a stipulation in the bill of lading, limiting the liability of each carrier to its own line, would be a reasonable limitation. In *Lewis v. Railroad Co.*, 25 S. C. 249, it was held the initial carrier could not without special authority make a contract binding upon the terminal carrier. Terminal and intermediate carriers were held entitled to the benefit of any reasonable stipulations in the bill of lading limiting their liability, in *Harby v. So. Ry. Co.*, 75 S. C. 321, 55 S. E. 760.

The act of 1882 (Civ. Code 1902, § 2176) provided the initial carrier should be liable for loss or damage to goods until it discharged itself by showing a written receipt from the carrier to which it was its duty to deliver it; and, when the initial carrier so discharged itself, the successive connecting carriers were made liable in the like manner, with the right to discharge themselves by like written receipt from the next carrier. The act further provided that any carrier by willfully failing or refusing to produce the written receipt of the next carrier, on the demand of any one interested, lost the benefit of it in any action brought against the carrier for the loss or damage of the property. This act was held constitutional in *Skipper v. S. A. L. Ry.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, and there is no ground to doubt the soundness of that conclusion. The act did nothing more than relieve persons interested in property lost or damaged in transit of intolerable hardship, by fixing the kind of evidence a carrier shown to have been in actual possession of the property should take, preserve, and produce that it had been properly delivered to another carrier. It merely made a rule of evidence less drastic than that which was held to be reasonable and valid in *Richmond, etc., Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 835, 42 L. Ed. 759. The section of the Virginia Code under consideration in that case was: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, \* \* \* if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satis-

factory proof to the consignor that the loss or injury did not occur while the thing was in his charge." In holding the statute to be the legitimate exercise by the state of Virginia of the power to determine the form in which contracts may be proved, not amounting to a regulation of interstate commerce, the court says, at page 314 of 169 U. S., page 336 of 18 Sup. Ct. (42 L. Ed. 759): "The inadequacy of the bill of lading to protect the carrier from liability beyond its own line resulted, it is true, from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument, upon which it is asserted that error was committed by the court below, but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition."

The act of May, 1903, now under consideration, is entirely different in scope from the Virginia statute and our statute of 1882. It goes far beyond prescribing a rule of evidence or the form of contract. By it the General Assembly has undertaken to make a complete change in the legal relations of connecting carriers to each other and to the owners of goods in transit, and in the right of such carriers to contract. The act provides that all carriers which recognize, acquiesce in, or act upon a contract for through shipment shall be statutory connecting carriers, and, as such, agents of each other with respect to the matter of transportation, and they shall be under contract each with all the others, and with the shipper, owner, and consignee, for safe and speedy transportation of the property from the point of shipment to destination. Any through bill of lading, issued by any one of such carriers, showing that any one of them received the property for through transportation, is made prima facie evidence of the agency of each other and all the others, and of the contract of each and all of such carriers with each other and with the owner to transport the property with safety and speed from the point of shipment to destination; and against this prima facie evidence of agency and contract the express stipulations of the parties themselves are made unavailing. In consonance with these provisions, it is further enacted, the person sustaining damage or loss shall have the right of recovery against any one of the connecting carriers he may choose to

sue; the liability being unaffected by proof that the property had been lost or damaged on another line, or had never come into the possession of the carrier sued. The carrier singled out by the shipper, owner, or consignee is in turn allowed to recover from the carrier through whose negligence the loss, damage, or injury was sustained, together with costs.

In *Central Ry. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, the Supreme Court of the United States held a statute of Georgia unconstitutional as to interstate commerce, which imposed upon the initial or any connecting carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established. In *Skipper v. Railway Co.*, supra, this court held section 1710 of Civil Code constitutional. Pointing out the particulars in which that section differed from the Georgia statute, which had been declared unconstitutional in *Central Ry. Co. v. Murphey*, supra, Mr. Justice Jones uses this language: "The Georgia statute made the initial carrier absolutely liable if it failed within 30 days after application to inform the shipper in writing when, where, how, and by what carrier the freight was lost or damaged, together with the names of witnesses to establish such facts; whereas, our statute (section 1710) provides that the carrier shall be excused from liability upon proof that, by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line, except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line, and it could not after due diligence comply with the statute." The act of 1903, now under consideration, goes as far beyond the Georgia statute as section 1710 fell behind it. The Georgia statute was held to be unconstitutional, in that it made one connecting carrier liable for the delict of another, unless it exempted itself by giving to the party interested information within 30 days as to the particulars of the loss. The requirement that the carrier should obtain and give this information was, as the court held, so onerous as to amount to an illegal attempt to regulate interstate commerce. Still, under the Georgia statute, the carrier had the chance to save itself by giving the information required. In our statute there is no means of escape for



a carrier which recognizes, acquiesces in, or acts upon the contract of the initial carrier for through shipment, however innocent from liability for the breach of duty of a connecting carrier.

The far-reaching character of the attempt to regulate interstate commerce will be still more apparent on viewing another feature of the statute. The provision that the carrier selected for liability by the owner of the goods should have the right of recovery from the carrier actually in default, to compensate for its own liability to the owner, would be of no avail against the real defaulting carrier operating entirely outside the state. For the state law can have no extraterritorial effect. A railroad operating in Kentucky cannot be made the agent of a railroad in South Carolina, or liable for its default, or subject to a suit by the South Carolina railroad for breach of duty to a shipper, by authority of a South Carolina statute. Therefore, if this statute is given effect, a carrier operating on an interstate line partly in this state, upon receiving freight in Georgia upon a connecting line, under a bill of lading issued by a Kentucky railroad, would have to pay for the loss or damage arising from the negligence of the Kentucky road, without any recourse against the defaulting road. Obviously, the practical result would be that the loss and damage on all through shipments from the entire country into South Carolina would fall on the interstate roads coming into this state, to the exemption of all connecting roads for their own defaults. On principle, as well as under the authority of *Central R. R. Co. v. Murphey*, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional.

The defendant submits that the act is obnoxious to the fourteenth amendment of the Constitution of the United States and section 5, art. 1, of the Constitution of South Carolina, in that it denies to common carriers the equal protection of the law, and should be declared void even as to the transportation of goods by connecting lines entirely within the state. The argument in support of this proposition is strong, but we do not think it is conclusive. While the lawmaking branch of the state government has no power to require persons or corporations to make contracts, it has in general the power to regulate the business of public transportation within its borders. Considered with respect to such business, in this act, the General Assembly has in effect forbidden a common carrier to recognize, acquiesce in, or act upon a through contract of shipment made by a shipper, owner, or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier. But the carrier may avoid this liability for the default of another by refusing to recognize, acquiesce in, or act upon the through contract of shipment. A carrier, it

is true, is required by section 2177 of the Civil Code of 1902 to forward freight sent on another road "according to the directions contained thereon or accompanying the same," and we think, aside from this statute, the common law imposes the obligation upon the carrier to receive and forward goods tendered by another carrier, just as if they were tendered by the owner. But in doing so it need not recognize, acquiesce in, or act upon the through bill of lading. It may receive the goods, give its own receipt, charge its own freight, and in all respects repudiate or disregard the through bill of lading. By thus refusing to recognize, acquiesce in, or act upon the through bill of lading, it would avoid liability for the default of another. It cannot therefore be said that the statute denies to the carrier the right to prosecute its business, except upon condition that it shall become liable for the default of others.

3. It remains to consider whether the judgment of the circuit court in this case can be sustained under section 1710 of the Civil Code of 1902, or under the act of February, 1903 (24 St. at Large, p. 81). As to section 1710, it is only necessary to refer to the case of *Cave v. Railway Co.*, 53 S. C. 498, 31 S. E. 359, where it was held no relief could be given under this section unless the complaint alleged shipment under a contract providing that the responsibility of each carrier should cease upon the delivery of the freight to a connecting carrier "in good order." There is no allegation of the kind in this case. On the contrary, it is evident from the complaint the action was intended to rest on the invalidity, under the act of May, 1903 (24 St. at Large, p. 1), of such a contract as section 1710 contemplates. Section 1710 therefore can have no application.

We come, then, to the act of 1903 (24 St. at Large, p. 81), which it is convenient to designate as the act of February, 1903, to distinguish it from the statute already considered, and held unconstitutional, passed in May, 1903 (24 St. at Large, p. 1). We are not concerned with the first section, which relates to freight charges and the duty of the carrier to deliver goods on payment of the charges after they have reached destination. The section of main importance here is the second, which provides for the recovery for loss of or damage to freight, and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it as provided in section 1710 of the Civil Code of 1902. We do not think it can be so construed. The main enactment as to the recovery of damages and penalties thus begins in section 2: "That every claim for loss of, or damage

to property *while in the possession of such common carrier* shall be adjusted and paid within forty days," etc. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for, to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier. It is true there is a proviso at the end of this section "that no common carrier shall be liable under this act for property which never came into its possession," if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina of 1902. But as the body of the act does not make the carrier liable at all "for goods which never came into its possession," a proviso which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

4. The rule is that all parts of a statute, including provisos, are to be construed together, and effect given if possible to all. But it is contrary to reason, as well as authority, to extend by implication a proviso to cover that which is opposed to the express language of the main enactment. *Southgate v. Goldthwaite*, 1 Bailey, 367; *U. S. v. Dickson*, 15

*Pet. (U. S.)* 141, 10 L. Ed. 639; *The Irresistible*, 7 Wheat. (U. S.) 551, 5 L. Ed. 520; 26 Am. & Eng. Enc. 681; *Endlich on Statutes*, §§ 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the proviso of section 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss, occurring while the goods are in its own possession. It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable under the act of February, 1903, for goods lost by a connecting carrier because it failed to obtain and give information of the kind required in cases falling under that act, or to use due diligence to obtain such information.

5. This penalty act of February will apply to the case if the finding on the new trial should be that the loss occurred on the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the Constitution of the United States. That question is discussed and decided against the defendant's contention in *Charles v. A. C. L. R. R. Co.* (recently filed) 58 S. E. 927.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the magistrate's court for a new trial.

(78 S. C. 33)

**LEWIS v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of South Carolina. Aug. 31, 1907.)

**APPEAL—REVERSAL—REJECTION OF EVIDENCE—GROUNDS OF DECISION—VOID STATUTE.**

A judgment of the circuit court affirming a judgment of a magistrate, based on 24 St. at Large, p. 1, rendering a connecting carrier liable for damages to freight suffered while on the line of another carrier, will be reversed; such act having been held a violation of the interstate commerce clause of the federal Constitution.

Appeal from Common Pleas Circuit Court of Clarendon County.

Action by W. M. Lewis against the Atlantic Coast Line Railroad Company. From an order of the circuit court affirming a judgment of a magistrate, defendant appeals. Reversed.

P. A. Willcox, Henry E. Davis, and Wilson & Du Rant, for appellant. W. O. Davis, for respondent.

**WOODS, J.** In July, 1904, Nordyke & Marmon Company delivered to the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, at Indianapolis, Ind., a corn mill, standard shoe and hopper, box iron castings, crated iron gear wheel, crated iron shaft, consigned to the plaintiff at Alcolu, S. C. The goods reached the defendant over the Atlantic Coast Line Railroad, the terminal carrier, in a damaged condition. Thereafter plaintiff brought this action in a magistrate's court against the terminal company for \$11 damages and the statutory penalty of \$50 for failure to adjust and pay the claim within 90 days. The judgment of the magistrate for the entire amount claimed was affirmed by the circuit court.

The complaint alleges a contract of through carriage with the Cleveland, Cincinnati, Chicago & St. Louis Railroad, by which it undertook for itself and its connecting lines, including the defendant, to transport the goods to destination; and it further alleges that all the connecting carriers received the goods and recognized, acquiesced in, and acted on the contract for through carriage. The plaintiff proved the goods were damaged when received. The bill of lading was introduced in evidence, but does not appear in the record. To rebut the presumption of damage by the terminal carrier, the defendant's receiving clerk testified the goods came into the possession of the defendant from the Chesapeake & Ohio Railroad Company at Richmond, Va., in a damaged condition. The credibility of this evidence was for the magistrate and circuit judge to pass on, and, if the record disclosed this evidence had been rejected on any reasonable ground, the judgment would be affirmed, because this court could not disturb the finding of fact that the presumption of damage by the terminal carrier had not been rebutted by credible testimony. The record

makes it clear, however, the cause was not decided on this ground, but on the statute of May, 1903 (24 St. at Large, p. 1), under which the defendant, as one of the connecting carriers, would be liable without respect to whether the damage to the goods occurred on its own line or on that of another carrier. If the act of 1903 is a valid statute, the evidence that the property was damaged on another line would be immaterial, and the circuit court no doubt so regarded it in holding the statute constitutional.

This case was heard in connection with *Venning v. Atlantic Coast Line Railway*, 58 S. E. 983, and the decision in that case disposes of all the questions arising in this.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the magistrate's court for a new trial.

(78 S. C. 124)

**KENNEDY et al. v. CITY OF GREENVILLE.**

(Supreme Court of South Carolina. Aug. 21, 1907. On Rehearing, Sept. 10, 1907.)

**1. NONSUIT—GROUNDS—ERRONEOUS ADMISSION OF EVIDENCE.**

It is error to grant a nonsuit on the ground that the trial court committed error in admission of evidence, or that on a previous trial of the case a judge erroneously granted a new trial after verdict.

**2. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.**

That a pedestrian knew of a defect in a street does not raise an inference, as a matter of law, that she was guilty of contributory negligence or assumed the risk of passing over it, unless the danger was so obvious that persons of ordinary prudence would not have attempted to use the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, §§ 1745-1757.]

Appeal from Common Pleas Circuit Court of Greenville County; Aldrich, Judge.

Action by Julia M. Kennedy and R. H. Kennedy against the city of Greenville. From an order granting a nonsuit, plaintiffs appeal. Reversed.

J. J. McSwain, for appellants. Wm. G. Sirrine, for respondent.

**POPE, C. J.** This action was brought by Julia M. Kennedy, to be hereafter designated as plaintiff, and her husband, R. H. Kennedy, against the city of Greenville, a municipal corporation of this state, to recover damages for personal injuries alleged to have been sustained by the plaintiff, by reason of the defective condition and mismanagement of its streets. It appears that on and before April 28, 1905, the defendant had been engaged in the installation of sewers in the street in front of plaintiff's residence, and for the purpose had opened a trench or excavation near the center of the street from six to eight feet deep, two to three feet wide, and several hundred yards long. All of the dirt was thrown to the south side, the side on

which plaintiff's residence was, thus throwing travel to the north side; the space left on the south side being too narrow for the passage of vehicles. This excavation interfered materially with plaintiff, who was accustomed to cross the street immediately in front of her house, for the purpose of attending services at the Episcopal Church, she being organist, and according to her testimony an agent of the defendant, at her request, moved the dirt and made a crossing, utilizing for the purpose a table top furnished by her. Over the objection of the defendant, it was sought to be shown that this crossing was used by the public generally, with the consent and acquiescence of the defendant. The acts of negligence alleged were failure to rope or rail the excavation and to properly light it so as to warn travelers of its exact location. On the night of the 26th of April, 1905, plaintiff having been out, she and her daughter returned some time between 12 and 1 o'clock. The carriage stopped in front of the residence, and the daughter alighted. Before the plaintiff could get out, however, the horses, being restless, moved up several steps, and, according to the allegations of the complaint, the night being very dark and rainy, the plaintiff lost her bearings and in moving forward, feeling with her feet for the crossing, she fell into the trench and was seriously injured. The case first came on for trial before Judge Dantzler and a jury and resulted in a verdict for the defendant. On motion of the plaintiff, Judge Dantzler granted a new trial on the ground that he had charged upon the facts. It was again heard at the March, 1906, term of court for Greenville county, Judge Aldrich presiding, and after the introduction of plaintiff's testimony, on the motion of the defendant, a nonsuit was granted on the ground that the only inference to be drawn from the evidence was that the plaintiff contributed to her injury by her negligence. The plaintiff appealed.

1. The controlling question in the case is whether or not the presiding judge erred in granting a nonsuit. The respondent, in addition to the grounds on which the motion was granted, seeks to have it sustained on the ground that it was error on the part of Judge Dantzler to grant a new trial after judgment in the first case, and also on the ground of the admission of incompetent evidence by Judge Aldrich. It is well settled that a nonsuit cannot be sustained on grounds additional to those on which it was granted. *Graham v. Seignious*, 53 S. C. 132, 31 S. E. 51; *Sumner v. Harrison*, 54 S. C. 353, 32 S. E. 572; *Norris v. Insurance Co.*, 55 S. C. 450, 53 S. E. 566, 74 Am. St. Rep. 765; *Lewis v. Hinson*, 64 S. C. 580, 43 S. E. 15. We think, however, that the errors alleged in granting a new trial can hardly be said to constitute a ground on which a motion for a nonsuit can be sustained, for the reason that it would require one circuit judge to pass upon the ac-

tion of another. Therefore, if the matter of granting a new trial can be considered at all, it must be regarded as separate from the appeal from the nonsuit. Defendant seeks to have the question considered under subdivision 3 of section 11 of the Code of Civil Procedure of 1902, which provides: That on an appeal from "a final order affecting a substantial right made in any special proceeding, or upon a summary application in any action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from," the court shall have jurisdiction. It does not require very close scrutiny to reach the conclusion that defendant is in error as to this contention. This section was intended to apply only to collateral proceedings arising after judgment. As was said in *Cureton v. Hutchinson*, 3 S. C. 606, this subdivision was intended to provide a remedy where matters, either of an independent nature or collateral to an action, arise upon a special proceeding, and where matters arise upon a summary proceeding in an action after judgment. The idea that this section was intended to apply to motions for new trials is negated by a special provision in subdivision 2 on this identical subject. We have endeavored to show in the recent case of *Lampley v. Ry.* (July 10, 1907, 57 S. E. 1104), that an appeal from such an order will lie only in those cases in which, if this court find that there was no error committed in granting a new trial, it can then render judgment absolute. The question here, however, is somewhat different. In this cause, we are met by the query as to the power of the court to consider the granting of a new trial on an appeal from a motion granting a nonsuit in that new trial. Whatever might be the rule when a case is decided on its merits, we are of the opinion that in the case now before us the motion cannot be considered. A decision as to the propriety of the nonsuit is the important matter. If the conclusion is reached that the nonsuit was properly granted, then that is an end of the matter. On the contrary, if the nonsuit should not have been granted, then the appeal as to the granting of a new trial is fraught with all the disadvantages set forth in the case of *Lampley v. Railway*, supra. If the court should decide that the new trial was properly granted, the presumption always being that it was, then, as was said in *Caston v. Brock*, 14 S. C. 111: "The party allowed to appeal without restrictions from such order would have two chances—he may contend for his verdict that has been set aside in the appellate court, and, on being dismissed from that court without relief, may return to the circuit and have a trial de novo of the whole case." Hence we hold that the motion for a nonsuit must stand or fall upon the grounds set forth in the motion.

2. These grounds, several in number, raise

only the question as to whether or not the only inference to be drawn from the testimony was that the plaintiff was guilty of contributory negligence. Defendant contends that plaintiff had knowledge of the condition of the street, and therefore in attempting to cross it she assumed the risk. Mere knowledge of defects will not of itself give rise to the conclusion that the only inference is that the plaintiff was negligent, unless it is made to appear that the danger, likely to result therefrom, was so obvious that no person of ordinary prudence would have attempted to cross. In the case of *Mosheuevel v. District of Columbia*, 191 U. S. 247, 257, 24 Sup. Ct. 57, 59, 48 L. Ed. 170, Justice White of the Supreme Court of the United States discussed this question at length. There it was contended that, where a defect existed in a highway, and was known to one who elected to use such highway, such election, even if it were justified by the dictates of ordinary prudence, nevertheless must be held as a matter of law to entail the consequence of a want of ordinary care and prudence. The court said: "We are of the opinion, however, that the rule as thus contended for is unfounded in reason and unsupported by the weight of authority. When analyzed, the proposition comes to this: That no person can, as a matter of law, without assuming all of the risks, use the streets of a municipality where he knows of a defect therein, even although it be that, in the exercise of a sound judgment, it might be deemed that with ordinary care and prudence the street could be used with safety. The result of admitting the doctrine would be to hold that all persons in making use of the public streets assumed all risks possible to arise from every known defect or danger." Judge White quotes many authorities to sustain this view, and we think we cannot do better than to incorporate some of them here. In *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219, the action was brought to recover from the owner of a building for damages occasioned to one who had fallen on a plank sidewalk covered with ice and snow, on his way out of the building. The proposition was that the injured person knew of the snow and ice on the walk, and therefore, by electing to use it, assumed the risk, and was, as a matter of law, conclusively presumed to be guilty of contributory negligence. In reviewing this contention, the court said: "The rulings of the justice presiding at the trial all rest upon the proposition that knowledge on the part of the plaintiff, at the time he entered upon the sidewalk, of the accumulation of snow and ice and of the unsafe condition of the sidewalk resulting therefrom, is in law conclusive evidence that he was not in the exercise of due care in attempting to pass over the sidewalk. *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, was an action by a tenant of a part of a

building against the landlord to recover for injuries received in consequence of the giving way of one of the steps of a staircase used in common by the tenants, for the safe condition of which the landlord was responsible, and it was held: 'That the fact, if proved, that the plaintiff had previous knowledge that the stairs were in a dangerous condition, would not be conclusive evidence that the plaintiff was not in the exercise of due care'—quoting a number of authorities. In *Mahoney v. Metropolitan Ry.*, 104 Mass. 73, it was held 'that the fact that the plaintiff saw the obstruction created by the defendant, and knew its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. A person, who in the lawful use of a highway, meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all of the circumstances surrounding the party. In the case at bar, if the plaintiff had reasonable cause to believe that he could pass the obstruction in safety, and used reasonable care in that attempt, he is entitled to recover.' \* \* \* We think the law in a case of this kind is that, only when the nature of the obstruction is such that the court can say, that it is not consistent with reasonable prudence and care that any person having knowledge of the obstruction should proceed to pass over it in the manner attempted, can the court rule that such knowledge prevents the plaintiff from maintaining his action. \* \* \*" In *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43, the damage sued for was occasioned by a fall sustained in attempting to pass over an embankment of snow and ice which had accumulated upon the sidewalk. The defendant requested the court, in effect, to charge the jury that if the plaintiff saw the obstruction, and chose to attempt to pass over it, and not go around it, she could not recover. The action of the trial judge in refusing to give such instruction was approved by the Court of Appeals; the court saying: "The charge of the judge sufficiently laid down the rule of law as to plaintiff's contributory negligence, and it would not have been proper for the judge to charge, as matter of law, that it was negligence for the plaintiff, under the circumstances disclosed in this case, to attempt to pass over the embankment"—quoting authorities. In *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416, the court uses this language: "These instructions were properly refused. They announce, in substance, the proposition, that, where a party goes upon a sidewalk which he knows to be in a dangerous condition, he is thereby guilty of negligence per se. Such is not the law." Again, in *Bloomington v. Chamberlain*, 104 Ill. 268, an instruction was held to be erroneous which told the jury that "the law required

the plaintiff to go out in the street, and pass around the walk, if she knew it was defective." In *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473, the court said: "It is not true that one who knows of a defect in a walk is necessarily guilty of negligence if he attempt to pass over it. Much depends upon the character of the defect, the occasion for passing over it, and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety by the exercise of ordinary care, and he is justified as a reasonably prudent man in holding that belief, he is not negligent in attempting to pass over it in an ordinarily careful and prudent manner." There are numerous other cases to the same effect, but we deem these sufficient to show the general trend of the decisions, as well as the rule they establish.

The rule thus laid down is the only one entirely consistent with reason. To hold that the mere use of a defective street or highway with knowledge of such defect is negligence would, in many cases, work great hardship and inconvenience. We think it can be legitimately said that, in the majority of cases where defects occur in a highway or street, the continued use of it is not so dangerous that it in itself would amount to negligence on the part of the user. In such cases the use may be entirely safe and free from danger if due care and prudence is exercised. What is due care under the circumstances of each case must be a question for the jury. Was the alleged defect in the case at bar so dangerous that no person of ordinary care and prudence would have attempted to use it, and did such use give rise to the inference of negligence on the part of the plaintiff? It was in evidence that this crossing was put there by one Williman, overseer of the workmen digging the trench, and that it had been used continuously by the plaintiff and the public generally. Plaintiff had used it very frequently and just a few hours before had crossed there in order to enter the carriage in which she was riding. It requires no vivid imagination to conceive by the use of ordinary care, the crossing in question could be safely used. The

length of it was only between two and three feet, and the width was over eighteen inches. The very idea that it was so dangerous that no person of ordinary prudence would use it is negatived by the fact that scores of persons had used it both in the daytime and at night. Whether the plaintiff in this case exercised due care under all of the circumstances of the case is a question of fact for the jury, unless there is no evidence going to show such care on her part. The statute under which the action was brought requires the plaintiff to show that she was not negligent. This must be alleged in the complaint as one of the material allegations thereof. *Walker v. Chester Co.*, 40 S. C. 342, 18 S. E. 936. Then if there is any evidence going to sustain it, a nonsuit would be improper. *Blakely v. Laurens Co.*, 55 S. C. 422, 33 S. E. 508. In this case there was such evidence. The plaintiff testified that as she got out of the carriage she felt her way over the ground very cautiously with her feet; that she was always a careful person. This was some evidence going to establish this allegation of the complaint. It certainly should have been passed upon by the jury. It was for that tribunal alone to say whether, under the circumstances, the plaintiff did exercise due care. Likewise, it was its province to say whether or not the crossing in question was used by the public generally with the consent and acquiescence of the defendant. It is true that the evidence on this point was objected to, but it was admitted, and on considering the nonsuit this court will not pass on its competency. *Lewis v. Hinson*, 64 S. C. 580, 43 S. E. 15. Hence the motion for nonsuit should have been refused.

It is the judgment of this court that the judgment of the circuit court be reversed.

#### On Rehearing.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has been overlooked or disregarded.

It is therefore ordered that the petition for a rehearing be dismissed and that the order heretofore granted staying the remittitur be revoked.

(145 N. C. 168)

**BLAND et al. v. BEASLEY et al.**

(Supreme Court of North Carolina. Oct. 10, 1907.)

**1. EJECTMENT—RIGHT OF ACTION—DEFENSES.**

The rule that under St. 32 Hen. VIII (Code 1883, § 1333), making void a conveyance of premises in the adverse possession of another, an action of ejectment would not lie, was modified by Code 1883, § 177, now Revisal 1905, § 400, providing that a grantee may maintain an action in his own name, notwithstanding his conveyance or that of one under whom he claims is void by reason of the premises having been in the adverse possession of another at the time of conveyance, and section 1333 was expressly repealed by Pub. Laws 1899, p. 138, c. 42.

**2. ADVERSE POSSESSION—NECESSITY OF ACTUAL POSSESSION.**

Where, in ejectment, the legal title is shown to be in plaintiff, and neither party is in possession, the law carries the seisin to plaintiff within Revisal 1905, § 383, barring an action for recovery of land, unless it appear that plaintiff or those under whom he claims were "seised or possessed of the premises" within 20 years before bringing the action.

**3. SAME—WHAT CONSTITUTES.**

Possession for seven years under color of title, to bar the entry of one shown to be or to have been the real owner, must be continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

**4. SAME—PRESUMPTIONS.**

Under the express provisions of Revisal 1905, § 386, the person establishing a legal title to premises in ejectment is presumed to have been possessed within the time required by law, and the occupation of the premises by any other person to have been under and in subordination to the legal title, unless such possession is shown to have been adverse.

Appeal from Superior Court, Pender County; Long, Judge.

Ejectment by J. T. Bland and others against L. A. Beasley and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

L. A. Beasley, H. L. Stevens, C. D. Weeks, and Shepherd & Shepherd, for appellants. J. D. Kerr, Jas. O. Carr, Simmons, Ward & Allen, E. K. Bryan, and C. E. McCullen, for appellees.

**CLARK, C. J.** Action to recover land. The defendants excepted because the court refused to charge the jury, as prayed, that, the plaintiffs having failed to show actual possession in themselves or in those under whom they claim within 20 years before this action was begun, they cannot recover. The plaintiffs acquired their title within said period, the defendant being then in possession. An action of ejectment could not have been maintained under St. 32 Hen. VIII (Code 1883, § 1333), which made a conveyance under such circumstances void, but that rule was modified by Code 1883, § 177, now Revisal 1905, § 400, which provides that "an action may be maintained by a grantee of real estate in his own name, whenever he or any grantor or other person through whom

he may derive title might maintain such action, notwithstanding the grant of such grantor, or other conveyance be void by reason of the actual possession of a person claiming under a title adverse to that of such grantor or other person at the time of the delivery of such grant or other conveyance." *Johnson v. Prarie*, 84 N. C. 773; *Osborne v. Anderson*, 89 N. C. 261. Indeed, section 1333 of the Code has been later totally repealed by chapter 42, p. 138, Pub. Laws 1899, and hence does not appear in the Revisal at all.

It will be noted that this defense is not under Revisal 1905, § 384, for the defendants did not prove "20 years' adverse possession." It is true that Revisal 1905, § 383, debars the plaintiffs from maintaining an action for recovery of realty, unless it appear that they or those under whom they claim were "seised or possessed of the premises" in question within 20 years before beginning the action. But the defendants have not shown 20 years' possession, and, the plaintiffs having shown the legal title, the law carries the seisin to the party having the legal title, when neither is in possession. His honor was correct in charging the jury that "the possession for seven years under color of title must be continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership to bar the entry of one shown to be or to have been the real owner, and, when the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse." *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345. Revisal 1905, § 386, provides that possession by another shall be deemed "to have been under and in subordination to the legal title," unless such possession is shown to have been adverse.

There was evidence sufficient to go to the jury to locate the grants and conveyances under which the plaintiffs claimed. The other exceptions need no discussion. The case was largely one for the jury on the evidence as to the location of the land in dispute; and, upon a thorough consideration of the exceptions, we find no error of which the defendants have cause to complain.

No error.

(145 N. C. 132)

**HORTON v. SEABOARD AIR LINE RY.**  
(Supreme Court of North Carolina. Oct. 10, 1907.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

Where plaintiff was injured by the alleged negligence of his fellow servant, for which defendant was responsible as provided by Revisal 1905, § 2646, in dropping the end of the main rod of an engine while plaintiff was endeavoring to adjust it, and plaintiff testified, without contradiction, both that his fellow servant "dropped his end of the rod" and "that the rod slipped

from his hand," whether the servant was negligent was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1051-1067.]

## 2. SAME—PRESUMPTION OF NEGLIGENCE.

The dropping of the rod was not in itself conclusive of negligence on the part of such fellow servant, nor did it raise a presumption of negligence, though it was some evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 891.]

## 3. SAME—DUTY TO FURNISH COMPETENT ASSISTANTS.

Where defendant ordered plaintiff to repair an engine, it was defendant's duty to furnish plaintiff competent assistants, who would exercise ordinary care in performing the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 334.]

## 4. TRIAL—REQUEST TO CHARGE.

Where the court charged that the fact that plaintiff was injured while in defendant's employ was "no evidence of negligence," and that the fact that plaintiff's fellow servant dropped the engine rod by which plaintiff was injured raised no presumption of negligence, and, if unsupported by other evidence from which the jury could reasonably infer negligence, was not proof of negligence, the court did not err in refusing to charge that, if the jury found from the facts that there were no attending circumstances from which they could reasonably infer negligence, other than the unexpected falling of the rod on plaintiff's arm, they should find that the defendant was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Trial, §§ 651-659.]

## 5. SAME—ASSUMED FACTS—APPLICABILITY TO EVIDENCE.

Where plaintiff was injured by his fellow servant dropping his end of an engine rod while plaintiff was endeavoring to adjust it, and there was no evidence as to why he dropped it, a request that, if "there were no attending circumstances" from which the jury could reasonably infer negligence other than the fact of the unexplained falling of the rod, etc., was properly refused as assuming the evidence showed an "unexplained falling of the rod."

Appeal from Superior Court, Vance County; Biggs, Judge.

Action by W. R. Horton against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for personal injury sustained by plaintiff while in employment of defendant. Plaintiff testified that he was at the time of, and had been for many years before, the injury complained of, in the employment of defendant as yard locomotive engineer at Henderson, N. C.; that on December 10, 1903, Mr. Clark, the traveling engineer of defendant, who had charge of its engines and the duty of looking after them, came to Henderson and told him that the front end of the engine was in bad condition and must be fixed at once. Plaintiff told Clark that the brass was worn out and that he could not fix it. Clark said that it must be done; that plaintiff must fix it at once. Plaintiff told him that he would do the best he could with it; that he had no tools. He said that it must be done that night. It snowed, and the wind blew "as hard as you ever saw it." When plaintiff quit work, he backed down to

a yard and bought some wood. Seagrave was fireman on engine. Plaintiff says: "We were working on the main rod. Seagrave had never seen a rod taken down before, and didn't look like he knew anything about it. I was trying to enter the rod into the back end of the strap, when his end slipped out of his hand and jerked my hand down on the rod. He dropped his end of the rod. I had hold of the other end of the rod. It mashed my arm. It was eight or ten feet long. It was about half-past 10 or 11 o'clock at night when I got through fixing the engine." He testified that certain tools were necessary to do the work, that he purchased a file himself, and that it was necessary to have one man to help him. The foregoing is all of the evidence in regard to the time, place, manner, etc., of the injury. There was evidence in regard to the condition of the engine and of the work to be done on it, and of the character and extent of the injury, none of which is necessary to set out in detail for the purpose of passing upon the exceptions referred to and relied upon in the defendant's brief. Defendant moved for judgment of nonsuit. Motion denied. Defendant excepted.

The usual issues were submitted to the jury. His honor, after stating the contentions of the parties, among other instructions not excepted to, charged the jury: "As between master and servant, the mere fact of the servant being injured while in his employ is not prima facie evidence of negligence, and the burden is upon the servant to prove the injury was caused by the master, and he must show that the injury was the result of his negligence. It is not sufficient to show that he was injured. He must go further and show the cause of the injury, and that it was the result of negligence of some agent of the master, and that it was this negligence that was the proximate cause of the injury. So much for the questions of law which I shall give you to guide you and control your actions in determining the first issue. Now, applying these rules to the facts in the case, you must determine whether Mr. Horton was injured by the negligence of the defendant's fireman, Mr. Seagrave, and whether that negligence was the cause of the injury, if you find that Mr. Horton sustained an injury. Did the defendant railroad, through its agent, fail to exercise proper care, as I have explained to you, in handling this rod? And was such negligence the proximate cause of the plaintiff's injury, if you find he was injured, as claimed by him on or about December 10, 1903? That is the question which you must determine with reference to the first issue." His honor explained the evidence and directed the attention of the jury to the several issues and phases of the case. To this there is no exception.

Defendant requested his honor to give the following special instructions:

"As between master and servant, the mere



fact that the servant is injured while in his employ is not *prima facie* negligence, and is no evidence of negligence." This prayer was given; the court adding: "But the burden of proof is upon the servant to prove that his injury is caused by the negligence of the master."

"Upon the whole evidence, if the jury believe it, they will answer the first issue 'No.' Refused, and the defendant excepts.

"The mere fact that plaintiff's arm was injured while in the employment of the defendant is no presumption of negligence." The court gave this instruction.

"The mere fact that Joseph Seagrave dropped the rod is no presumption of negligence." The court gave this instruction.

"The general rule is that the mere fact and proof of injury, unsupported by other evidence of negligence, or any attending circumstances whereby the jury can reasonably infer negligence, is not a presumption of negligence; and if the jury should find from the facts in this case there are no attending circumstances from which they can reasonably infer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" His honor gave the first part of the instruction, but omitted to give the latter part, to wit: "And if the jury should find from the facts in this case that there are no attending circumstances from which they can reasonably infer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" Defendant excepted.

There was judgment upon the verdict. Defendant appealed.

Day, Bell & Allen, for appellants. T. M. Pittman and J. O. Kittrell, for appellee.

CONNOR, J. (after stating the facts as above). Defendant, in the well-prepared brief and the oral argument of counsel, alleges as the first ground for a reversal of the judgment the refusal of his honor to direct judgment of nonsuit. This contention involves the proposition that there was no evidence of negligence fit for the consideration of the jury. It is conceded that plaintiff was in the line of his duty, acting by direction of an employé of the company having the power to give the order, and that Seagrave, whose alleged negligence was in dropping the rod from his hand, was a fellow servant for whose negligence defendant is liable under the fellow servant law. Revisal 1905, § 2646. Is there any evidence that Seagrave "dropped his end of the rod"? The plaintiff swears to it, and he is not contradicted. Seagrave is not introduced by either party. It is true that plaintiff also used the expression, "The rod slipped from his hand." It was for the jury to say which was the correct statement. If he dropped the end of

the rod while plaintiff's arm was in a position to be injured thereby, it certainly constituted some evidence from which the jury may have inferred negligence. It was his duty to hold the rod—to use such physical power as was at his command to prevent it from dropping. The dropping of the rod was not conclusive, nor, as his honor charged the jury, did it raise a presumption of negligence; but it was certainly some evidence thereof. In this connection his honor said to the jury: "In determining the question as to whether the agent of the defendant was or was not negligent in dropping or letting the rod slip, if you find he dropped or let it slip, the question of whether he acted as a reasonably prudent man would have acted under similar circumstances must be considered; the burden being upon the plaintiff to satisfy you by greater weight of evidence that the agent did not exercise proper care. If you are satisfied by the greater weight of evidence that the agent did not exercise proper care, that he was negligent, and that this negligence was the proximate cause of the plaintiff's injury, then, as I have explained, it is your duty to answer the first issue 'Yes.' If you are not satisfied by the greater weight of evidence that he was negligent, or that it was the proximate cause of plaintiff's injuries, you will answer that issue 'No.'" His honor carefully explained to the jury that the burden of proof was upon the plaintiff, not only to show that Seagrave let—that is, permitted—the rod slip or drop from his hand, but that he failed to exercise the care of a prudent man to prevent its doing so. There is no suggestion that the rod slipped or dropped because of its weight, or that Seagrave did not have physical strength sufficient to hold it; that it was too heavy for one man to hold. It is true that plaintiff says: "I should say that it weighed 400 or 500 pounds. I never weighed one." Defendant's witnesses say that it did not weigh to exceed 75 pounds. It was the duty of defendant, when, by its agent, it ordered plaintiff to fix the engine, to furnish a competent man to assist him, who would exercise reasonable—that is, ordinary—care in holding the rod. If it failed to do so, there was negligence; and, if such negligence was the proximate cause of the injury, it was actionable.

We have examined the cases relied upon by defendant. Bryan's Case, 128 N. C. 387, 38 S. E. 914; Alexander's Case, 132 N. C. 428, 43 S. E. 1003. We do not think them conclusive of the question presented by this record. Certainly, if it is the duty of one to hold up an iron rod while another person is in a position with reference to it that dropping it will injure him, the duty is imposed upon the person so holding to use ordinary care to prevent it from dropping. In the absence of any explanation why he "dropped" it, is it not a reasonable inference that he failed to exercise ordinary care? The

principle governing cases of this kind has been so fully and so recently discussed by us that we deem it only necessary to cite the last one, in which Mr. Justice Hoke reviews all of them. *Fitzgerald v. Railroad*, 141 N. C. 530, 54 S. E. 391, 6 L. R. A. (N. S.) 337. We are all of the opinion that his honor correctly denied the motion for judgment of nonsuit, or to direct a verdict upon the first issue.

There is no exception to the charge as given argued in the brief, and we find no error therein. Defendant, however, earnestly contends that his honor committed prejudicial error in refusing to give the last part of the instruction asked. While it is settled by a number of cases decided by this court that a party is entitled to formulate a correct proposition of law applicable to phases of the testimony and have it submitted to the jury, it is equally well settled that if the court, either in its general instruction or in response to special prayers, has stated the same proposition in a form equally favorable to the contention of appellant, the failure to give such prayer is not reversible error. His honor had clearly instructed the jury in respect to the law applicable to the testimony. He had also, in response to defendant's prayer for special instruction, told the jury that the mere fact that plaintiff was injured while in the employment of defendant was "no evidence of negligence"; that the "mere fact that Joseph Seagrave dropped the rod is no presumption of negligence"; and, again, that "the mere fact and proof of injury, unsupported by other evidence of negligence or any attending circumstances whereby the jury can reasonably infer negligence, is not a presumption of negligence." We are unable to see how much more strongly his honor could have put defendant's contention, unless he had instructed them that there was no evidence of negligence. Having submitted the question of negligence to the jury upon the theory that if they found that Seagrave dropped the rod, etc., we do not perceive how he could have said to them that, if they found no attending circumstances, they must find that there was no negligence. Plaintiff's contention was that, in the absence of "attending circumstances" explaining why he dropped the rod, the jury should infer that he did so negligently; that he was not exercising due care. To have given the instruction asked would have been to reason in a circle, and withdraw from the jury indirectly the very question which he had submitted to them. It was the unexplained dropping of the rod which plaintiff relied upon to maintain his contention.

It will be further noted that the instruction assumes that the evidence showed an "unexplained falling of the rod." This assumption has no support. All of the evidence is that Seagrave "dropped the rod," or that it "slipped" from his hand. It has been frequently held that, where the duty is im-

posed of securely fastening an object the falling of which endangers life or limb of one to whom the person owes the duty of fastening the object, the falling of it unexplained justifies the inference that it was not securely fastened. *Winnemann v. Calhoun*, 88 Md. 92, 40 Atl. 1078; *Gerlach v. Edelmeier*, 88 N. Y. 645; *Kearney v. Railroad*, L. R. 5 Q. B. 411; and other cases cited in *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493. Here Seagrave was an intelligent human being, knew the conditions and the duty which he owed plaintiff, and almost certain injury to him if he dropped the rod. If there were "attending circumstances" explaining why he did so, as if his hands were benumbed by cold, or he was taken suddenly sick, or for any reason he was suddenly disabled, it was open to defendant to show such conditions. The instruction asked is not perfectly clear; but, as we interpret the language, his honor correctly declined to give it. The case has been, so far as an examination of the record discloses, fairly tried, and every phase of the testimony submitted to the jury with correct instructions in respect to the law.

The judgment must be affirmed.

(145 N. C. 112)

BALTHROP v. TODD et al.

(Supreme Court of North Carolina. Oct. 3, 1907.)

**DEEDS—CANCELLATION—CONFIDENTIAL RELATIONS—BURDEN OF PROOF.**

Where, in a suit by a grantor to set aside a deed conveying without consideration her entire real estate to her sister, the evidence showed that the grantor was feeble and illiterate, and reposed confidence in her sister and her husband, a confidential relation was shown; and the grantee, to sustain the deed, must show the good faith of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 587.]

Appeal from Superior Court, Nash County; Biggs, Judge.

Action by Zaney Balthrop against James H. Todd and another. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial granted.

Jacob Battle, for appellant. F. S. Spruill, for appellees.

BROWN, J. It is in evidence that on March 1, 1900, the plaintiff, a feeble old woman, approaching 70 years, conveyed her entire landed estate, consisting of three tracts, to her sister, Sarah J. Todd, with whom (she and her husband, James H. Todd) the plaintiff had made her home for some 14 years. No money was paid or promised, and at the time the defendants did not claim that plaintiff owed them a penny. Plaintiff had no other property whatever, except \$108, to support herself. In her advanced age and enfeebled condition, she leaned upon her brother-in-law and sister, and reposed trust

and confidence in them. Plaintiff was a widow, childless, could not read and write, and was in bad health. Shortly before the deeds were executed, Todd told a neighbor that the plaintiff had some money and land; that he was going to promise to take care of her during her life and thus get her property, and, after he got it, he was going to drop her. He told the plaintiff that her brother intended to have a guardian appointed for her, and then she could no longer control her own property. She doubtless thought that it was necessary to do as her brother-in-law told her to do in order to retain control of her property. She asked him if she could not make a will. He said: "Make a deed. It will be best, as a will can be destroyed." James H. Todd then procured the deeds to be written and executed at his house, reciting a money consideration, although not a dollar was paid or promised, and no claim made that plaintiff owed him anything.

Clearly his honor erred in not submitting the case to the jury upon appropriate issues and under proper instructions. It is true that the evidence does not bring the case within either of the four definite fiduciary relations mentioned by Judge Pearson in *Lee v. Pearce*, 68 N. C. 87, when the court can instruct the jury that fraud is presumed as matter of law. But the evidence discloses plainly such a "confidential relation" or "position of dependence" that, if the jury find the facts to be as testified to by plaintiff, the burden of proof shifts, and, to sustain the validity of the deeds, the defendant must satisfy the jury of the bona fides and legality of the transaction. The evidence brings it within that class mentioned by Lord Hardwicke in *Chesterfield v. Jansen*, where fraud arises from the circumstances and condition of the immediate parties to the transaction. 2 Pom. Eq. §§ 922, 923. It comes within the fourth class of those quasi relations of confidence mentioned in *Lee v. Pearce*, viz., "when the relation is that of friendly intercourse and habitual reliance for advice," etc., which Judge Pearson says "raise a presumption of fraud, as matter of fact, to pass before the jury for what it may be worth." See, also, *Buffalo v. Buffalo*, 22 N. C. 241; *Smith v. Moore*, 142 N. C. 296, 55 S. E. 275, 7 L. R. A. (N. S.) 684; *Timmons v. Westmoreland*, 72 N. C. 587; *Bigelow on Fraud* (1890) p. 295; 2 Pom. Eq. §§ 928 (2), 956.

New trial.

(145 N. C. 140)

ORMOND v. CONNECTICUT MUT. LIFE INS. CO.

(Supreme Court of North Carolina. Oct. 10, 1907.)

# 1. TRIAL—SUBMISSION OF ISSUES.

No particular form is required in the submission of special issues to the jury, and, if they substantially present the issues as raised by the pleadings, it is sufficient.

## 2. INSURANCE—RIGHT TO PROCEEDS—ACTIONS TO DETERMINE—PARTIES.

In an action to recover of an insurance company testator's share of a policy, beneficiaries to whom the insurance company had paid the policy in full were properly made parties defendant.

## 3. PARTIES—NONJOINDER OF NECESSARY PARTIES—EFFECT.

Failure to join a necessary party is error, to which exception lies.

## 4. SAME—JOINDER OF UNNECESSARY PARTIES.

Joinder of unnecessary parties either plaintiffs or defendants is immaterial, save only as it may affect the matter of costs.

## 5. INSURANCE—ASSIGNMENT OF POLICY.

No particular form of words is essential to effect an assignment or surrender of a policy of insurance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 479.]

## 6. EVIDENCE—ADMISSIONS—DECLARATIONS OF TESTATOR—ADMISSIBILITY AGAINST EXECUTOR.

In an action to recover of an insurance company testator's share of a policy, declarations of testator are admissible against the executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 983-985.]

## 7. SAME—ASSIGNMENT OF POLICY.

In an action by an executor against an insurance company to recover testator's share of a policy, evidence held to show an assignment of testator's interest in the policy to his children, barring any recovery by his executor.

Appeal from Superior Court, Lenoir County; Long, Judge.

Action by Y. T. Ormond, executor of A. R. Miller, deceased, against the Connecticut Mutual Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff sues to recover one-fifth of, a policy of insurance on the life of his testator, issued by defendant. The court submitted the following issues: "(1) Did the plaintiff's testator, \* \* \* after the death of his wife, relinquish any rights and interest he might have had in the policy from his wife, and surrender said policy to his children to be kept alive for their benefit as alleged in the answer? Ans. Yes. (2) Did the defendants Hyatt, Luce, and E. L. Miller, agreeably to such an understanding with A. R. Miller, keep alive the said policy and pay the premiums according thereon from year to year and until the death of A. R. Miller (plaintiff's testator), as alleged in the answer? Ans. Yes." From the judgment rendered, plaintiff appealed.

Y. T. Ormond and Geo. V. Cowper, for appellant. W. S. O'B. Robinson and F. H. Busbee & Son, for appellee.

BROWN, J. The evidence in this case tends to prove that in 1868 plaintiff's testator, A. R. Miller, insured his life in the defendant company in the sum of \$10,000 for the benefit of his wife, Delia M. Miller, and their four children, Sybil Hyatt, E. L. Miller, Maude Luce, and W. R. Miller. In 1884 Mrs.

Della M. Miller died intestate, leaving her husband, A. R. Miller, and the four children above named. No administration was granted upon her estate. In 1903 W. R. Miller assigned his interest in the policy to Mrs. Sybil Hyatt, and soon thereafter died, before the death of A. R. Miller. In June, 1905, A. R. Miller died, leaving a will in which Mrs. Luce was named as residuary legatee. The policy was presented to the insurance company for payment by the three children and by Mrs. Hyatt, as assignee of W. R. Miller, and the amounts due were paid by the company, as appears by the receipts and releases of the beneficiaries. The rights and interest of A. R. Miller having been relinquished and surrendered as claimed to the four children, the company paid to them as beneficiaries the amount of the policy in full, without deduction. The plaintiff brings this action as executor of A. R. Miller to recover one-fifth of the amount of the policy, alleging that the interest of Mrs. Della M. Miller in the policy had not been relinquished or surrendered to the other beneficiaries by Dr. Miller, the insured, who, it is admitted, acquired such interest upon the death of his wife in 1884.

1. The objection made by the plaintiff to the form of the issues submitted by the court to the jury is without merit. No particular form is prescribed by law, and, if the issues submitted substantially present the issues as raised by the pleadings, they are not open to objection. *Mace v. Ins. Co.*, 101 N. C. 122, 7 S. E. 674. The issues submitted in this case are so formulated that they clearly express the controverted facts alleged on the one side and denied on the other.

2. Upon application of the defendant company, the court some time before the trial entered an order making the beneficiaries to whom the insurance company had paid the policy in full parties defendant, to which plaintiff excepted. The beneficiaries themselves take no exception to the order of the court making them parties. It possibly may be, as contended by the plaintiff, that they are not strictly speaking necessary parties. They certainly are not improper parties; and it is doubtless best for the due administration of justice that they should be present before the court when the title to the fund is settled. Under our practice, the failure to join a necessary party is an error, to which exception may be properly taken; but the joinder of unnecessary parties, either as plaintiffs or defendants, is immaterial, save only as it may affect the matter of costs. *Rowland v. Gardner*, 69 N. C. 53.

3. It is contended by appellant that the evidence, in any view of it, fails to establish an assignment of A. R. Miller's interest in the policy to his four children to whom the company paid the full amount of the policy. No particular form of words is essential to effect an assignment or surrender of a policy of insurance. An assignment is substantially a transfer, actual or constructive, with the

clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. *May on Ins.* §§ 388, 390; *Winberry v. Koonce*, 83 N. C. 351. The declarations of plaintiff's testator, which are clearly competent against his executor, indicate that he did not care to pay the premiums any longer, and that he "turned over" the written policy and his interest in it to his four children hereinafter named, who agreed to pay the premiums thereon, and that after that the testator paid no further premiums. We think the two letters signed by the testator, dated November 30, 1890, and April 13, 1893, written to the insurance company and received by them in due course of mail, are clear proof of an assignment or surrender of all of the testator's interest which he then had in the policy to his four children. In the letter of April 13, 1893, the testator practically directs the company to cancel the policy, and to issue "a separate paid up policy, the amount being divided into four equal parts, and made payable to the following individuals: Mrs. Sybil Hyatt, Kinston, N. C., Mrs. Maude Luce, Galesville, Wis., E. L. Miller, Lenana, Kan., and W. R. Miller, Kinston, N. C. You can send them here to my care or to the above addresses as you think best." The evidence shows that the written policy was delivered to Dr. Hyatt, the husband of Mrs. Sybil Hyatt, one of the children, for the benefit of testator's four children, and there is no evidence that up to his death he exercised any control over it or claimed any interest in it. We think there is abundant evidence to be submitted to the jury that the two letters to the company were written by the testator or by his direction and authority, and that the plaintiff's exception on that ground is untenable.

Upon a review of the whole record, we are of opinion that the case has been fairly tried, and that there is no error.

(145 N. C. 422)

#### STATE v. TISDALE.

(Supreme Court of North Carolina. Oct. 3, 1907.)

#### INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INDICTMENT—DESIGNATION OF PURCHASER.

An indictment, charging defendant with carrying on the business of a retail liquor dealer in a city in which the sale of liquor was prohibited by law, is insufficient, where it does not charge a sale to some person by name, or to some person unknown to the jurors, notwithstanding Revisal 1905, § 2060, providing that the possession of a license issued by the United States to manufacture or sell at wholesale or retail intoxicating liquor shall be prima facie evidence that the person having such license is guilty of doing the act permitted by it in violation of the state law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 237-239.]

Clark, C. J., dissenting.

Appeal from Superior Court, Craven County; Neal, Judge.

Nathan Tisdale was convicted of carrying on the business of retail liquor dealer in a city where the sale of liquor was prohibited, and he appeals. Judgment arrested.

W. D. McIver and R. A. Nunn, for appellant. Assistant Attorney General Clement, D. L. Ward, and L. I. Moore, for the State.

BROWN, J. It is unnecessary to consider any of the exceptions taken by the defendant on the trial, as his exception to the bill of indictment is well taken, and the motion to arrest the judgment must be allowed. The first count charges the unlawful sale of liquor without a license to some person, to the jurors unknown, in violation of the general law. The second count charges the unlawful sale to some person, to the jurors unknown, within territory wherein the sale of liquor is wholly prohibited by law. The third count is as follows: "The jurors aforesaid, upon their oaths aforesaid, do further present: That the said Nathan Tisdale, late of the county of Craven, on the 20th day of September, 1906, unlawfully and willfully did engage in and carry on the business of retail liquor dealer, by selling spirituous and malt liquor to divers persons in the city of Newbern, said city of Newbern being an incorporated town where the sale of spirituous and malt liquors is forbidden by law, and where the majority of the qualified voters of said city had voted against the sale of spirituous, vinous, and malt liquors in said city and for prohibition, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The state entered a nol. pros. as to the first and second counts. The court below overruled defendant's motions as to the insufficiency of the third count, and the defendant was tried and convicted upon that count alone. This count does not charge the defendant with a sale of liquor to any specific person by name, nor does it charge a sale to any person whose name is unknown to the jurors. It charges that the defendant did engage in and carry on the general business of a retail liquor dealer in the city of Newbern, where the sale of liquor is prohibited by law.

The learned counsel for the state rely upon section 2060 of the Revisal to sustain the bill. This section provides that the possession or issuance to any person of a license to manufacture, rectify, or sell, at wholesale or retail, spirituous or malt liquors by the United States government or any officer thereof in any county, city or town, where the manufacture, sale, or rectification of spirituous or malt liquors is forbidden by the laws of the state, shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by the said license, in violation of the laws of this state. There is nothing in

it, or any other statute, to which our attention has been called, or which we have been able to find, which supports the contention of the state. It is evident the General Assembly never thought it necessary to create any such specific offense as carrying on the general business of retailing liquor in territory where its sale is entirely forbidden. In such territory liquor is a contraband, and the sale of it is a secret transaction. The bill of indictment may charge a sale to some person by name, or to some person unknown to the jurors. It must charge one or the other. *State v. Stamey*, 71 N. C. 202. In an indictment for the unlawful sale of liquor, it is not sufficient to charge the defendant generally with the offense of illegal selling. The facts constituting the offense must be set forth. *State v. Faucett*, 20 N. C. 239. "Every necessary ingredient in the offense must be set forth," says Judge Daniel for the court, in that case, and he then proceeds to state the exceptions to the rule, viz., indictments against a common barrator, a common scold, for keeping a common gambling house or bawdy house. In *State v. Stamey*, the identical point is decided, as it was in *Faucett's Case*; both being indictments for selling liquor. In *State v. Blythe*, 18 N. C. 199, decided in 1835, the question seems to have been first presented to this court. It is there held, in an opinion by Chief Justice Ruffin, that the indictment was defective because the names of the slaves to whom the liquor was sold were not set out in the bill. The learned Chief Justice says: "Every indictment ought to have convenient certainty as to time, place, and persons, and give to the accused reasonable notice of the specific facts charged on him, so that he may have an opportunity of defending himself. Here the indictment conveys no information of that sort." The same principle of criminal pleading is set forth in *State v. Ritchie*, 19 N. C. 29. The *Stamey Case* is cited with approval in *State v. Pickens*, 79 N. C. 654; *State v. Miller*, 93 N. C. 516, 53 Am. Rep. 469; *State v. Foy*, 98 N. C. 748, 3 S. E. 524; *State v. Hazell*, 100 N. C. 474, 6 S. E. 404; *State v. Dalton*, 101 N. C. 683, 8 S. E. 154; *State v. Farmer*, 104 N. C. 889, 10 S. E. 563; *State v. Gibson*, 121 N. C. 681, 28 S. E. 487. This rule of criminal pleading is recognized by the common law and is founded upon a just regard for the rights of persons charged with crime. Archb. Crim. Prac. 41, 42. It is not a technical refinement of the law. Had it been, it would have long since been discarded, and would never have survived up to 1897, when the last opinion citing *Stamey's Case* was written by the present Chief Justice.

The reason for setting forth the name of the person to whom the liquor is sold is because each sale constitutes a distinct offense for which the offender may be punished. When the name of the vendee of the liquor is given, the particular transaction on

which the indictment is founded is identified. The accused then has notice of the specific charge, and may have the benefit of the first acquittal, or conviction, if accused a second time of the same offense.

Judgment arrested.

WALKER, J. (concurring). It seems to me that the distinction between the sale of liquor under a general prohibitory statute, of the character of that upon which this indictment was drawn, and the like offense when the act is prohibited, for instance, near a church, or other place, is simply this: That in the former there may be repeated indictments for different offenses, while in the latter the crime consists in doing the prescribed act in, or near, a certain place, or within a given distance of a certain locality. Where there may be numerous indictments arising out of different offenses, as where a man sells liquor in violation of the general statute, the name of the person to whom the liquor is sold should be given, by every elementary rule of criminal pleading, which has been adopted to protect the defendant from double punishment and to enable him to make his defense and to successfully plead his former conviction or acquittal, for there may be many offenses committed by the violation of the same law, on different occasions. Not so, perhaps, where the offense consists in selling in a prohibited place. It makes no difference to whom the defendant sold, so that it appears that he had sold within the prohibited distance of the church, or other place, intended to be protected. Selling in the prohibited place is the offense. The writer of this opinion is not willing, at present, and without further reflection, to assent to the doctrine that, even in the latter case, the name of the purchaser should not be given, if known, because we should always be careful to safeguard the defendant against a second prosecution for the same offense, as it is abhorrent to us—living, as we do, under a system of laws and a constitution which forbids double punishment—to impose two penalties for the same crime. It is contrary to the fundamental principles of the common law, to Magna Charta, and to the Bill of Rights. Const. art. 1; *Com. v. Blood*, 4 Gray (Mass.) 31; *Capritz v. State*, 1 Md. 569; *Dorman v. State*, 34 Ala. 216. We should be careful therefore to see that, in administering the criminal law, whether in pleading, evidence, or practice, we do not depart from this manifestly just and well-established principle. The people of this state, who are really and substantially the prosecutor in all criminal proceedings, do not ask that any man be punished, or even be exposed to punishment, twice for the same criminal act. Justice Bynum, who always stated a principle of law with conciseness and vigor, in *State v. Stamey*, 71 N. C., at page 203, says: "The purpose of setting forth the name of the person on

whom the offense has been committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have notice of the specific charge and have the benefit of an acquittal or conviction if accused a second time." See, also, *State v. Blythe*, 18 N. C. 199; *State v. Ritchie*, 19 N. C. 29; *State v. Faucett*, 20 N. C. 239, and, in the reports of other states, *State v. Allen*, 32 Iowa, 491; *State v. Steedman*, 8 Rich. (S. C.) 312; *Dorman v. State*, supra; *Capritz v. State*, supra; *Com. v. Blood*, supra. Mr. Bishop, in his work on *Statutory Crimes* (1873 Ed.) § 1037, classifies the courts in respect to their decisions upon this subject, and places this court with those who have held that it is essential to a valid indictment to state the name of the person to whom the liquor was sold. He also recognizes the distinction between the cases which I have attempted to point out in this opinion. *State v. Steedman*, supra. No one, of course, in this particular prosecution, is seeking to punish the defendant twice for the same offense. That is palpably not the question. It is the liability to be punished hereafter upon a second prosecution and for the same act by reason of a material defect in the bill. The distinction between the two cases is too plain for argument. And, again: Shall a citizen be tried hereafter by "indictment, presentment or impeachment," as required by sections 12 and 17, art. 1, of the Constitution, or merely by a bill of particulars. Unhesitatingly, I declare in favor of the former method, under which the freemen of England and this country have heretofore been safe against untrue and unjust accusation against the citizen. We may soon imperil the liberty of the citizen by impairing and thereby gradually abolishing the forms of law intended for his protection. Trials are not conducted now as they were in the days of Sir Walter Raleigh. We live, not under a king, or a potentate, but in a democracy, the best form, we think, of all government, where every man has an equal chance, or should have, before the law, and the right "in all criminal prosecutions to be informed of the accusation against him, and to confront his accuser and witnesses with other witnesses, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or (even) necessary witness fees of the defense, unless found guilty." Const. art. 1, § 11. If this had been the law of England, as it should have been, when Raleigh was called to the bar to answer the charge against him, he would, perhaps, have escaped the ignominy of the block. Even the ancient forms and the old lore should not be neglected, or disregarded, as we cannot well know what the law is, except by what it has been, and how it has gradually developed by degrees into a perfect and more liberal system. But, however, in our rapid progress towards a more sensible ad-

ministration of justice, and however lightly we may have regarded mere forms of procedure, we should not by a too liberal construction jeopardize the liberty of the citizen, and especially should we not deliberately violate his constitutional right and privilege.

CLARK, C. J. (dissenting). In *Black on Intoxicating Liquors*, § 464, where the precedents are collected, the overwhelming weight of authority is that in indictments for the illegal sale of liquor it is not necessary to name the persons to whom it was sold. In this state, in *State v. Faucett*, 20 N. C. 239, it was held that the name of the purchaser must be charged, because, said Daniel, J., the words of the statute (1 Rev. St. c. 34, § 81) prescribed a penalty for "each and every offense." This case has been followed only by *State v. Stamey*, 71 N. C. 202. These two cases have never been cited in any other case on this point. They have been cited on other points. On the other hand, in *State v. Muse*, 20 N. C. 403 (in same volume with *State v. Faucett*, supra), it was held that, in indictments for selling liquor near a church, it was not necessary to name the vendee, because, says Ruffin, C. J., the statute does not give a penalty for each and every offense. This last case is exactly in point, for our present statute is like the wording of the statute in this last case, and differs from that in *State v. Faucett*, in the same particular which Chief Justice Ruffin there pointed out. The statute under which the defendant is indicted is Revisal, § 2062: "No person shall sell or otherwise dispose of for gain any spirituous, vinous or malt liquors, or intoxicating bitters, without first obtaining, as provided by law, a license so to do." This case therefore falls exactly under *State v. Muse*, and not under *State v. Faucett*. The words "for each and every offense," are not in the statute now, which is the distinction both Judge Daniel and Chief Justice Ruffin made in those cases. The only other reason given in *State v. Faucett*, supra, is that the defendant may be able to use the judgment as an estoppel when again indicted. Yet the same case (*State v. Faucett*) holds that, if the sale is charged to have been made "to persons to the jurors unknown," the indictment is valid. So if the sale is charged, as in this case, merely "to divers persons," the indictment is invalid; but, if the sale is charged to have been made to "divers persons to the jurors unknown," the indictment is good. It is impossible that one of these forms should be more informing to the defendant, or to the court, than the other.

Revisal 1905, § 3254, forbids an indictment to be quashed, or judgment stayed thereon, "by reason of any informality or refinement if in the bill sufficient matter appears to enable the court to proceed to judgment." It is clear that, if there is sufficient matter to

enable the court to proceed to judgment in one case, there is in the other. The mere adding after "divers persons" the words "to jurors unknown" cannot give the trial court any additional light when proceeding to judgment. The difference is a "refinement" which the statute requires to be disregarded, and there is no better time to do so than now and in this case. *State v. Faucett*, 20 N. C. 239, was decided far back when such refinements still lingered occasionally in the administration of the criminal law, and *State v. Stamey*, 71 N. C. 202, was so held merely to follow the other case. It would be best not to lengthen the line by adding the present case to the other two. It is like the expressions "with force and arms," "against the form of the statute," "against the peace and dignity of the state," and the like, which at one time were considered sacred and indispensable and in some undefinable way connected with the maintenance of our liberties, and whose omission from an indictment vitiated a verdict against the guiltiest criminal. *State v. Harris*, 106 N. C. 687, 689, 11 S. E. 377. The growing enlightenment of the age has given a clearer conception both to the Legislature and to the courts that a trial for crime should proceed solely upon the merits of the case, disregarding all informalities and refinements. In former days, in an indictment for homicide, the nature and size of the wound had to be charged, the manner in which it was inflicted, the value of the weapon, and, if a firearm was used, it was gravely charged that it was loaded with powder and shot, and that by the ignition of the powder "the leaden bullets aforesaid were propelled in and against the left side of" aforesaid, and many similar details taking up two to four pages of foolscap. Now, three or four lines state the charge in a clear business like way, and no prisoner has ever suffered injustice thereby. If details are required by the prisoner for information, he can have a bill of particulars. There is no reason why the "refinement" of quashing a bill for selling liquor should be allowed for not adding to "divers persons" the further words "to jurors unknown," when the latter allegation is not required to be proven; still less ought the judgment to be arrested as here when objection for the omission to use those words was not made till after trial and verdict. As was said in *State v. Harris*, 106 N. C. 689, 11 S. E. 379, "To sustain absolute technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and in some instances would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not the last-mentioned result, it is no advantage to defendants to resort to technicalities, and, if it has such effect, the courts should repress, as they do, a reliance upon them."

Here upon the evidence the defendant was guilty beyond question. The jury have so found. The judge states that in defiance of law the defendant continued to sell after indictment and even after verdict. He feared the federal courts enough to pay the United States tax on his business. Why should the state courts reward his contempt of state process by turning him loose, unwhipped of justice, because of the mere omission of the words "unknown to the jurors," which could have been of no aid to the court in proceeding to judgment, nor could their omission be any possible detriment to the just rights of the defendant. Instead of following an ancient decision, based on a differing statute, and which is contrary to the overwhelming weight of authority in other jurisdictions, it seems to me we should obey the statute (Revisal 1905, § 3254), which was passed to prevent just such miscarriages of justice, and to follow the present statute (Revisal 1905, § 2062), which is like that upon which the court in *State v. Muse*, supra, sustained an indictment, which like this did not charge the names of the vendees. The courts should keep up with legislation. The law should express the best sentiment of the age. It should move because all the world beside is moving, for, as Galileo said: "E pur si muove." We should move up abreast of our age, and not take our seats by the abandoned camp fires of a generation that has gone before.

No one is seeking to punish this defendant twice. No such question is before us. The difficulty is to punish him once for an offense of which he has been duly convicted upon a trial in which there was no valid objection taken. He is seeking to escape judgment upon the attenuated technical ground that the indictment charged the sales to have been made by him to "divers persons," instead of to "divers persons unknown." He might have had this information if he had asked at the trial for a bill of particulars as to the names of the vendees. He made no objection on that score at the trial. He does not show that he has received any detriment. Revisal 1905, § 3254, provides that no bill shall be quashed nor judgment stayed by reason of any informality or refinement. It was passed for just such cases as this. *Magna Charta*, the English Bill of Rights, nor the common law can have any effect to prohibit or restrict the legislative power of the people of North Carolina, except in so far as they have been expressly placed by our people in the words of our Constitution. In indictments for false pretense (Revisal 1905, § 3432), and in some other offenses, the statute provides that the ownership of the property need not be charged, and certainly the Legislature could provide, and has intended, that when there is a mere technical omission (as here of the word "unknown") in an indictment, not objected to at the trial, and which

is not shown to have worked any detriment, the trial, verdict, and judgment shall not be vitiated by such omission.

(145 N. C. 432)

#### STATE v. DOWDY.

(Supreme Court of North Carolina. Oct. 10, 1907.)

#### 1. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—INDICTMENT—SUFFICIENCY.

An indictment, charging an unlawful sale of spirituous liquor to a person or persons to the jurors unknown, is not subject to the objection that it does not give the name of the person or persons to whom the sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 239.]

#### 2. CRIMINAL LAW—APPEAL—PRESUMPTIONS—GENERAL VERDICT—GOOD AND BAD COUNTS.

Where two counts in an indictment are good, and there is evidence tending to sustain them, on a general verdict of guilty the conviction should be upheld, though a third count may be defective.

#### 3. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE—ADMISSIBILITY.

A writing under the hand and seal of a collector of internal revenue: "Current list of special taxpayers in C. county, \* \* \* L. & D., retail malt liquor dealers. \* \* \* Date of payment and issue of certificate Sept. 30, 1906" —is a certification that a license was issued, and that the license issued was to sell spirituous liquor, the term "spirituous liquor" including malt liquor, and hence was admissible on a trial for an unlawful sale of spirituous liquor; Revisal 1905, § 2060, providing that the issuance to any person of a license to manufacture or sell spirituous or malt liquor by the United States government in any county or city where the manufacture or sale of such liquor is forbidden by state law shall be prima facie evidence that the person having such license is guilty of doing the act permitted thereby, in violation of the state law.

#### 4. CRIMINAL LAW—EVIDENCE—OFFICIAL RECORDS.

Rev. St. U. S. § 3240 [U. S. Comp. St. 1901, p. 2093], providing that each collector of internal revenue shall keep for public inspection a list of persons who shall have paid special taxes in his district, and shall state thereon the business for which such special taxes have been paid, and on application of any prosecuting officer of any state shall furnish a certified copy thereof, as of a public record, makes the matter certified to an official record of his office, for the purpose of the certificate, and, as such, the copy, properly certified, is made competent evidence by Revisal 1905, §§ 1616, 1617, providing that copies of all official papers and records of any public office of the state or the United States shall be received in evidence when certified to be true copies.

#### 5. SAME—TRIAL—RECEPTION OF EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES.

Revisal 1905, §§ 1616, 1617, provide that copies of all official papers and records of any public office of the state or the United States shall be received in evidence when certified to be true copies. Rev. St. U. S. § 3240 [U. S. Comp. St. 1901, p. 2093], provides that each collector of internal revenue shall keep in his office for public inspection a list of persons paying special taxes in his district, and shall state thereon the business for which such special taxes have been paid, and on application of any prosecuting officer of any state shall furnish a certified copy thereof. The rules of the Department of Internal Revenue prohibit its officers from giving oral testimony of the contents



of public records in its offices. *Held*, that the admission in evidence, on a trial for an unlawful sale of spirituous liquor, of a certified copy of the list of persons paying special taxes, was not an invasion of defendant's constitutional right to confront the witnesses against him.

**6. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—CRIMINAL PROSECUTIONS—RULES OF EVIDENCE.**

Revisal 1905, § 2060, providing that the issuance to any person of a license to manufacture or sell spirituous or malt liquor by the United States in any county or city where the manufacture or sale of such liquor is forbidden by state law shall be prima facie evidence that the person having the license or to whom the same was issued is guilty of doing the act permitted thereby, in violation of state law, is not unconstitutional; it being within the power of the Legislature to change the rules of evidence and declare that certain facts, when shown, shall constitute prima facie evidence of guilt.

**7. CRIMINAL LAW—EXCESSIVE PUNISHMENT.**

A sentence of two years' imprisonment for unlawfully selling spirituous liquor is not excessive, where the evidence tends to establish a deliberate violation of law, with an evident purpose to persist in it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3304-3308.]

Appeal from Superior Court, Craven County; Neal, Judge.

D. W. Dowdy was convicted of unlawfully selling spirituous liquor, and he appeals. Affirmed.

Henry R. Bryan and W. D. McIver, for appellant. Assistant Attorney General Clement and D. L. Ward, for the State.

**HOKE, J.** The various questions raised by the exceptions have been heretofore resolved against the defendant, and we find no error which entitles him to a new trial. Objection is made that the bill of indictment is not sufficiently definite and specific, in that it does not give the name of the person or persons to whom the alleged unlawful sale was made. There are three counts in the bill; the first two charging an unlawful sale to a person or persons to jurors unknown, and the third charging that defendant was unlawfully carrying on the business of selling spirituous liquors in prohibited territory. It may be that under section 3529 of the Code the third count could be sustained for some of the unlawful conduct forbidden by that section, but, without passing upon that question, we think the first two counts are undoubtedly good, alleging an unlawful sale to person or persons to jurors unknown. This kind of allegation should only be resorted to from necessity, and when the facts justify such a method of statement; and it seems from the authorities that when the charge is made in this way it should be proved as laid. *State v. Trice*, 88 N. C. 630; *Archbold's Criminal Practice & Pleading*, p. 124. It is important always, and required when possible, that in cases where each forbidden act constitutes a separate offense, the name of the person to whom the sale is made should

be given, to the end that the defendant should have reasonable opportunity to prepare such defense as he may have, and that the bill on conviction may protect him from a second prosecution for the same conduct. *State v. Faucett*, 20 N. C. 239; *State v. Stamey*, 71 N. C. 262; *State v. Tisdale* (at this term) 58 S. E. 998. As a matter of form, however, the first two counts in the present bill are sufficient and have been frequently upheld. *State v. Faucett*, supra; 1 Chitty, Criminal Law, marg. pp. 212, 213. The two first counts then in the present bill being good, and there being evidence tending to sustain them, on general verdict of guilty, the conviction would be upheld on the good counts, even though the third should be defective. *State v. Sheppard*, 142 N. C. 586, 55 S. E. 146; *State v. Toole*, 106 N. C. 736, 11 S. E. 168.

The defendant further excepts because the court admitted on the trial, as incriminating evidence, a written paper under the hand and official seal of E. C. Duncan, collector of internal revenue, in terms as follows: "Current list of special taxpayers in Craven county, N. C., as of record Nov. 7, 1906. Lee & Dowdy, retail malt liquor dealers, New Bern, from Sept. 1, 1906. Tax \$20.83. Date of payment and issue of certificate Sept. 30, 1906. Serial Number Stamp 222. 304 Queen Street; the firm consisting of N. G. Lee and D. W. Dowdy. Witness my hand and official seal. E. C. Duncan, Collector. [Seal.]"—the objection being, first, that it does not certify that a license was issued to sell spirituous liquors. Second, was it such a copy or extract from the record of any public office as should be received in evidence under the law? It is held with us that the term "spirituous liquors" includes malt liquors as well. *State v. Giersch*, 98 N. C. 720, 4 S. E. 193. And while the paper does not state in exact words that a license issued, we think that such a statement is by fair intendment the necessary import of the words used, and as such making a copy receivable in evidence under the law. The federal statute addressed to this question provides as follows: "That chapter three of the Revised Statutes of the United States be and hereby is amended in section thirty-two hundred and forty, so as to read: Sec. 3240. Each collector of internal revenue shall, under regulations of the commissioner of internal revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place and business for which such special taxes have been paid, and upon application of any prosecuting officer of any state, county or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of one dollar for each one hundred words, or fraction thereof, in the copy or copies so requested, may be charged. Approved June 21, 1906." This statute makes the matter certified to an of-

ficial record of the office, for the purpose of the certificate, and, as such, the copy, properly certified, is made competent evidence by the express provisions of our own statutes on the subject. Revisal 1905, §§ 1616, 1617.

It is strongly urged, however, that the admission of this paper violates the constitutional right of the defendant that on a trial for crime he should have opportunity to confront his accusers and the witnesses offered to sustain the charge. This right, of such supreme importance to the citizen, so essential to any proper and impartial administration of justice, should appeal most impressively to the courts of this state, for North Carolina declined to adopt the federal Constitution until the amendment by which it was guaranteed had been formulated by the federal Congress and its adoption practically assured. It has, too, a prominent place in our own Bill of Rights, and this court would never uphold or countenance any legislation or procedure by which it was destroyed or substantially impaired. The right, however, does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. At the time of the adoption of our Constitutions, the principle was subject to several well-recognized exceptions, as the testimony of a witness examined at a former trial and since deceased, dying declarations under certain circumstances, official certificates, and the like. Says Mr. Greenleaf (volume 1, 163): "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future. The Constitution indorsed the general principle subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended." And on approval of these exceptions as to official records, Mr. Justice Avery, in the case of *State v. Behrman*, 114 N. C. 804, 19 S. E. 220, 25 L. R. A. 449, says: "When facts from their very nature can only be proven by a record or a duly authenticated copy of a record, proof of them does not fall within the constitutional inhibition since the genuineness of the original was determined by inspection and of the copies by an examination of the certificates, and the right to confront accusers was intended to be secured to the accused, not under all circumstances, but only where it would bring with it the benefit of testing the truth of testimony by meeting a prosecuting witness face to face and subjecting him to cross-examination." And to like effect is *Reeves v. State*, 47 Tenn. 96. The case before us comes, we think, clearly within the principle established by this exception. It was shown that the Department of Internal Revenue has prohibited its officers

from giving oral testimony of the contents of public records in its office. This was no doubt found necessary for the proper and efficient administration of the business of the department, and in any event the Executive Department is made the conclusive judge of whether the order should be made, and it has been directly upheld and approved as a valid and binding regulation by the United States Supreme Court in *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846; the doctrine being there laid down as follows: "The regulation adopted by the Secretary of the Treasury was authorized by section 161 of the Revised Statutes [U. S. Comp. St. 1901, p. 80], and that section was consistent with the Constitution of the United States. To invest the Secretary with authority to prescribe regulations not inconsistent with law for the conduct of the business of his department, and to provide for the custody, use, and preservation of the records, papers, and property appertaining to it, was a means appropriate and plainly adapted to the successful administration of the affairs of his department; and it was competent for him to forbid his subordinates to allow the use of official papers in their custody except for the purpose of aiding the collection of the revenues of the United States." It was no doubt on account of this ruling, and in recognition of its fitness, that Congress enacted the statute above referred to, providing that copies of the records might be furnished prosecuting officers. The entries then having been constituted official records, and a copy and its admission as evidence expressly provided for by statute, and the rules of the department making it impossible that oral testimony speaking directly to the facts recited should be obtained, the case we think comes clearly within the principle established by the recognized exceptions to the constitutional provision, and the copy was properly received in evidence.

It is further assigned for error that the court charged the jury as follows: "The court charged the jury that the possession of or issuance to any person of a license to manufacture, rectify, or sell at wholesale or retail spirituous liquors by the United States government or any officer thereof in any county, city, or town where the manufacture, sale, or rectification of spirituous or malt liquors is forbidden by the laws of this state, constituted prima facie evidence that the person having such license and issued, as before stated, was guilty of doing the act permitted by the said license, in violation of the laws of the state, and if you find from the evidence beyond a reasonable doubt that the defendant had license to carry on the business of retail liquor dealer in the city of New Bern, it being admitted that said city is incorporated where the sale of liquor is prohibited by law, this would be prima facie evidence of his guilt; but unless you find from

all the evidence that he is guilty beyond a reasonable doubt, then you ought to acquit him." Defendant admits that the charge is in accord with our statute on the subject (Revisal 1905, § 2060), but contends that the statute is unconstitutional. We have so recently discussed and decided this question in *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 628, that we do not feel it necessary to do more than refer to that decision. In *Barrett's Case*, we held that the Legislature had the constitutional power to change the rules of evidence, and to declare that certain facts and conditions, when shown, shall constitute prima facie evidence of guilt; the limitation being that the facts and conditions should be relevant to the inquiry and tend to prove the fact in issue. And the case we think comes clearly within the principle, and the objection must be overruled.

Again, it is contended that the judgment should be set aside because the judgment is excessive, but we do not assent to the position, and here, too, the authorities are against the defendant. *State v. Farrington*, 141 N. C. 844, 53 S. E. 954; *State v. Miller*, 94 N. C. 904. Without expressing an opinion on the question of prohibition, the people of New Bern have adopted this as the law by which they are to be governed, and they are entitled to have the law enforced. This is not an exceptional instance of law breaking which can be dealt with in leniency or by an ordinary sentence; but the evidence tends to establish a willful and deliberate violation of law on the part of the defendant with an evident purpose to persist in it, and presents a case where a light or even an ordinary sentence would be inefficient and entirely out of place.

There is no error, and the judgment below is affirmed.

No error.

(145 N. C. 440)

#### STATE v. TOLER.

(Supreme Court of North Carolina. Oct. 10, 1907.)

Appeal from Superior Court, Craven County; Neal, Judge.

Thomas J. Toler was convicted of unlawfully selling spirituous liquor, and he appeals. Affirmed.

R. A. Nunn, for appellant. Asst. Atty. Gen. Clement and D. L. Ward, for the State.

HOKE, J. The exceptions presented by this appeal are in all respects similar to those decided in case of *State v. Dowdy* (at the present term) 58 S. E. 1002.

For the reasons stated in that opinion, the exceptions of the defendant are overruled, and the judgment against him affirmed.

No error.

(145 N. C. 156)

#### WILLIAMS et al. v. McFADYEN'S ADM'R et al.

(Supreme Court of North Carolina. Oct. 10, 1907.)

##### 1. JUDGMENT—ENFORCEMENT—LIMITATIONS.

While a judgment for plaintiff, in an action to enforce a vendor's lien, and for foreclosure by sale, is final as to the amount of indebtedness, and, for purposes of appeal, as to all litigated questions, yet, as to all subsequent questions incident to the sale, possession of the property, distribution of the proceeds, etc., the decree is interlocutory, and hence no sale having been made under a decree awarded in 1895, Revisal 1905, § 391, limiting the time for suing on judgments, does not bar plaintiffs' right to a sale of the property; that section applying to final judgments only, or to judgments partaking of that nature.

##### 2. VENDOR AND PURCHASER—VENDOR'S LIEN—SALE—FORM OF RELIEF—MOTION.

Where, on judgment for plaintiffs in an action to enforce a vendor's lien, a sale was decreed, but none made, the cause not having terminated by final judgment, plaintiffs' remedy to enforce a sale is only to be had by motion in the cause.

Appeal from Superior Court, Sampson County; Long, Judge.

Action by Charles Williams, guardian, and others, against Duncan McFadyen; defendant's administrator and heirs being substituted on his death. From a judgment for plaintiffs, defendants appeal. Affirmed.

It appears from facts found by his honor at the hearing below that in September, 1894, the original summons was issued in the name of Chas. Williams, guardian of Julia Blizzell (now Parrott), against Duncan McFadyen, to collect the purchase money for a tract of land and enforce a vendor's lien therefor against said McFadyen, who held the same under a bond for title, and was in possession claiming the interest in land, existent by reason of said bond. At a subsequent term, said Chas. J. Williams, individually, and his wife, Sarah J. Williams, mother of Julia F. Blizzell, were allowed to join and file a supplemental complaint as claimants of a part of said purchase money. At October term, 1895, judgment was had in favor of plaintiffs for the amount of the purchase money and "condemning the land to be sold" for the payment of the debt, interest, and cost, allowing plaintiffs to bid at the sale, and appointing Jno. D. Kerr, attorney of plaintiffs, as "commissioner to make the sale pursuant to the order of the court, make report of his proceedings, and retaining the cause on the docket for further orders and decrees." No sale was ever had under this decree, nor was any action taken by the commissioner, and the cause was continued from term to term, until February term, 1905, when the original defendant, Duncan McFadyen, having died, it was ordered that his administrator and heirs at law be made parties defendant, which was done by service of summons issued and returnable at a subsequent term. Later, at May term, 1906, it

was ordered that Julia F. Parrott, formerly Julia Blizzell, and her husband, Geo. F. Parrott, be made parties plaintiff, and these parties thereupon filed another complaint setting out their interest in the purchase money and giving a history of the cause to date, styling their affidavit a complaint. Defendants filed an affidavit, styled an answer, setting forth their statement of the matter and pleading various statutes of limitations, more especially setting up the 10-year statute in bar of plaintiffs' right to relief. The cause then came on for hearing before his honor, Judge B. F. Long, as stated, who found the facts, and gave judgment for plaintiffs, directing sale by a substituted commissioner, as shown by his decree. Defendants excepted and appealed.

L. V. Grady and Stevens, Beasley & Weeks, for appellants. Rouse & Land, for defendants.

HOKE, J. (after stating the facts as above). We are unable to perceive in what way or by what statute of limitations the plaintiffs are barred of their right to enforce the collection of their debt by a sale of the property. The defendants more particularly insist that the demand is barred by the 10-year statute of limitations applicable to judgments (Revisal 1905, § 391), and that this position finds support in a direct adjudication of this court. *McCaskill v. McKinnon*, 121 N. C. 194, 28 S. E. 265, 61 Am. St. Rep. 659. But we do not think their position is well taken, or that they have correctly interpreted the authority cited as applied to the facts of the present case. Our statute of limitations applies to final judgments, or to judgments or decrees which partake of that nature, and was never intended to effect interlocutory judgments, and in a cause still pending. The action to enforce a vendor's lien for unpaid purchase money, where the vendee, defendant, is in possession under the bond of title, is in many of its aspects like a proceeding of foreclosure and sale to collect a debt secured by mortgage. Where a definite indebtedness is declared, and judgment therefor entered, and foreclosure by sale decreed, such judgment is final as to the amount of indebtedness so adjudicated, and it is final also for purposes of appeal as to all debated and litigated questions between the parties preceding such a decree; but, as to all subsequent questions arising as incident to the sale, the occupation and possession of the property by the parties of record, the collection and distribution of the proceeds, and the like, the decree is interlocutory, and the cause is still pending. *Knight v. Houghtalling*, 94 N. C. 408; *Clement v. Ireland*, 138 N. C. 136, 50 S. E. 570; *Nutt v. Cumming*, 155 N. Y. 309, 49 N. E. 880; *Morgan v. Casey*, 73 Ala. 222. This is true in all jurisdictions where the cause in express terms is retained for further orders and decrees, and it is true with

us from the force and effect of such a decree, and whether such a feature formally appears or not, for our decisions are to the effect that a decree for absolute sale without requiring a report to be submitted for further consideration by the court is irregular and improper and will be set aside on motion. *Foushee v. Durham*, 84 N. C. 56; *Mebane v. Mebane*, 80 N. C. 34. The double aspect of this class of decrees being final in some respects, and in others as interlocutory, is recognized in the authority relied upon by defendant. *McCaskill, Adm'r, v. Graham*, 121 N. C. 190, 28 S. E. 264, where it is said by Furches, J.: "The judgment of \$754.93 was a personal judgment and was final. The judgment foreclosing the mortgage was the exercise of the equitable jurisdiction of the court, and was not what would have been a final decree in equity, and was not so in this case." And so it is here. The judgment as to the debt is final, and on plea of statute properly entered could no longer be enforced as a judgment in personam and against other assets of deceased; but, as a proceeding in rem, the cause is still pending for the purposes of carrying out the provisions of the decree directing a sale of the property, and an application of the proceeds to the satisfaction of the plaintiffs' debt.

We have it, then, that as to the questions involved in this motion, the cause is still pending. Plaintiffs are here representing the same interests and asserting the same right claimed and established by the unexecuted and interlocutory decree; and defendants, as successors and heirs at law of Duncan McFadyen, deceased, are parties of record bound by the terms of the decree, subject to the orders of the court made in the cause, and when nothing has occurred to put them in a hostile attitude so as to cause the statute to operate for their protection. The judge below was correct therefore in ruling that plaintiffs' right to proceed was not barred by the statute of limitations. Inasmuch as some of the affidavits offered and used on the hearing are styled complaints, and some of the notices issued are called summons, we deem it well to note that the relief sought by plaintiff on this hearing, the cause not having terminated by final judgment, is only to be had by motion in the cause; and that, according to our present decisions, an independent action instituted and prosecuted as such will no longer be treated as a motion in a pending cause. *Long v. Jarratt*, 94 N. C. 443; *Falson v. McIlwaine*, 72 N. C. 312. It is evident here, however, from a perusal of the record and papers, that all the notices issued and the affidavits filed were in the pending cause, and that the parties have properly treated them as a proceeding in that cause, and no new action was entered or contemplated.

There is no error, and the judgment is affirmed.

Affirmed.

(145 N. C. 418)

## STATE v. HERRING.

(Supreme Court of North Carolina. Oct. 10, 1907.)

## 1. INTOXICATING LIQUORS—STATUTES—REPEAL.

Under Revisal 1905, § 5458, declaring that the Revisal shall not repeal any act prohibiting or regulating the sale of liquors in any particular section of the state, section 2080, extending and applying the regulation that the place of delivery of liquors shall be the place of sale to certain counties and townships of the state, not including P. county, did not repeal Pub. Laws 1903, p. 851, c. 498, making the place of delivery of whisky in P. county the place of sale.

## 2. SAME—REGULATIONS—POLICE POWER—VALIDITY.

Pub. Laws 1903, p. 851, c. 498, making the place of delivery of whisky in P. county the place of sale, constituted a valid regulation of the sale of liquors.

## 3. SAME—AIDING AND ABETTING—EVIDENCE.

Under Pub. Laws 1903, p. 851, c. 498, making a place of delivery of whisky in P. county the place of sale, evidence held to show a sale by the dealers from whom the liquor was ordered to the persons to whom it was delivered in P. county, in which defendant aided and abetted.

Appeal from Superior Court, Pender County; Long, Judge.

Sol. Herring was convicted of illegal sales of intoxicating liquors, and he appeals. Affirmed.

Solicitor Jones, the alleged vendee of the liquor, testified for the state as follows: "On Wednesday or Thursday I gave defendant 50 cents to send for some liquor, and 4 cents to pay express. I gave him the 54 cents the morning he sent off the order. I got the liquor on Saturday following. I went to the stables and got the liquor. Sol. was there, and I got my liquor. I got a quart of gin. The arrangement we made with defendant about sending for the liquor was on Wednesday or Thursday. Jim Johnson, Ellis Taylor, and Amos Grady were present when we made the arrangement to send for the liquor. Defendant was going to order some for himself, so we all gave him the money, 50 cents each and 4 cents express from Wilmington. Defendant was to send for the liquor. The liquor came on Saturday morning following, in the daytime. The box was open when I got to the stable. Defendant and Amos Grady were there when I got there. When I got there Sol. said: 'It has come, and you all know what you ordered.' I picked mine up out of the box and took it and went home. Jim Johnson, Ellis Taylor, and Amos Grady were present when I gave defendant the money. The others gave defendant same amount at the same time, in this town. When I saw the liquor it was at Johnson's stables. It was in a box. I got it out. All the bottles had the names of the owners upon it, and I did not see any bottles unmarked. My bottle was wrapped in a paper, and name on bottle. Ellis Taylor got his at the same time that I got mine." There was further testimony as follows: William Hand, cross-examination:

"I saw a negro carrying a box to the stables. Cannot say who the man was carrying the box. He was 250 yards away from me. Four bottles had been taken away when I got there. Seven remained in the basket covered with a bag. Solicitor Jones and the three other witnesses each had liquor. I examined the box when it came in, and it had express tag on it from Wilmington, N. C. Defendant told me he had not made a cent on the whisky, and ordered it to come in his box, but each bottle was labeled in the name of the person to whom it belonged; that he sent the order to Sternberger Bros., Wilmington, N. C., and they packed and shipped the whisky as above stated to him at Burgaw. Sternberger Bros., are licensed barkeepers in the city of Wilmington, N. C." Defendant requested the court to charge the jury that if they believed the testimony they would render a verdict of not guilty, which was refused, and defendant excepted. Verdict of guilty, and from judgment on verdict defendant appealed.

Stevens, Beasley & Weeks, for appellant. Assistant Attorney General Clement, for the State.

HOKE, J. (after stating the facts as above). Chapter 350, p. 503, of the Public Laws of 1901, prohibits the manufacture or sale of spirituous liquors in the county of Pender, and chapter 498, p. 851, of the Public Laws of 1903, makes the place of delivery of such whisky in said county the place of sale. Section 2080 of revisal of 1905, which extends and applies this last regulation to 47 counties in the state, and to certain townships in some additional counties, does not include the county of Pender, and might probably have the effect of repealing the local law, just referred to, but for the express provision elsewhere found in the Revisal itself (section 5458) to the effect that the Revisal shall not repeal any act prohibiting or regulating the sale of liquors in any particular section of the state, etc.

We have it, then, that the sale of liquors is unlawful within the county of Pender, and the further statutory regulation that the place of delivery of whisky within said county shall be the place of sale. The validity of this regulation, popularly known as the "Anti Jug Law," has been upheld with us by direct adjudication (State v. Patterson, 134 N. C. 612, 47 S. E. 808) and the decision on this question, we think, is well considered. We see no reason, as a general proposition, why the Legislature cannot make the place of delivery the place of sale, as to all contracts entered into after the enactment of such a law; and certainly a statute of this kind is valid to the extent required for the proper exercise of the police power, as here. Page on Contracts, § 1778; Freund on Police Power, § 499; State v. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706. In Page on Contracts,

It is said: "The power to regulate contracts is at least as wide as the police power and has been assumed to be the same thing." And in Freund, § 499: "The liberty of contracts yields readily to any of the acknowledged purposes of the police power." This, then, being a valid regulation, we think the evidence, if believed, shows a clear case of guilt on the part of the defendant; and the court was right in refusing to give the defendant's prayer for instruction. The testimony tended to establish that there was a sale of whisky by Sternberger Bros., of Wilmington, N. C., to Solicitor Jones, the person named in the bill of indictment, completed by delivery at and in Pender county; and that defendant aided and abetted such unlawful sale, both in taking the orders, procuring the whisky, and having same delivered to the purchaser, as charged in the bill of indictment. *State v. Johnston*, 139 N. C. 640, 52 S. E. 273.

There is no error, and the judgment is affirmed.

No error.

(145 N. C. 161)

**RALEIGH REAL ESTATE & TRUST CO. v. ADAMS et al.**

(Supreme Court of North Carolina. Oct. 10, 1907.)

**1. BROKERS—EMPLOYMENT—TERMINATION.**

Where defendants fixed no definite time for the duration of plaintiff's employment as their broker, either was entitled in good faith to terminate the employment at will, before any contract was effected with a purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 10, 11.]

**2. SAME—DUTY OF BROKER.**

A broker endeavoring to sell land for his principal is bound to communicate to the principal the real facts and true situation with reference to a proposed purchase of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 16-26.]

**3. SAME—RIGHT TO COMMISSIONS.**

A broker must obtain a contract from a proposed purchaser able to buy, where by the purchaser is bound to buy on the authorized terms, or produce to his principal a proposed purchaser who is able, willing, and ready to buy on the terms authorized, to entitle the broker to commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 65-81.]

**4. SAME—TERMINATION OF AUTHORITY.**

Defendants employed plaintiff as a broker to sell certain real estate for \$5,000 cash. Plaintiff obtained a purchaser who was ready and willing to purchase on the terms specified, but plaintiff represented that the property had been sold for \$1,000 cash, and the balance on time, but if such terms were unsatisfactory cash would be raised for the whole amount. Defendants declined to sell on those terms, and immediately withdrew the property from the market. Held, that plaintiff did not produce a purchaser on the terms prescribed, and was therefore not entitled to commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 66, 67.]

Appeal from Superior Court, Wake County; E. B. Jones, Judge.

Action by the Raleigh Real Estate & Trust Company against M. J. Adams and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought by the plaintiff to recover the sum of \$250 alleged to be due by the defendants, as commissions for the sale of two lots in the city of Raleigh. The plaintiff's version of the facts was that the property was placed with it for sale by the defendants at 5 per cent. commissions for services rendered in making the sale. That it sold the lots to Mr. Corpening and Mr. Tennille for \$5,000, the price named by the defendants, as vendors. Mr. Ellington, who conducted the transaction for the plaintiff, went to the house of the defendant Adams on December 1, 1905, to take his acknowledgment and his wife's privy examination to the deed for the lots, telling him at the time that he had sold the property for \$1,000 in cash and the balance on time, and, if the defendants did not want to take the \$1,000 and give time on the balance, he could raise the cash for the whole amount. The defendants declined to sell the property on those terms. Mr. Ellington testified that he had made an arrangement with the Raleigh Savings Bank to get the balance of \$4,000. He demanded the commissions for making the sale on December 2d, and the defendants refused to pay the same. The defendants' testimony tended to show, on the contrary, that they had placed the lots for sale in the hands of several real estate dealers, with the understanding that the one who first sold them, according to the stipulated terms—that is, \$5,000 in cash—should be preferred and receive the commissions. That Ellington had met Adams on the street and stated to him that he held the lots at too high a price. He afterwards, on or about Thanksgiving Day, 1905, told the defendants that he had a proposition to make to them, and that he would pay \$1,000 down and the balance in one and two years, to which the defendants replied that they would not accept it, that the sale must be for cash, as before agreed upon, that they did not care to sell on time, and had decided to take the property off the market. Ellington did not say that he could raise the cash, but merely made a proposal to buy as above indicated. There was but the one offer of part in cash and the balance on time. The defendants, when this offer was made by Ellington and refused by them, withdrew the property from the market. There was other evidence and facts bearing more or less upon the controversy, but the foregoing is a sufficient statement to present the point decided in this court. No question was made about the actual ability of Corpening and Tennille to pay the \$5,000.

The issues submitted to the jury and the answers thereto were as follows: "(1) Did the defendants withdraw the property from sale in good faith before the plaintiff found a purchaser, ready, willing, and able to pay

(for the property)? Ans. Yes. (2) In what amount, if any, are the defendants indebted to the plaintiff?" (Not answered, as the response to the first issue disposed of the case.) The plaintiff requested the court to instruct the jury as follows: "If they found from the evidence that the plaintiff procured a purchaser able, ready, and willing to pay \$5,000 in cash, before they withdrew the property from sale, they should answer the first issue 'No,' although the plaintiff did not tell the defendants that the purchaser would pay cash." This instruction was refused and exception taken. The court then charged the jury as follows: "The burden of proof upon the issue submitted is on the defendants. Among other things, the jury are instructed that, if they find from the evidence that Mr. Ellington, the plaintiff's agent, as claimed by him, told the defendants at the interview between them that he had found a purchaser who desired to pay \$1,000 cash and the balance on time, but if it was not satisfactory he would raise all the purchase price in cash and pay the same, and the defendants then declined to sell, and withdrew the property from sale, then the jury will answer the first issue 'No.' But if you find from the evidence that the defendants went to the office of the plaintiff, as they were requested to do, and Mr. Ellington told them he had a proposition to make them, which was that they take \$1,000 cash for the property and the balance, \$4,000, in one and two years, and he did not tell the defendants that they could get the purchase price, \$5,000, cash at the time, and they withdrew the property from sale in good faith, and Ellington did not tell them they could get the cash for the property until the next day, or afterwards, as testified to by them, then the jury will answer the first issue, 'Yes.'" The defendant duly excepted to the charge and now assigns, as error, the refusal to give its special prayer and the two instructions given by the court. There was judgment upon the verdict for the defendant, and the plaintiff appealed.

Womack, Hayes & Pace, for appellant. W. N. Jones and W. H. Lyon, Jr., for appellees.

WALKER, J. (after stating the facts as above). The defendants having specified no definite time for the duration of the plaintiff's employment as their broker, when they appointed and authorized it to sell the lots, either had the right to terminate it at will, before any contract was effected with a purchaser, subject, however, only to the ordinary requirement of good faith. *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119; *Sibbald v. Iron Company*, 83 N. Y. 378, 38 Am. Rep. 441; *Coffin v. Landis*, 46 Pa. 426; *Young v. Trainor*, 158 Ill. 423, 42 N. E. 139; *Bailey v. Smith*, 103 Ala. 641, 15 South. 900; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; *Insurance Co. v. Williams*, 91 N. C. 69,

49 Am. Rep. 637; *Brookshire v. Vonnannon*, 28 N. C. 231; *Wilcox v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882. The cases which we have so copiously cited will show the different circumstances under which this rule of law has been applied and demonstrate the wisdom of it.

There is another principle equally as well settled: A broker, who negotiates the sale of property, is not entitled to his commissions, unless he finds a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed upon between him and his principal, the vendor. *Mallonee v. Young*, 119 N. C. 549, 26 S. E. 141; 2 Am. & Eng. Enc. of Law, 584; *McGavock v. Woodlief*, 20 How. (U. S.) 221, 15 L. Ed. 884. Can it be that a real estate broker will be permitted by the law to recover his commissions, when he has reported to his principals a sale upon terms materially different from those which the latter had stated in their proposal to sell; the offer being thereupon rejected, and the property withdrawn from sale? No authority has been cited to us which sustains such a proposition as an affirmative answer to the question would establish. It was clearly the duty of the broker in this case to communicate to his principals the real facts and the true situation, as no doctrine is better settled in the law of agency than that the agent must give to his principal notice of all facts, relative to the business entrusted to him, which have come to his knowledge, and which may materially affect the principal's interests. *Tiffany on Agency*, p. 415, § 107; *Humphrey v. Robinson*, 134 N. C. 432, 46 S. E. 953. The relation between the agent and the principal being of a fiduciary nature, it results that there must always be the exercise of good faith by the former towards the latter. The principal reposes confidence in his agent and is entitled to receive, in return, perfect loyalty to himself and unselfish attention to his business. There should be no conflict between their interests, as the agent must always be free and untrammelled, in order to serve his employer with undivided devotion and fidelity to his trust and an unremitting endeavor to promote the success of the matters committed to his charge. *Reinhard on Agency*, §§ 239-246. An agent must also obey instructions and observe the terms of the agency, otherwise he does not perform, in the eye of the law, his full duty towards his principal, and is not entitled to receive the compensation for his services promised to him in the contract of agency.

We held substantially, in *Humphrey v. Robinson*, *supra*, following the general principles thus stated, that a real estate broker, who fails to communicate to his employer any facts known to him and material to the transaction he had in charge, was not entitled to damages for the failure of his principal to comply with the contract made by the broker in his name and on his account with a third person. So, here, the plaintiff, as

agent, failed to disclose to the defendants, who employed it to sell the lots, the facts as it now claims they actually existed. Its agent reported to them a contract with Corpening and Tennille entirely different from the one he was authorized to make, and the defendants had the right, then and there, to reject the proposition and terminate the agency, which they did, according to the findings of the jury. We cannot imagine upon what principle of equity, even broadly considered, and certainly we have failed to discover any principle of law, upon which the plaintiff is entitled to commissions, as upon a sale made by it, for surely none have been justly earned. It is now the established doctrine of the courts that, in the absence of any usage, or contract, express or implied, to the contrary, or conduct of the seller preventing a completion of the bargain by the broker, an action by the latter for his commissions will not lie until it is shown that he has procured and effected a sale of the property upon the terms fixed by the vendor. It is not enough that the broker has devoted his time, labor, or money to advance the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement or contract between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success. If there has been no contract, and the seller is not in default, then there can be no reward. His commissions are based upon the contract of sale. *Rapalje on Real Estate Brokers*, § 75, and cases cited in the note; *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441. The broker must also act strictly, or at least substantially, according to the authority conferred upon him, in order to entitle himself to the stipulated compensation. *Rapalje on Real Est. Brokers*, §§ 59, 60. In one of the cases cited on the argument by the plaintiff (*McDonald v. Smith*, 99 Minn. 42, 108 N. W. 292), it is said: "A real estate broker, in order to earn a commission for finding a purchaser, must either obtain a contract from a proposed purchaser able to buy, whereby he is legally bound to buy on the authorized terms, or he must produce to his principal a proposed purchaser who is able, willing, and ready to buy upon the terms authorized. It is not necessary that the principal and the purchaser actually be brought face to face, but the principal must be notified that such purchaser has been found and afforded a full opportunity to make a binding contract for the sale of the land on the authorized terms."

If the plaintiff has lost the benefit of its commissions upon a sale that it could easily have made, the fault was its own, and no blame can attach to the defendants. The mistake it made was in trying to obtain a little better terms from its principal in re-

spect to the time for the payment of the purchase money. It tried to make a sale, contrary to the instructions of the principal, in which payment of the larger part of the purchase money was to be deferred, when in fact, as it now claims, the purchaser was ready to pay all in cash. It is plain that a cash sale is what the defendants desired, and it was no doubt more advantageous to them. They had at least a right to consider it so when they made the bargain with the plaintiff. The latter was therefore, by every consideration of good faith, bound to communicate to the defendants the important fact that they could get cash for the property. Instead of doing so, the plaintiff withheld this information until the defendants had exercised their undoubted right to put an end to the agency.

The jury have found against the plaintiff upon the facts, adopting the defendants' version of them. The instruction requested was properly refused under the circumstances, and the charge of the court, which was concise and clear-cut, presented the case to the jury in its proper light.

No error.

(145 N. C. 144)

#### SWINDELL v. LATHAM.

(Supreme Court of North Carolina. Oct. 10, 1907.)

#### 1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

An agent can only contract for his principal within the limits of his authority, and one dealing with an agent with limited powers must generally inquire as to the extent of his authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 245.]

#### 2. SAME.

An agent, with authority to buy or sell, has, in the absence of any restriction to the contrary, the power to buy or sell for cash or credit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 280.]

#### 3. SAME.

An agent authorized to buy goods, where no funds are advanced to him, has implied authority to buy on the credit of his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 280, 313.]

#### 4. SAME—RATIFICATION OF AGENT'S ACTS.

Where, in an action against a principal for money loaned to his agent, authorized to buy goods for a mercantile business, the principal claimed that the agent was instructed to buy for cash and draw checks on a bank, and that arrangements had been made with the bank to honor checks, an instruction that where an agent is directed to buy for cash with money advanced by the principal, who fails to furnish cash, and the agent borrows money and uses it to pay for goods which are used for the benefit of the principal, the latter is liable for the money borrowed, was erroneous because making the liability of the principal for the money borrowed turn only on whether the money was applied to the payment of goods used in the business, though he did not know that the agent had violated instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 627.]



**5. SAME—INDIVIDUAL INTEREST OF AGENT.**

An agent cannot, without the knowledge of his principal, represent himself and the principal, where their interests conflict.

**6. SAME — ACTIONS — EVIDENCE — ADMISSIBILITY.**

In an action against a principal for money borrowed by his agent, evidence that the transaction between plaintiff and the agent was usurious, in so far as it affected the principal, was admissible on the question whether plaintiff knew the agent was exceeding his authority.

Appeal from Superior Court, Beaufort County; W. R. Allen, Judge.

Action by W. E. Swindell against J. E. Latham. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought to recover the sum of \$3,906.25, which the plaintiff alleges is due to him from the defendant, by reason of the fact that the latter, who lived in Newbern, was conducting a mercantile business in Washington, Beaufort County, N. C., by and through his agent, A. B. Smith, and that Smith was authorized to purchase such goods, wares, and merchandise as were necessary to be used in the conduct of the said business, either for cash or on credit, and that, in the usual and necessary conduct of the affairs of his principal, A. B. Smith borrowed from the plaintiff the said sum, which was used in the said business, and of which the defendant derived the use and benefit. The defendant denied all of this and averred that his agent was authorized to buy only for cash which was to be furnished by him, or procured through the bank.

The court charged the jury as follows: "(1) The plaintiff brings this action to recover money which he alleges was borrowed by the defendant's agent, A. B. Smith, for use in the defendant's business, of buying and selling cotton and merchandise, in Washington, and that the agent, when he received the loan of the money, was acting within the scope of his authority, and that the defendant received the benefit of the money so borrowed in the prosecution of his business in Washington. (2) The defendant admits that he was doing business in Washington by his agent, A. B. Smith, but he denies that Smith, as his agent, had any authority to borrow money, but, on the contrary, he was instructed to buy only for cash and to draw checks on the bank for the purchases so made by him, both of cotton and merchandise, and that sufficient arrangements had been made with the bank to honor all checks so drawn, and he avers that he is not liable to the plaintiff for any money borrowed by Smith from him. (3) A principal is not bound by the act of his agent, unless the act is within the authority of the agent. This authority may be expressly given, but there is no evidence of such authority in this case. It may also be implied. If the principal acts in such manner, and permits his agent to so conduct his business as to lead one of ordinary prudence to believe he has authority to

do a particular act, and a third party deals with the agent, relying upon this apparent authority, the principal is liable. (4) If an agent has no authority to borrow money in order to pay for goods, but is directed to buy for cash with money advanced by the principal, and the latter fails to furnish the cash, and the agent, for the purpose of promoting the business, borrows money and uses it to pay for goods for his principal, and the goods are used in said business for the benefit of the principal, then the principal is liable for the money so borrowed."

(5) The court here stated the contentions of the parties and recited the testimony, showing its bearing upon the issues in the case.

"(6) If you find by the greater weight of the evidence that the defendant held Smith out as his agent, and with his knowledge and consent permitted the business to be so conducted by Smith as to lead a man of ordinary prudence to believe that he had authority to borrow money, and the plaintiff, while acting upon this belief, loaned money to said agent, which was used in buying goods for the defendant, you will answer the first issue 'Yes.' If you find by the greater weight of the evidence that the defendant failed to furnish his agent with sufficient funds to pay for goods, that he knew goods were to be bought for cash, that his agent borrowed money from the plaintiff and used the same to pay for goods, and that these goods went into the business of the defendant and were disposed of for his benefit, you will answer the first issue 'Yes'; otherwise 'No.'

(7) If you believe the evidence in this case, the plaintiff loaned to Smith \$1,548.75 in October, 1903, \$857.50 on February 16, 1904, and \$1,500 on December 16, 1904. If you further believe the evidence, the first two of these transactions are usurious, and the plaintiff would not be entitled to recover any interest thereon, and all payments made would be deducted from the principal sum. The third transaction is dependent upon the intention of the parties. If it was made for the purpose of securing a greater rate than 6 per cent, it was usurious; but, if otherwise, it was not. (8) If you answer the first issue 'Yes,' you will answer the second issue, if you believe the evidence, \$1,356.25 on the first transaction, \$778.75 on the second, \$1,500 on the third, if you find it was usurious, or \$1,500 and interest from December 16, 1904, if it was not usurious. (9) If you answer the first issue 'No,' do not consider the first and second loans any further, but you will still consider the third, and if you find from the evidence that Smith borrowed the \$1,500 from the plaintiff on December 16, 1904, and used it to buy goods for the defendant, that these goods were received by the defendant and used by him with a knowledge of these facts, that the defendant is liable therefor, and if you so find, answer the second issue \$1,500, if usurious, or \$1,500 and interest, if not usurious.

If you do not so find, and you answer the first issue 'No,' then you will answer the second issue 'Nothing.' If you believe the evidence and answer the first issue 'Yes,' you will answer the second issue \$300, less \$92, leaving \$207.12, with interest from January 7, 1905."

The following issues were submitted to the jury: "(1) Was A. B. Smith, prior to December 13, 1904, authorized by the defendant to enter into the contracts with the plaintiff, sued on in this case, and to charge defendant with the payment of the money received thereby? Ans. Yes. (2) Is the defendant indebted to the plaintiff, and, if so, in what amount? Ans. \$3,635."

There was a verdict, under the evidence, and the charge of the court, for the plaintiff, as appears in the record, and judgment was entered thereon, from which the defendant, having duly excepted to the alleged errors of the court in the trial of the case, appealed to this court.

W. C. Rodman, for appellant. Harry McMullan and Ward & Grimes, for appellee.

WALKER, J. (after stating the facts as above). It seems to us that the presiding judge went too far, under the facts and circumstances of this case, in the fourth instruction given the jury, which was as follows: "If an agent has no authority to borrow money in order to pay for goods, but is directed to buy for cash with money advanced by the principal, and the latter fails to furnish the cash, and the agent, for the purpose of promoting the business, borrows money and uses it to pay for goods for his principal, and the goods are used in said business for the benefit of the principal, then the principal is liable for the money so borrowed." We presume that his honor, in giving this instruction, was attempting to follow the principle which he thought had been declared in *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616, and *Id.*, 137 N. C. 30, 49 S. E. 54; but he did not confine himself to the limit which, in that case, is prescribed to an agent, in buying goods for his principal, and, for this reason, he erred in the instruction given to the jury because it broadened the scope of the agent's authority as there defined. There is undoubtedly one expression in that case, as reported in 135 N. C. 492, 47 S. E. 616, which, when considered by itself, might, perhaps, have led the judge into this error; but what is said in a judicial opinion must be read with reference to the facts of the particular case then under investigation, and also in connection with the context. In *Brittain v. Westhall*, as reported in 135 N. C. 492, 47 S. E. 616, and again in 137 N. C. 30, 49 S. E. 54, there were two questions involved: (1) Whether Westall had furnished Townsend, his agent, with funds to buy the goods; and (2) whether if he had done so, and his agent, instead of using the

funds for that purpose, bought the goods on the credit of his principal, and the latter afterwards received and appropriated them, knowing that Townsend, his agent, had violated his instructions to buy only for cash with money supplied to him and had bought on credit. With reference to these questions, we stated several legal propositions: (1) "That an agent can only contract for his principal within the limit of his authority, and persons dealing with an agent having limited powers must generally inquire as to the extent of his authority." *Brittain v. Westhall*, 135 N. C. 495, 47 S. E. 616. See, also, *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811. (2) "When the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. *Ruffin v. Mebane*, 41 N. C. 507. Or if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. *Sprague v. Gillett*, 50 Mass. 91." *Brittain v. Westall*, 137 N. C. 32, 49 S. E. 54; *Komorowski v. Krumdick*, 56 Wis. 23, 13 N. W. 881. (3) "On the face of the contract, it appeared that Townsend was directed to buy only for cash, and, this being so, he could not, of course, buy on credit contrary to the instruction of his principal. Whether the defendant subsequently ratified what he did, and is therefore liable to the plaintiff, is quite another and different question." *Brittain v. Westall*, 137 N. C. 33, 49 S. E. 54. This was said by us in regard to a prayer of the defendant, as follows: "The written contract introduced in evidence constituted Townsend the agent of Westall, with limited authority only. As such agent, Townsend had authority to buy lumber for cash, with money furnished him by Westall, but he did not have authority under said written contract to buy lumber on Westall's credit." (4) "The contract expressly required Townsend to buy for cash, and the only possible ground of defendant's liability is that he received and appropriated the lumber to his own use, knowing that his agent had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case the latter had implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 Am. & Eng. Enc. of Law, 1021, and notes." *Brittain v. Westall*, 137 N. C. 34, 49 S. E. 54. This language was used by us when commenting upon a

prayer of the defendant, as follows: "Although the identical lumber in controversy came into the possession of defendant and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or accepted and appropriated the lumber with notice of the fact that Townsend had bought it on his (defendant's) credit." We also stated that, if the agent is instructed to buy only for cash to be furnished by the principal, and violates his instructions by buying on credit, and the principal thereafter receives and uses the goods knowing that he has not furnished the cash with which to buy them, he is liable at least for the value of the goods to the seller, as he must have known that they were bought on credit, but if it appears that he did furnish the cash, and the agent nevertheless purchased on credit, he is not liable for the price even though he afterwards received and used the goods, if it appears that he did so without notice of his agent's default.

It follows from this statement of the law, as declared by the two decisions in that case, that the instruction of the judge below was erroneous, because the defendant's liability, as principal of A. B. Smith, to the plaintiff, was made to turn only upon whether the borrowed money had been applied to the payment for goods which were used in the defendant's business, in which event the jury were told that the defendant would be liable, not merely for the value of the goods so used by his agent in his business, or for the value of any benefit he may have derived therefrom, but for the full amount of the borrowed money. The defendant lived in Newbern; the business was carried on by his agent, Smith, in Washington. It may be that, under the real facts and circumstances of this case, the defendant did not know that his agent had violated his instruction, and his liability to the plaintiff for the amount of the borrowed money depended upon such knowledge. This was the ultimate fact to be established, and the jury should have been so instructed. Whether the defendant would be liable for the value of the goods actually used in his business or for the value of any benefit derived therefrom, even if he had no notice that his agent had disobeyed his instructions, is a question which is not now before us. We simply decide that there was error in the instruction of the court to the jury.

There are some expressions in the receipts given by A. B. Smith, the agent, to the plaintiff for the borrowed money, which might indicate that they were buying flour on joint account for the purpose of speculation, using the credit of the defendant for that purpose. We may not correctly understand these receipts, and their meaning and significance may be far otherwise than would appear on their face; but it is not permissible for an

agent thus to use his principal's credit, if we are right in our interpretation of these receipts. An agent cannot, in law, represent himself and his principal, where their interests conflict, and without the knowledge of the latter. An agent cannot thus well serve in two capacities, for himself and his principal, because the latter's interests may be prejudiced even by an unconscious and unintentional desire to advance his own. *Sumner v. Railroad*, 78 N. C. 289; *Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850; *Mining Co. v. Fox*, 89 N. C. 61; *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. 628. We have only referred to this matter that the intention of the parties may be made clearer at the next trial. It may be, and likely is, that the transaction is entirely free from any objectionable feature.

If the transactions between the plaintiff and the agent, A. B. Smith, were usurious, in so far as they affected the defendant, we do not see why this is not at least a circumstance to be considered by the jury upon the question as to whether the plaintiff did not know that the agent was exceeding his authority and acting contrary to his principal's instructions.

New trial.

(78 S. C. 327)

EPSTIN et al. v. BERMAN et al.

(Supreme Court of South Carolina. Oct. 5, 1907.)

#### 1. PLEADING—MOTIONS—MAKING COMPLAINT MORE DEFINITE AND CERTAIN.

A complaint alleged that the plaintiffs, as members and trustees of a religious corporation, are entitled to the custody and control of a certain lot with a synagogue thereon, the property of the corporation, and that defendants, wrongfully claiming to be the trustees, are assuming to act as such, and are wrongfully exercising control and custody over the lot and synagogue to the plaintiffs' damage, wherefor they pray, besides other relief, for a certain sum in damages. *Held*, that the wrongful acts alleged do not necessarily import substantial pecuniary damage to the plaintiffs, and the court properly ordered the complaint amended by stating with particularity how and in what way the plaintiffs have been damaged.

#### 2. SAME.

The order to amend the complaint did not require plaintiffs to allege mere evidentiary matters or special damages.

#### 3. APPEAL—DECISIONS REVIEWABLE—ORDERS TO AMEND PLEADINGS.

An order to make the pleadings definite and certain by amendment is appealable when it deprives the appellant of some substantial right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 703.]

#### 4. SAME—DISCRETION OF COURT—ABUSE OF DISCRETION.

The Code vests the circuit courts with power to order an amendment to make a pleading more definite and certain, and the court's action will not be disturbed unless it clearly appears that the appellant has been prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3832.]

#### 5. DAMAGES—GENERAL DAMAGES.

General damages are such as necessarily accrue from the unlawful acts alleged, and are

recoverable under a general averment of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 4.]

#### 6. SAME—SPECIAL DAMAGES.

Special damages are such as naturally and proximately, but not necessarily, accrue from the unlawful acts alleged, and are not recoverable unless specifically alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 4.]

Appeal from Common Pleas Circuit Court of Richland County; R. Withers Memminger, Judge.

Action by Philip Epstein and others against Julius Berman and others. From an order requiring the complaint to be made more definite and certain, plaintiffs appeal. Affirmed.

J. S. Muller and D. W. Robinson, for appellants. Melton & Belser, for respondents.

JONES, J. This appeal is from an order of Judge Memminger requiring the complaint to be made more definite and certain. The complaint alleges, substantially: (1) That the Tree of Life is a religious corporation organized by the Israelites of the city of Columbia; (2) that the plaintiffs are members and the trustees of said corporation charged with the custody and control of its property; (3) that said corporation owns a certain lot, described, with a synagogue thereon, for use by its members for divine worship; (4) that the defendants, Julius Berman, August Kohn, J. M. Cohen, C. C. Goldstein, J. M. Epstein, and August Meyer, are wrongfully claiming to be trustees of said religious body and corporation, and are assuming to act as such, and are wrongfully exercising control and custody of said lot and of said synagogue; (5) "that the plaintiffs have been damaged by the unlawful and wrongful acts of defendants in the sum of \$5,000." The prayer of the complaint is that they be declared the rightful trustees of the corporation; that the claims of the defendants be declared wrongful, and they be prevented from further attempting to exercise the duties of such trustees; that plaintiffs be put in charge of said corporation; and "for \$5,000 and costs." Judge Memminger held that the wrongful acts alleged in paragraph 4 of the complaint are of the most general character, and do not necessarily import substantial pecuniary damages to the plaintiffs; and that, if such damages are claimed, the particular acts and circumstances out of which such damages arise should be set forth in order to enable defendants to prepare to meet the plaintiffs' charge, and ordered plaintiffs to amend the complaint by stating with particularity, definiteness, and certainty by what precise acts, in what items, and how and in what way the plaintiffs have been damaged in the sum claimed. The plaintiffs except to the order on substantially two grounds: (1) That defendants were not called upon to meet any

claim for special damages, but damages such as would naturally and necessarily result from the wrongs alleged; that the effect of the order would be to require plaintiffs to allege special damages which they do not choose to claim. (2) That compliance with the order would require plaintiffs to allege evidentiary matter.

An order to make pleadings definite and certain by amendment is appealable when it deprives the appellant of some substantial right. *Bolin v. Railway Co.*, 65 S. C. 228, 43 S. E. 665; *Lynch v. Spartan Mills*, 66 S. C. 16, 44 S. E. 93. The Code, however, invests the circuit court with power to order such amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge is not apparent, and large discretion must necessarily be allowed the circuit court, and the court's action will not be disturbed except in a case where it clearly appears that the appellant has been prejudiced. The delay and trouble involved in appeals from orders of this character should not be encouraged by any very technical or refined criticisms of the action of the circuit court. The manifest object of the court was to require a definite statement of the acts of defendants alleged to be wrongful and resulting in damage to plaintiffs. The mere characterization of acts as "wrongful," or "unlawful," does not assign any specific legal character to the acts, and may generally be disregarded. *Aaron v. Southern Ry.*, 68 S. C. 100, 46 S. E. 556. The acts characterized as unlawful—"claiming to be trustees of said religious body," "assuming to act as such," "exercising control and custody of said lot and synagogue"—are very general and indefinite. In *Bolin v. Railway Co.*, 65 S. C. 228, 43 S. E. 665, and *Lynch v. Spartan Mills*, 66 S. C. 17, 44 S. E. 93, the court approves the statement in *Pom. Code Remedies* that: "The material facts which constitute the ground of relief should be averred as they actually existed or took place, and not the legal effect or aspect of these facts, and not the mere evidence or probative matters by which their existence is established." Good pleading requires a plain and concise statement of the final, ultimate facts which constitute the cause of action or defense. While the general allegations in the complaint may be sufficient as against a general demurrer, yet the defendants on this motion were entitled to have a definite statement of the specific acts of wrong, so that the court could reasonably infer resulting damage to plaintiff, and the defendants may know what particular delict is charged against them. The plaintiffs certainly must know wherein the defendants have breached plaintiffs' alleged right to the control and custody of the property. They are not required to do an impossible thing, and no substantial right is taken away or impaired by the order. We do not construe the order as either requiring

plaintiffs to allege mere evidentiary matter or as requiring the allegation of special damages.

General damages are such as necessarily accrue from the unlawful acts alleged, and are recoverable under a general averment of damage, while special damages are such as naturally and proximately, but not necessarily, accrue from the unlawful acts alleged, and are not recoverable unless specifically alleged. The complaint does not undertake to allege any special damages, and we do not interpret the order as doing anything more than requiring the plaintiff to state with definiteness and certainty the unlawful acts relied on as the basis of a claim for general damages.

The judgment of the circuit court is affirmed.

(78 S. C. 352)

**BUSSEY v. CHARLESTON & W. C. RY. CO.**

(Supreme Court of South Carolina. Oct. 8, 1907.)

**1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATING ABROGATED RULE.**

A section master killed by collision of a train with his hand car was not guilty of contributory negligence by violating the company's rule, providing for the sending of a flagman ahead; it having been abrogated by accustomed disregard thereof, known to and acquiesced in by the company's representative, the road master, whose duty it was to furnish rules and supervise the work of the division.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 763-765.]

**2. SAME—RULES OF MASTER—REASONABLENESS—QUESTION FOR COURT OR JURY.**

Conflicting expert testimony as to the necessity for the rule of a railroad company, that a section master approaching a curve on a hand car shall stop and send a flagman ahead, does not raise an issue of fact on which the reasonableness of the rule depends, in which case only is the reasonableness of the rule one for the jury, instead of the court; but such an issue is raised by evidence that another rule required the section master to go over his section at least every other day, and that it was impossible for him to do so if he stopped at curves to send ahead a flagman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1032-1043.]

**3. SAME—NEGLIGENCE—EVIDENCE.**

Evidence of negligence, in an action for death of a section master from collision with his hand car of a special freight, held sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000-1050.]

**4. SAME—FELLOW SERVANTS—RAILROADS.**

Under Civ. Code Ga. 1895, § 2610, providing that, except in case of railroad companies, the master is not liable to one servant for injuries from the negligence of other servants about the same business, a railroad company is liable for injury to an employé from negligence of his fellow servants.

**5. SAME—NEGLIGENCE—PRESUMPTION.**

Under the law of Georgia, in case of injury to an employé, on its being shown that he was

without fault, there is a presumption of negligence of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 873.]

**6. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

The substance of a rejected charge having been given in the charge of the court, any error in holding it to be a charge on the facts is harmless.

**7. MASTER AND SERVANT—INJURY TO EMPLOYÉ—NEGLIGENCE—EVIDENCE.**

Though, under the law of Georgia, failure of a train to give the statutory signal at a crossing cannot be considered as negligence *per se*, in the matter of the collision of the train with a hand car three-quarters of a mile from the crossing, yet it may be considered as an item of evidence tending to establish negligence.

**8. APPEAL—REVIEW—QUESTIONS OF FACT.**

There being evidence of defendant's negligence to go to the jury, the refusal of a motion for new trial on the ground that the verdict for plaintiff was against the weight of evidence will not be disturbed.

**9. SAME.**

It is not error of law for the court, in denying a motion for new trial, to state as conclusions facts not sustained by the evidence.

**10. DEATH—DAMAGES—EXPECTANCY OF LIFE—EVIDENCE.**

Under the law of Georgia, the jury are not limited to the mortality and annuity tables in estimating the value of a life.

Appeal from Common Pleas Circuit Court, of Edgefield County; R. Withers Memminger, Judge.

Action by Elizabeth J. Bussey, administratrix of John C. Bussey, deceased, against the Charleston & Western Carolina Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

S. J. Simpson and Sheppard Bros., for appellant. J. Wm. Thurmond and James H. Tillman, for respondent.

**POPE, O. J.** This action was brought in July, 1905, by the plaintiff, Elizabeth Bussey, as administratrix of John C. Bussey, deceased, against the defendant railway company, to recover damages for the alleged wrongful death of the intestate herein. The deceased was in the employment of the defendant railway as a section master, having under his control a section of road reaching from the neighborhood of Woodlawn, a station just on the south side of the Savannah river, to Lulaville, a station in Georgia. On the 25th of February, 1905, deceased, together with his men, were on the road working towards Augusta. They stopped at Woodlawn, where, according to the testimony introduced by the plaintiff, they had dinner, and, Mr. Bussey having learned from the agent at this place that the track was clear, they continued their work up the road. After leaving Woodlawn some distance, they were proceeding around a curve in the road, their hand car moving upgrade at the rate of 20 miles an hour, when they were run into by an extra freight train, and Bussey was killed. The plaintiff alleged negligence on the part of the defendant in not notifying the deceased of the ap-

proach of the extra train; in failing to blow the whistle at Sneed's Crossing, a public crossing three-fourths of a mile from the scene of the accident; in coming around the curve at a high rate of speed without having the train under control; failure to blow at the curve, as was customary; and, finally, failure of the engineer to apply the brakes and stop the train before striking the car of deceased. The defendant denies that it was negligent in any of the above particulars, and alleges that it was not its duty to give deceased notice of the extra train, and that his injury was caused by his own negligence in not sending a flagman ahead, as he, according to the rules under which he was employed, was bound to do. The case came on for hearing at the October, 1906, term of court for Edgefield county. Judge Memminger having refused defendant's motion for a nonsuit, the case went to the jury and resulted in a verdict of \$15,000 for the plaintiff. Thereupon defendant made a motion for a new trial, and, it also having been refused, it now appeals to this court, alleging error in a number of particulars.

In disposing of the exceptions, the first question naturally arising is whether or not the rule requiring section masters to send ahead flagmen had been abrogated. The plaintiff introduced evidence in reply tending to show an accustomed disregard of the rule. Whether this evidence was admissible depends upon the fact whether the disregard was brought home to the defendant company. Certainly secret and occasional violations of the rule by employes are not admissible to prove its abrogation. 20 Am. & Eng. Ency. 107, and authorities; *Binion v. Railway*, 118 Ga. 282, 45 S. E. 276. It must be shown that the failure to observe such regulation is sufficiently well known to the master to raise the presumption that by acquiescence in its violation the rule had been annulled. In this, as in all other cases, knowledge of the representative is knowledge of the master, and therefore if knowledge is brought home to such representative, and such acquiescence on his part is shown, the rule cannot relieve the master. *Railway Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Baulec v. Railway*, 59 N. Y. 356, 17 Am. Rep. 325; 20 A. & E. Ency. 108. The evidence here objected to tended to show an accustomed disregard of the rule by all section masters, and that even Stillwell himself, who was the road master, and whose duty it was to furnish rules and supervise the work of his division, regularly traveled without sending flagmen ahead. We think the only reasonable inference from the testimony is that Stillwell had notice of the violation of the rule. His duties, being those of the master, made him the representative of the master. Therefore his knowledge was the master's knowledge. The purpose of the evidence was to show that the rule was constantly violated by both the servants and the

representative of the master; that it was so universally disregarded that the only reasonable inference was that the master had notice of and acquiesced in the violation. This being so, even granting that the rule was promulgated by Kenley, the result would not be effected. The question here is: Was the violation of the rule brought to the knowledge of the master, and did he acquiesce in it? Its determination was for the jury. It is quite true that rules are necessary for the conduct of the complex business of railroads and should be given effect. No organization composed of many departments can be successfully managed where there is an absence of system and regulation. Where such rules are established and promulgated in some reasonable way, and employes have knowledge of them, they are binding, and the duty devolves upon employes to obey them. Many rules are, however, adopted which, when they are attempted to be put into practice, prove impracticable, and without being expressly revoked they are allowed to be constantly violated. Such abrogated rules cannot in a true sense be regarded as rules, and employes are not guilty of negligence in violating them. They are not a scale by which servants' acts are to be measured as to whether or not they are negligent. Care and diligence are not governed by them. *Pa. Co. v. Roney*, 89 Ind. 453, 48 Am. Rep. 173; 1 *Labatt on Master and Servant*, pp. 315, 511. We are of the opinion therefore that the evidence was properly admitted, and that the court was correct in leaving it to the jury to decide whether the rule had been abrogated.

Under this view, if the jury found that the rule was not abrogated, then the question as to the reasonableness of the rule becomes important. Was it proper to submit this question to the jury? There seems to be much conflict of authority on this subject. In volume 1, at page 508, of his work on *Master and Servant*, Labatt says: "Whether reasonableness of a rule is a question for the court or the jury is one as to which there is much conflict of authority. One theory is that the question is always for the court; the reason for this view being that it would otherwise be impossible to secure a uniformity of view or to insure the rule pronounced unreasonable by another jury in a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles, viz., that reasonableness of a rule is a mixed question of law and fact, except in plain cases." The rule is thus laid down in 20 A. & E. Ency. 104: "Rules adopted by employers engaged in a complex and dangerous business are presumably selected as the best for avoiding injuries to their employes, and unless clearly shown to be unreasonable and in-

sufficient the master should not be charged with negligence in adopting them. \* \* \* Whether or not a rule adopted by the master for the conduct and government of his employees is reasonable is a question of law for the court." In *Elliott on Railroads*, § 202, we find: "The reasonableness of such regulations and the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the courts to decide, if any fixed or permanent regulations are to be established, and the better authority holds it to be such, since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the rule to be unreasonable. \* \* \* There are many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts and circumstances, and where this is true it may perhaps be called a mixed question of law and fact; but, when the facts are undisputed, we think it clear both upon principle and according to the weight of authority that the question is one of law for the court." Again, Thompson, in his work on Trials, says, at section 1057: "Whether a certain rule of a railway corporation is reasonable, and therefore valid, is a question of law for the court; the general rule being that the reasonableness of the by-laws, rules, and regulations of corporations, whether private or municipal, is to be decided as a question of law. And it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the jury for decision." The practice in our state seems to be in accord with these authorities. *Broom v. Tel. Co.*, 71 S. C. 506, 51 S. E. 259; *State v. Earle*, 66 S. C. 202, 44 S. E. 781; *Gideon v. Enoree Mfg. Co.*, 44 S. C. 442, 22 S. E. 598. Therefore the plaintiff must show that there was an issue of fact raised to entitle the submission of the question to the jury. In her endeavor to do this, she contends that the defendant after putting the rule in evidence produced witnesses to prove the necessity, which is practically identical with the reasonableness of the rule; that reply was made by the plaintiff, and thus an issue of fact was clearly raised. This point is not well taken. We are unable to see where the disputed fact or facts come in. The evidence introduced by the defendant was merely the expert opinion of the witnesses as to the necessity of the rule. It is true that the facts are stated upon which the rule is based, but nowhere in the plaintiff's reply can we find these facts contradicted. A contradiction of an opinion merely could raise no issue of fact. It would raise simply the original question of necessity or reasonableness that the court is called upon to decide. There is the fact, however, that, according to rule 1,000 of the defendant railway, the deceased was required to go over his section of

road at least every other day. There was testimony to the effect that this was impossible if plaintiff's intestate had stopped at curves to send a flagman ahead. This, then, raises a question of fact, and makes the reasonableness of the rule, so far as the deceased was concerned, a question for the jury.

From the consideration of the question above, it is clear that the nonsuit was properly refused; the ground of the motion being that the plaintiff was negligent. The evidence raised issues which had to go to the jury on this point. *Binlon v. Railway*, 118 Ga. 878, 36 S. E. 938. If, after consideration of the testimony, the jury found that the deceased was justified in violation of the rule in question, then, so far as the plaintiff's testimony was concerned, her intestate was free from fault in bring about the injury. Nor according to the plaintiff's testimony was the defendant so absolutely absolved from negligence as to warrant such a course. It was in evidence that the defendant's agent informed the deceased that the track was clear; that the defendant's agents were rounding the curve with a special train at a rapid rate of speed; that no signal was given, nor was the train under control. These, together with the other alleged acts of negligence, were sufficient to carry the case to the jury.

The circuit judge charged the jury that a servant of a railroad company does not assume the risks caused by the negligence of the company or its employees acting in the scope of their duties, and such risks cannot be said, under the law, to be incident to his employment, and assumed by him. The appellant endeavors to show that this is an incorrect proposition of law, in that it makes the master liable for injuries caused by the negligence of fellow servants. Section 2610 of the Civil Code of Georgia of 1895 declares that, except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business. *Gun v. Willingham*, 111 Ga. 427, 36 S. E. 804. The plain implication, and in fact the holding in Georgia, is that, where an employee of a railroad company is injured by the negligence of a fellow servant, the master is liable. *Ry. v. Worley*, 92 Ga. 84, 18 S. E. 361; *Ralley v. Garbutt*, 112 Ga. 288, 37 S. E. 360. Therefore this contention must be overruled.

The fifth exception alleges error on the part of the circuit court in charging the jury that, if it was affirmatively shown that the intestate was without fault himself, a presumption of negligence would arise against the defendant, and the burden of proof would be upon the defendant to show that it was not negligence. The charge, according to the doctrine prevailing in Georgia, is correct. The cases make a distinction between injuries to employees and those resulting to

third persons. In the latter case, immediately upon the happening of the injury, the presumption arises that the master was negligent, which presumption it is incumbent upon him to overcome. In the former case, where the plaintiff was taking part in the act during the performance of which he was injured, before the presumption will arise, he must show that he was free from fault in bringing about the mishap. When this is done, the presumption is identical with that in cases of injuries to persons not employes. *Railway v. Vandiver*, 85 Ga. 470, 11 S. E. 781. The presumption is, of course, by no means conclusive, and even very slight evidence on the part of the defendant may dispel it. This being the law, there was no error in the charge.

Again, error is alleged in refusing to charge the following request, and in holding it to be a charge upon the facts: "So, if you find that Bussey neglected to send forward a flagman on the occasion in question, if his duty required him so to do, and that he took the risk of being on the track with his hand car, without a flagman ahead of his car when run into by the train, then I charge you that the plaintiff is not entitled to recover, even if you find that the company was also negligent, and if these were the facts you should find for the defendant." This exception cannot be sustained. Throughout his charge the circuit judge was apparently anxious to impress upon the jury the fact that, if the deceased was in any way to blame for the injury resulting to himself, the plaintiff could not recover. That if he neglected his duty in failing to send forward a flagman, he was blamable, is stated in a number of instances. Thus, at folio 590, he uses this language: "To find such section master free from fault, you should find from the evidence, if there is any such evidence, that at the time of his injury on the railway curve in question, if there was any such curve, that he was doing everything that his employers required him to do for his protection, and had sent out a flagman to flag approaching trains, if his duty required him to send out such flagman. If his duty required him to send out such flagman, and he failed to do so, you will not be authorized to find Mr. Bussey free from fault." Again, at folio 598, he says: "And if you find that such rules notified him that extra trains would run without notice, and that he should not run around curves without a flagman in advance, then I charge you that he was bound to obey such rule, and had no right to substitute any other rule or measure of diligence, but must obey that prescribed by his employer, unless he was authorized in ignoring the rules with the knowledge and acquiescence of the company or those in authority to promulgate and enforce same." And, again, he charged, at folio 610: "The court charges you that if you find from the evidence that it was the duty of the employe, Bussey, to send forward flagmen to flag the

curve in question, as against the approaching trains, and that such flagging was required to be done by Bussey as an act of precaution under the rules and regulations of the company, if there were such rules, of which he had notice, if he did have notice, and that Bussey failed so to flag on the occasion in question, and as a result thereon was killed by an approaching train, then I charge you that such failure to obey the rules would be such an act on his part as would prevent any recovery in this case." Clearly, from these quotations, the substance of the rejected charge was given to the jury, and, even were the circuit judge in error in holding it a charge upon the facts, it was immaterial and harmless.

The judge instructed the jury that the failure of the defendant to give the signal at Snead's Crossing could not be considered as negligence per se, with respect to the deceased, but that it might be considered only as an item of evidence tending to establish negligence. The defendant alleges that this was error. An examination of the Georgia cases will show that they sustain the circuit judge. In the case of *Railway v. Golden*, 93 Ga. 510, 21 S. E. 68, we find this language: "But this court, so far as I know, has never held, relative to a person that distance from a crossing, that the omission to give the signal required by law is negligence per se, as was charged in this case by the trial judge. It has been held that the evidence of noncompliance with the statute by the servants of the railroad company is admissible, and the jury may be instructed by the judge that they may consider it. This, I think, is as far as the court has gone on the subject." In the very strong opinion in the case of *Railway v. Gravitt*, 93 Ga. 369, 20 S. E. 550, the court lays down the same rule. The purpose of such a holding is clear. The neglect to blow the whistle at the crossing, as defendant's duty required, has a tendency to show a negligent or reckless disregard of duty. This fact, together with other facts, may form a chain bringing home to the defendant the negligent act complained of, and for which it is sought to be held responsible. It may be very important, or it may be of no value at all. It is just so much evidence as the jury may take into consideration and give such weight as to them seems proper.

Finally, we consider the question whether it was error on the part of the trial judge to refuse a new trial. It is well settled that for error of fact this court is without power to review the circuit court's action. Therefore, to entitle the defendant to a new trial, error of law must be shown. The first alleged error, based upon a number of subdivisions alleging error, is that the verdict should have been set aside because it was contrary to the overwhelming weight of the testimony. Without taking up the subdivisions separately, we hold that the grounds



alleging error because of a lack of proof of negligence cannot be sustained. These questions were properly submitted to the jury, and, they having reached a verdict, this court will not interfere upon the ground that the finding is against the weight of the testimony. *Ruddell v. Railway*, 75 S. C. 291, 55 S. E. 528; *Cain v. Railway*, 74 S. C. 89, 54 S. E. 244. Likewise, it has been held that it is not error of law for a judge in overruling a motion for a new trial to state as conclusions facts not sustained by the testimony. *Caldwell v. Railway*, 73 S. C. 443, 53 S. E. 746. Therefore these grounds must be overruled. Nor can we see that the circuit judge attempted to lay down any new rule as regards master and servant in his order. His intention was to say that a railroad company could not lay down a rule and in contemplation of such rule act in entire disregard of the rights of the employé.

The eleventh exception raises the point that under the Georgia statute and the decisions of that state a verdict of \$15,000 was illegal and excessive, in that it was more than the amount that could, by the rules established by the courts of Georgia, have been fixed by the jury as the value of the life of the deceased. According to these rules, the plaintiff is allowed to recover for the full value of the life of his or her intestate. The difficulty is in arriving at the value of the life. The defendant contends that the proper and only method is to use the mortality and annuity tables, and from the former the number of years the deceased probably would have lived, and from the latter the amount of \$1 for that time, and multiply that amount by the yearly earnings of the deceased. This is a correct statement of the general rule when the tables are used, but the jury are not bound to use the tables in estimating the value of a life. *Railway v. Clark*, 117 Ga. 548, 44 S. E. 1; *Railway v. Burney*, 98 Ga. 1, 26 S. E. 732. And even when the tables are used there is no iron-clad law holding the jury down to them. As was said by Justice Lumpkin, in what he thought would be a proper charge for the trial judge as set out in the case of *Burney v. Railway*, supra: "In estimating the probable length of a given man's life, as compared with the average duration of life of one of the same age, his health, occupation, habits, and surroundings, just as they are disclosed by the evidence, ought to be considered, and proper weight be given to all these things in fixing the expectancy of the life, diminishing or increasing the figures laid down in the tables according to the facts in the particular case under investigation. \* \* \* If in any case the expectancy of the person under consideration would, under the evidence, have been properly greater or less than that of the average man, the amount of damages to be allowed should be increased or diminished accordingly. \* \* \* Feebleness of health,

actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, the corresponding diminution of earning capacity, and other causes, may contribute to a greater or less degree to decreasing the gross earnings of a lifetime. All should be taken into consideration." We take it for granted that the jury properly considered all of these matters, and reached their verdict only after careful deliberation. The circuit judge, who was present and heard the testimony, by his refusal to grant a new trial, expressed his approval of the verdict. This court therefore holds that it is correct.

Nor can we sustain the exception that the new trial should have been granted because the verdict was contrary to the charge of the court. The jury were instructed that in order for the plaintiff to recover she must show that her intestate was free from fault, and that, if both he and the defendant were free from fault, there could be no recovery. As was said above, the whole question of negligence was submitted to the jury, and they, having found a verdict for the plaintiff, thereby made it known that they found the facts such as would sustain a verdict. Therefore this court cannot set it aside.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(78 S. C. 381)

# WILSON v. VIRGINIA-CAROLINA CHEMICAL CO.

(Supreme Court of South Carolina. Oct. 15, 1907.)

## 1. MASTER AND SERVANT—INJURIES TO SERVANT—CAUSE OF ACCIDENT—QUESTION FOR JURY.

In an action for the death of an employé, run over and killed while standing on a railroad track by a loaded car being pushed down on him, evidence as to whether the failure to give a signal of the approach of the car was the proximate cause of the accident held sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

## 2. SAME—MOTION FOR NONSUIT.

Where an employé was killed by being struck by a loaded car pushed down against him as he was standing on a railroad track, whether those who were pushing the car had by their negligence brought on decedent such a sudden emergency as to excuse him for trying to escape on the less safe side of the track was an issue of fact which could not be decided on a motion for nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

## 3. SAME—FELLOW SERVANTS.

Plaintiff's intestate, a shoveler employed in defendant's phosphate mill, was killed by being struck by a loaded car being pushed against him. Decedent and the men who were pushing the car were working in different departments of the mill under different foremen, neither of whom, however, had power to hire laborers, provide machinery or the place of labor, or to do any duty imposed by law on the master. Held, that the employés pushing the car were decedent's

fellow servants, for whose negligence defendant was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 483.]

#### 4. SAME—FELLOW SERVANT LAW—SCOPE.

The change in the fellow servant law made by the Constitution of 1895 affects only the employees of railroad corporations.

Appeal from Common Pleas Circuit Court of Charleston County; R. O. Purdy, Judge.

Action by Lizzie Willson, as administratrix of the estate of William Wilson, deceased, against the Virginia-Carolina Chemical Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Simeon Hyde, Mordecai & Gadsden, and Rutledge & Hagood, for appellant. Jas. L. Jervey and Jervey & Cohen, for respondent.

WOODS, J. The plaintiff, as administratrix of the estate of William Wilson, recovered judgment against the defendant for \$1,500, under these allegations charging the intestate's death to have been caused by defendant's negligence: "That on or about the 14th day of March, 1906, the plaintiff's intestate was in the employ of the defendant company and was actively engaged in his duties, which consisted in shoveling up scattered phosphate rock from the space in front of the door of a certain building into which phosphate rock was being discharged from cars, through which space ran a railroad track; that, while so engaged and intent upon his work, a railroad car, loaded with phosphate rock, was carelessly and negligently pushed along said railway track by the agents and employees of the said defendant company; that no signal was made nor warning given of the movement of said car; that by reason of said carelessness and negligence of the defendant, as aforesaid, the said car struck the said William Wilson, and crushed him between the said moving car and said building, and he was thereby injured, so that he then and there died." A motion for nonsuit was made on these grounds: (1) That it appeared from the testimony that the injury to the plaintiff's intestate was caused by the negligence of fellow servants, who were not doing any part of the duty of the master; (2) that the injury to the plaintiff's intestate was due to his own contributory negligence as a proximate cause thereof; (3) that there was no evidence of the negligence of the defendant which could support the verdict in the case. The main question in the appeal was whether the circuit judge was right in refusing the motion for nonsuit.

The evidence verifies the complaint as to the mechanical means by which Wilson met his death. While it is far from clear that the failure to give a signal of the approach of the car was the proximate cause of the accident, on this point there was evidence to go to the jury. It is true Wilson was aware of the approach of the car, and called to

White, who was working with him, to get out of the way, and he could have escaped by getting off of the track, as White did, on the safe side away from the house, against which he was crushed; yet the evidence made a question of fact as to whether the car was so close on him when he saw it that even a man of ordinary coolness and discretion would not be responsible for an unwise choice of a means of escape. Whether those who were pushing the car had by their negligence brought upon Wilson such a sudden emergency as to excuse him for trying to escape on the less safe side of the track was an issue of fact not to be decided on a motion for nonsuit.

There is not the least doubt, however, that the men who were pushing the car, including Robinson, who was the foreman, were fellow servants of Wilson, and the nonsuit should have been granted on that ground. Charlie Sanders was the miller and foreman of those working in and immediately at the mill, and deceased and White were working under his orders. Sam Robinson was foreman of the gang pushing the car. He and Sanders were nothing more than gang foremen; both working under the orders of Hapolt, who was the boss in charge of all the laborers referred to in the testimony. These foremen had no power to hire laborers, provide machinery or the place of labor, or to do any duty imposed by law on the master. They were therefore fellow servants of the deceased, and the master is not responsible for their negligence. *Shirley v. Abbeville Co.*, 76 S. C. 452, 57 S. E. 178, and authorities cited; *Tucker v. Buffalo Mills*, 76 S. C. 539, 57 S. E. 626; *Biggers v. Catawba Co.*, 72 S. C. 264, 51 S. E. 882; *Bryant v. Mfg. Co.*, 75 S. C. 487, 56 S. E. 9.

Even if it be considered that the deceased and those who were pushing the car were servants employed in different departments of the same general business, this would not avail the plaintiff. *Gunter v. Mfg. Co.*, 15 S. C. 455. The change in the law on this subject, made by the Constitution of 1895, affects only the employees of railroad corporations.

The nonsuit should have been granted.

The record does not indicate the action was commenced after the adoption of rule 27 of this court, and therefore the cause must be remanded for a new trial.

(78 S. C. 433)

**McMILLAN et al. v. INSURANCE CO. OF NORTH AMERICA.\***

**SAME v. INSURANCE CO. OF NORTH AMERICA et al.**

(Supreme Court of South Carolina. Oct. 11, 1907.)

**1. INSURANCE—FIRE—ACTION ON POLICY—QUESTION FOR JURY.**

In an action on an insurance policy, held, under the evidence, a question for the jury whether a cashbook was delivered to the ad-

\*For opinion on rehearing, see 58 S. E. 1135.

juster, as required by the policy, or was destroyed by fire.

**2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.**

Where, in an action on a fire policy, there was an issue whether a cashbook had been delivered to the insurer, as required by the policy, an instruction that, if the books were kept and securely locked in an iron safe, it is presumed that, having once been in the safe, they continued there, unless it be shown they were taken out, was not prejudicial to the insurer, since manifestly a book would remain in a safe securely locked until removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

**3. INSURANCE—FIRE—KEEPING BOOKS—SUBSTANTIAL COMPLIANCE.**

Where a mercantile fire policy requires insured to keep books, etc., to present a complete record of the business transacted, and to keep the books locked in a fire-proof safe at night, a substantial compliance reasonably meeting the end in view is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 853.]

**4. SAME—ACTION ON POLICY—INSTRUCTIONS.**

In an action on a fire policy requiring insured to keep books, showing the state of their business, an instruction that a substantial compliance with the clause was required, and that if by accident books should be lost without insured's design, if there still remained means of fully ascertaining the value of the stock, so that the insurer has suffered no disadvantage, the loss would not vitiate the policy, was not objectionable as meaning that a failure to comply substantially with the clause would not defeat the policy if the loss resulted, not from design, but accident.

**5. SAME—QUESTION FOR JURY.**

Under the evidence in an action on a fire policy, held a question for the jury whether insured substantially complied with a clause requiring them to keep books to show the state of their business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1737.]

**6. EVIDENCE—BOOK ENTRIES—PAROL TESTIMONY.**

Where a mercantile fire policy sued on required insured to keep books showing the state of their business, one of the cashbooks being lost, it is no fatal objection to proving insured's cash sales by other book entries that some parol testimony is necessary to make the showing complete.

**7. INSURANCE—FIRE—WAIVER OF NONWAIVER PROVISIONS.**

A nonwaiver agreement respecting a fire policy may be waived.

**8. SAME—WAIVER OF FORFEITURE PROVISIONS.**

An insurer waives a forfeiture provision, if with knowledge of the facts constituting forfeiture the policy is delivered as a valid contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1023.]

**9. SAME.**

A forfeiture under a fire policy is waived, if, knowing the facts showing right to forfeiture, the insurer requires insured to do some act or incur expense inconsistent with the position that the contract has become inoperative.

**10. SAME—QUESTION FOR JURY.**

In an action on a fire policy, held, under the evidence, a question for the jury whether insured had waived a nonwaiver agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1743.]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Marion County; J. C. Klugh, Judge.

Actions by M. L. McMillan and another, partners as M. L. McMillan & Son, against the Insurance Company of North America, and against the Insurance Company of North America and the Fire Association of Philadelphia, doing business as Philadelphia Underwriters. From judgments for plaintiffs, defendants appeal. Affirmed.

King, Spalding & Little and W. F. Stackhouse, for appellants. M. C. Woods and Henry Mullins, for respondents.

JONES, J. The plaintiffs, in the first-named case, recovered judgment against defendant for \$1,745.29 on a policy of insurance issued February 9, 1903, on a stock of general merchandise, furniture, and fixtures at Mullins, S. C., which was destroyed by fire December 27, 1903, and in the second-named case recovered judgment against defendants for \$1,734 on a policy of fire insurance issued September 4, 1903, on the same stock of general merchandise at Mullins, S. C., destroyed by fire as stated. These cases were heard together in this court, as they involved substantially the same facts and are controlled by the same principles of law.

The main controversy on the trial and on this appeal relates to the question whether the policies were forfeited by failure to comply with the "iron-safe clause." This clause provides that the assured shall take a complete itemized inventory of the stock once a year, keep a set of books which shall clearly and fully present a complete record of the business transacted, including all purchases, sales, shipments, both for cash and credit, from date of inventory and during the continuance of this policy, and will keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the building mentioned in the policy is not actually open for business, or, failing in this, the assured will keep such books and inventory in some place not exposed to a fire which would destroy the aforesaid building; further providing that a failure to provide such set of books and inventory for the inspection of the company shall render the policy null and void and constitute a perpetual bar to recovery thereon. The assured kept an iron safe in their storeroom, and kept a set of books consisting of an inventory book showing inventory taken January 5, 1903, an invoice book, a journal, cashbook, and ledger. Account of cash sales from January 5, 1903, to August 17, 1903, was kept in one book. This book being filled, they entered cash sales in the journal from August 17th to September 9th, and thereafter to the time of the fire in a separate cashbook. The defendant concedes that all the books were delivered to it after the fire, except the book showing cash sales from January 5th to August 17th. The failure to deliver this book is the point relied on as in violation of the iron-safe clause. The plaintiff Joseph A. Mc-

Millan, managing partner, and the clerk, John McMillan, testified that the last time they saw this book it was in the safe where it was usually kept. Joseph McMillan testified that after the fire the books were taken from the safe and deposited in the Bank of Mullins, and were delivered to the adjuster of defendant on December 31, 1903; that until the adjuster called his attention to the absence of entry of cash sales from January 5th to August 17th he thought he had delivered all the books to the adjuster. A. L. De Rossett, the adjuster, testified that no such cashbook was ever delivered to him; that Jos. A. McMillan told him that it was destroyed in the fire, and gave him an affidavit to that effect on February 20, 1903, which was introduced in evidence. Thus an issue was raised for the jury as to whether such cashbook was ever in the hands of the adjuster. On this point, the court charged, in effect, that, if plaintiff did have a complete set of books and turned them over to the adjuster, that was a compliance with the policy. It is contended that there was error in this charge, as there was no evidence on such issue. The charge was correct as a matter of course, and as there was some evidence tending to show that the book was not in use at the time of the fire, and was last seen in the safe where it was usually kept by those in charge of it, and that the books in the safe after the fire were delivered to the adjuster, it was for the jury to say whether the book was delivered to the adjuster, or was destroyed in the fire.

In this connection, it is relevant to notice the exception which complains that the court erred in charging: "If you find from the evidence that the books were actually kept and securely locked in an iron safe, then the law raises the presumption that having once been in the safe they continued there, unless it be shown that they were taken out, on the general rule that, where any state of facts is shown to be in existence, the law presumes that that state of facts continues until it is shown that it has been changed." As is manifest that an inanimate object like a book would remain in an iron safe where it was securely locked until removed by some agency, we fail to see how the charge could be prejudicial to appellant. Under this charge, if the jury should accept the adjuster's statement that the cashbook in question was not delivered to him by McMillan, and should accept McMillan's statement that he delivered to the adjuster all the books found in the safe after the fire, nothing in the safe having been destroyed by the fire, then the inevitable inference would be that the book was not in the safe at the time of the fire. But, on the other hand, if the jury should accept the statement of the McMillans that the book was last seen by them in the safe before the fire, and there is nothing in the circumstances to indicate removal by accident or design before the fire, then the necessary

inference would be that the book was in the safe at the time of the fire, and if nothing in the safe was destroyed by the fire, and if McMillan delivered to the adjuster all the books in the safe after the fire, the inference would be that the cashbook was delivered to the adjuster. The statement of Joseph McMillan to the adjuster, during the negotiations for a settlement, that the book was destroyed in the fire, and his affidavit to that effect on February 20th, drawn by the adjuster, may have been regarded by the jury as the mere expression of McMillan's opinion or belief that such was the only way he could account for the absence of the book if he did not deliver it to the adjuster, for, at folio 227 of the brief on the trial of the second-named case above, the adjuster testified that McMillan said "he presumed the book got burned." But if the statement of McMillan to the adjuster was meant to convey the idea that he actually knew that the book was destroyed in the fire while out of the safe, still it was for the jury to decide between the truth of that statement and his positive testimony on the stand that he last saw the book in the safe.

In the first-named case, the court, in part, instructed the jury: "If you find that they substantially complied with that provision, so that the defendant has not been either defrauded or put to any disadvantage in its efforts to ascertain the truth in reference to the character and condition of the property at the time of the fire, and should find that the plaintiffs, acting in good faith, even though there might accidentally by some possibility have been a defect, and some book or paper was missing, not by plaintiff's design, but as the result of accident, and yet that the plaintiffs furnished to the defendant all the evidence, from information, that such a part of their set of books would have furnished, so that the defendant was not put at any disadvantage, and that the loss of the book or paper was not through the fault of the plaintiffs, then that would amount to a substantial compliance with that clause of the policy." And in the second-named case the jury were instructed: "A substantial compliance with that (iron-safe clause) is required, and if by chance, by accident, there should apparently be a failure to comply with that provision, if by accident some book, or some of the books, should be lost without any design on the part of the parties insured, if there still remains the means to ascertain accurately and fully the value of the stock, so that the insurance company has suffered no disadvantage by reason of the loss, that loss would not amount to a violation of the policy."

These and other extracts from the charge on this subject are made the basis of several exceptions, but a consideration of the foregoing will involve all that is material on this branch of the charge. The object of the iron-safe clause is to secure the means of showing

with reasonable ease and certainty the extent of the loss by fire destroying the stock of merchandise, and it serves to protect the insurance company against an ignorant or fraudulent overestimate of the loss by the assured. The law, however, does not require a strict literal compliance with this clause by the assured, but is satisfied by a substantial compliance which reasonably meets the end in view. *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 327, 45 L. Ed. 460; *Western Assurance Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *Western Assurance Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; *North British & Mercantile Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. E. 350. In 19 Cyc. 167, cases are cited to support the text that, "if the insured has complied with the requirements by taking an inventory and keeping books, the fact that some of such books were destroyed will not invalidate the policy, where the missing information is supplied by other satisfactory means." We do not construe the charge under consideration to mean, as contended by appellant, that a failure to comply substantially with this clause would not defeat the policy if the loss was the result, not of design, but of accident. We think it clear that a failure to substantially comply with the iron-safe clause would defeat the policy, in the absence of a waiver, whether the result of design or negligence. The court was endeavoring to convey to the jury his view of what would constitute substantial compliance, and the charge must be construed with reference to the testimony touching compliance. It was not denied that plaintiff fully complied with all the requirements of the clause in question, except as to one disputed particular, whether there was a failure to produce the book showing cash sales for a part of the time covered by the policy. The charge, therefore, had reference to this alleged deficiency alone. The vital question was whether there could be a substantial compliance in the absence of the missing cashbook. The import of the charge thus considered was that if the loss of this cashbook, or the failure to produce it, was accidental, and not the result of design or fault, and there still remained the means to ascertain accurately and fully the value of the stock, so that the insurance company would suffer no disadvantage by reason of the loss, there would be a substantial compliance. As the policy does not require any particular set of books or any particular method of bookkeeping, that which would enable one of average skill and intelligence in such matters to make a reasonably accurate estimate of the extent of the loss would answer every purpose of the stipulation. The policy further permits books to be kept out of the safe in some place not exposed to a fire which would destroy the building in which the business was being conducted. From this it must result that if

the books and inventory kept in the safe, together with books kept elsewhere, would furnish to a person with average intelligence the data for a fair estimate of the loss, the terms of the policy would be substantially met, even though some particular book of the set kept in the safe should be missing. To this extent there is no reasonable ground to doubt the general correctness and applicability of the charge. In this case the insured supplied the information contained in the missing book by reference to the expense account, as shown by the books remaining in the safe, and the cash deposit account of plaintiffs as shown by the books kept by the Bank of Mullins, with testimony that it was plaintiffs' custom to make deposit in the bank of the daily cash sales, less such items for expenses as were paid out during the day. By this method the cash sales from January 5th to August 17th were shown to be \$1,609.16.

Was it proper to submit to the jury under the instructions to determine whether there was a substantial compliance with the policy? We think so. Under a strict and literal construction, this would not be a compliance, as the book of the Bank of Mullins was not a book kept by the assured in their business as merchants; but, under a liberal construction with a view to substantial justice between the parties to this contract of indemnity, the plaintiffs' cash deposit account kept by the Bank of Mullins for the mutual benefit of the bank and its depositors afforded, in connection with the expense account shown by plaintiffs' books and custom of plaintiffs making their deposits, a reasonably accurate and satisfactory means of showing cash sales by book entries. *Insurance Co. v. Hefflin* (Ky.) 60 S. W. 393. The jury, under the charge, must have been satisfied of the accuracy of this method, and that defendant suffered no disadvantage thereby. The fact that some parol testimony was necessary to make the showing by book entries complete is not a fatal objection, as under any ordinary system of bookkeeping some reliance must be placed upon parol testimony in explanation to show stock on hand at any particular time, for in every case such factors as appreciation or depreciation of invoice price of stock, the rate of profit on cash and credit sales, the honesty and accuracy of the bookkeeper, must be taken into account.

The defendant's adjuster arrived at Mullins on December 30 or 31, 1903, after information as to the fire, and on December 31, 1903, the parties entered into what is known as the nonwaiver agreement, which stipulates: "That any action, inquiry, investigation, or examination undertaken by the said parties of the second part in investigating, developing, or determining the cause, origin, or spread of the fire, occasioning the damage, if any, suffered by said loss claimant, or in investigating or ascertaining the amount, na-

ture or extent of the said loss and damage, if any, to the property of the parties of the first part, caused by fire alleged to have occurred on the 27th day of December, 1903, to property situated in Mullins, county of Marion, state of South Carolina, shall not in any manner or to any extent whatsoever admit the liability of the parties of the second part for said loss, or waive, avoid, or invalidate any of the conditions, exceptions, or forfeitures of the policies of the parties of the second part, held by the parties of the first part, and shall not waive, avoid, or invalidate any rights, known or unknown, or any privilege or exemption from liability by either of the parties to this agreement. The purpose of this agreement is to preserve without estoppel, waiver, or forfeiture, the rights of all parties hereto, and provide for and permit an impartial and full investigation of the alleged fire, and the just determination of the amount of loss or damage, if any, without regard to or admission of any liability of the parties of the second part."

With respect to this agreement, the court, at request of appellant, charged: "A written paper styled nonwaiver agreement has been introduced in evidence. If you find in this cause that the plaintiff and the defendant company, through its adjuster, before anything was done towards adjusting the loss here sued on, entered into the nonwaiver agreement above mentioned, then I charge you that the legal effect of such nonwaiver agreement is such that nothing done after its signature in or about the investigating of said loss or ascertaining the amount of the stock or of the loss would operate as a waiver of any of the rights of either party, either plaintiff or defendant, or as a waiver of any of the terms of the policy sued, or as any waiver of any forfeiture or violation of its terms, if you find that any such forfeiture or violation had taken place." In connection with this charge, the court instructed the jury that a nonwaiver agreement may itself be waived by express agreement or by acts or conduct.

The appellant excepts to this last instruction as a mere abstract proposition, inapplicable and prejudicial, as there was no testimony tending to show such waiver. It is not, and cannot be, disputed that the nonwaiver agreement could be waived, as it would be unreasonable to give more potency and sanctity to such an incidental agreement than to the principal agreement. The policy itself contains nonwaiver agreements. In one place it is stipulated that the company "shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof by any agreement, act or proceeding on its part relating to the appraisal or any examination herein provided for," and in another place that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy except such as by the terms

of the policy may be the subject of agreement indorsed hereon or added hereto, and to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless waiver, if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Notwithstanding such provisions in the policy, the law is well settled in this state that an insurance company waives the forfeiture if, with knowledge of the facts constituting forfeiture, the policy is delivered as a valid contract. *Pelzer Mfg. Co. v. Sun Fire Office Co.*, 36 S. C. 273, 15 S. E. 562; *Gandy v. Insurance Co.*, 52 S. C. 228, 29 S. E. 655; *Madden & Co. v. Insurance Co.*, 70 S. C. 303, 49 S. E. 855; *Doyle v. Hill*, 75 S. C. 263, 55 S. E. 446; *Fludd v. Assurance Society*, 75 S. C. 320, 55 S. E. 762. It is also well settled that a forfeiture is waived if, with knowledge of the facts showing forfeiture, the insurance company requires the insured to do some act or incur some trouble or expense inconsistent with the position that the contract had become inoperative by breach of a condition. *Kingman v. Insurance Co.*, 54 S. C. 603, 32 S. E. 762. The same rule applies with reference to alleged forfeiture under contract with a telegraph company. *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731. Applying the same test to the nonwaiver agreement, we think there was evidence which made it proper to submit the whole question of waiver to the jury. There was evidence that the books were examined by the adjuster, and the absence of cash entries from January 5th to August 17th was discovered, soon after the delivery of the books on December 31st. *McMillan* testified that the adjuster made no claim that such deficiency worked a forfeiture, but, on the contrary, the evidence shows that the adjuster, notwithstanding this knowledge, proceeded with the attempted adjustment by requiring the plaintiffs to procure certified invoices. The adjuster returned to Mullins on February 20th after notice from plaintiffs that they had procured the invoices, and, with full knowledge that the books failed to show said cash sales, he procured from a plaintiff *Jos. A. McMillan* an affidavit in which the sales for the period named were estimated at \$1,640. *McMillan* testified that when he signed that paper he was trying to come to a settlement of the amount of the loss by the fire, that the adjuster told him he could not make proof of loss without having some agreement about it, and requested him to make an estimate of the cash sales. Plaintiff further testified that, when the adjuster left on February 20th, he promised to return the following Wednesday, but did not do so. This was certainly some evidence of conduct on the part of the company incor-

sistent with the idea that the absence of the cashbook would be regarded as a forfeiture of the policy.

The foregoing conclusions render it necessary to overrule the exceptions in each case.

The judgment of the circuit court in each of the above-named cases is affirmed.

WOODS, J. I dissent on the ground that there was no evidence of waiver of the non-waiver agreement. All the acts relied on to constitute waiver of this contract were done after the execution of the contract in investigating the nature and extent of the loss, and were expressly covered by the nonwaiver agreement.

(62 W. Va. 154)

#### STATE v. JOHNSON.

(Supreme Court of Appeals of West Virginia.)

Dissenting opinion.

For former opinion, see 57 S. E. 371.

POFFENBARGER, J. (dissenting). Believing the parties to the contract of sale, in the first instance, were Stone and Johnson, and that there was a subsequent sale by Johnson to Midkiff and Adkins, and not merely one sale by Stone to Johnson, Midkiff, and Adkins, I am constrained to dissent from the opinion and decision in this case. The whisky was Stone's. He consigned and shipped it to Johnson. Whether he knew Johnson is immaterial. He knew of him. In some way he had ascertained that there was such a man, and he offered to sell him the whisky for \$2. He made no offer to either Midkiff or Adkins. Nobody but Stone could have changed his offer of sale to Johnson, so as to make it an offer of sale to Johnson, Midkiff, and Adkins. The offer was accepted without any modification, and the whisky delivered in execution of the contract of sale. Legally viewed, as it must be, this effectuated a sale from Stone to Johnson, notwithstanding the participation of Midkiff and Adkins in the transaction. These two strangers obtained part of the whisky, and, in legal contemplation, they obtained it from Johnson, and not from Stone. The legal test as to what constitutes a sale governs. *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 836; *Morganstern v. Commonwealth*, 27 Grat. (Va.) 1018. The distinction between the legal and practical test in construing statutes, and especially revenue statutes, must be observed. *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928, 6 L. R. A. (N. S.) 628; *State v. Graybeal* (W. Va.) 55 S. E. 398. No doubt Johnson, Midkiff, and Adkins, viewing the matter from the standpoint of laymen, thought they three jointly were purchasing from Stone, but this was a legal impossibility, without the concurrence of Stone as the seller, and there is no evidence that he consented to the inclusion of Midkiff and Adkins as purchas-

58 S. E.—65

ers. Mere ignorance of the law on the part of Johnson, as to what constitutes a sale, could not excuse him, and his intention is immaterial, for the question on which the soundness of the decision turns is the construction of the statute. What he did brought him within the letter of the statute, and as the plain object of our statutes, regulating the liquor traffic, is to prevent all sales except those made by persons specially licensed therefor, to the end that the revenues of the state may be augmented by the license tax, and the right of sale limited to persons deemed suitable by the license court, when authorized, and entirely prohibited when the license court, in the exercise of its discretionary power, sees fit not to authorize any sales to be made, he was likewise within the spirit of the statute. To allow a consignment to one person in a community, to become a means of sale, in a practical sense, to several persons, will necessarily work a great inroad upon our system of law, ordained for the regulation of the liquor traffic, and open the door for wide and serious evasion thereof.

(62 W. Va. 223)

#### WALTON v. KNIGHT et al.\*

(Supreme Court of Appeals of West Virginia.  
May 22, 1907.)

##### 1. EASEMENTS—RIGHT OF WAY—PRESCRIPTION.

A private right of way by prescription may be acquired over another's land by visible, continuous, and uninterrupted use thereof for 10 years, under a bona fide claim of right, with the acquiescence of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 27–33.]

##### 2. SAME—ACQUIESCENCE OF OWNER—PRESUMPTIONS.

Such use is presumed to be with the knowledge and acquiescence of the owner and to prima facie give the right, which presumption will be conclusive, unless accompanied by the protest and objection of the owner under such circumstances as to repel it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

##### 3. SAME—BONA FIDES.

When there has been such use of another's land for the period requisite to create an easement by prescription, the bona fides of the claim of right is established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 27, 28.]

##### 4. SAME—UNINCLOSED LANDS.

Such right of way may be acquired as well over uninclosed and uncultivated land as over land inclosed by visible fence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 32.]

##### 5. SAME—ROUTE—DEVIATIONS.

While, as a general rule, the right thus acquired must be confined to one definite route between the same termini, such right will not be lost by occasional variations from the route to avoid muddy or worn places therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 31.]

(Syllabus by the Court.)

\*Rehearing denied October 17, 1907.

Appeal from Circuit Court, Greenbrier County.

Suit by Minnie M. Walton against James Knight and others. From a decree in favor of plaintiff, defendants' appeal. Affirmed.

John W. Arbuckle, for appellants. Williams & Dice, for appellee.

MILLER, J. The parties plaintiff and defendant own contiguous tracts of land in Greenbrier county; each consisting of about 400 acres, parts of an original survey of 800 acres, both traversed by Spring creek, and the plaintiff's land being the part lying back of that owned by the defendants, whose land lies between that of the plaintiff and the county road. The land owned by the defendants passed from William Hanna, the original patentee of the 800 acres, to Albert Hanna, who in December, 1849, conveyed the same to Andrew McCoy, who in October, 1855, conveyed it to Andrew Knight, the father of the defendants. The bill alleges, and the answer denies, that the plaintiff owns a right of way as appurtenant to her farm over a portion of the land of the defendants about 300 yards in length, passing from the west side of her land down the northern side of Spring creek a short distance, thence across said creek to intersect the public road leading from Dry Run to Falling Spring; that she and those under whom she claims have used said way for travel by vehicles, hauling, walking, and riding for at least 35 years prior to the institution of this suit, continuously, uninterruptedly and adversely, without obstruction or permission from any one; that it is the only practicable way she has for travel from said farm to the public road; that within the past few months the defendants have caused said right of way to be ploughed up and fence posts to be set in the ground across the same for the purpose of completely obstructing it; and she prays for an injunction and for general relief.

It has been held by this court that such a right of way may be acquired by grant, express or implied, or by prescription; that a private right of way may be acquired by prescriptions by the visible, continuous, and uninterrupted use thereof for 20 years under a bona fide claim of right. *Boyd v. Woolwine*, 40 W. Va. 283, 21 S. E. 1020; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632. To the same effect are *Stokes v. Appomattox Co.*, 3 Leigh (Va.) 318; *Coalter v. Hunter*, 4 Rand. 58, 15 Am. Dec. 726. In *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233, this court held that the use of a private way for 10 years with the acquiescence of the owner will confer a right thereto, unless denied; that such user is without more taken to be with his acquiescence and knowledge, and prima facie gives the right; but that if it appears that the user is against his protest, and he denies the right, it cannot become vested from time of user—citing *Field v.*

*Brown*, 24 Grat. (Va.) 74; *Nichols v. Ayler*, 7 Leigh (Va.) 546; *Washb. Easem.* 86, 111. In *Worrall v. Rhoads*, 2 Whart. (Pa.) 427, 30 Am. Dec. 274, it is said a grant of a right of way will be presumed from the uninterrupted enjoyment thereof for 21 years, and that such presumption applies to a way over uninclosed land, whether clear or woodland. In *Garrett v. Jackson*, 20 Pa. 331, it is held that where one uses a road whenever he chooses over the land of another, without leave or objection, the use is adverse, and, if uninterrupted for 21 years, gives an indisputable title to that enjoyment; that such enjoyment, without evidence as to how it began, is presumed to have been in pursuance of a grant, and the burden of showing the contrary lies on the owner of the land.

Some confusion may arise from the language used in our decisions as to the time required to establish title to a way by prescription. In *Boyd v. Woolwine*, supra, it is held to be 20 years; but in *Wooldridge v. Coughlin*, supra, 10 years. The natural inquiry is, why this difference, and what is the time essential? It is evident, from the authorities cited, that the court was referring in the former case to the common-law rule, and in the latter to our present statute of limitations. "By judicial construction an adverse user of an easement for the period mentioned in the statutes (of limitations), as they were passed from time to time, became evidence of a prescriptive right." *Jones, Easem.* § 161; *Railroad Co. v. McFarlan*, 43 N. J. Law, 605, 617. "Such adverse user must have existed for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession." *Jones, Easem.* § 164; In *Lucas v. Turnpike Co.*, 36 W. Va. 427, 437, 15 S. E. 182, 185, the court quotes with apparent approval *Goddard on Easements*: "Without minutely stating here the local statutes of limitations as to adverse user, it may be safely asserted that no less period will suffice, and no greater will be required, in fixing the requisite length of enjoyment to gain a right to an easement in land by prescription than to acquire the land itself by adverse occupation. This element of duration is therefore comparatively simple."

What is the nature of this presumption of title arising from such use of another's land is a question about which there has been a diversity of opinion. It is generally supposed to rest upon the fiction of a lost grant; not, however, because even the court or a jury is to believe the presumed grant, but because public policy and convenience require that such long-continued use be not disturbed. *Jones on Easem.* § 161, says that the fiction of a lost grant seems to have been originally invented to avoid the rule of pleading requiring proof, quoting from *Railroad Co. v. McFarlan*, supra. *Jones* says (section 162): "The weight of authority is that such presumption is conclusive, as a matter of law."



that the use of the easement was adverse and under a claim of right, in the absence of circumstances indicating the contrary; and, moreover, such enjoyment of the right affords a conclusive presumption of the right." And, quoting from *Railroad Co. v. McFarlan, Jones* says in the same section: "When the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right, or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negatived in the judgment of juries the existence of a grant. This state of the law produced great insecurity to titles by prescription, and subjected such rights to the whim and caprice of juries. This evil was remedied by the later English authorities, which gave to the presumption of title arising from an uninterrupted enjoyment of 20 years the most unshaken stability, and made it conclusive evidence of a right. \* \* \* In this country the prevailing doctrine is that an exclusive and uninterrupted enjoyment for 20 years creates a presumption, *juris et de jure*, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant."

But this court, in its decisions above referred to, and the court of Virginia, seem committed to the doctrine that such user for the statutory period raises only a *prima facie* presumption of a grant which may be repelled. Judge Brannon, in *Wooldridge v. Coughlin*, supra, says: "The flight of the long time requisite to vest the right under the old law afforded a conclusive presumption that there had been an express grant of the easement, its evidence lost by the tooth of time, and no proof that it never existed could be heard; whereas, under the new rule, user for the statutory period raises only a *prima facie* presumption of a grant, which may be repelled. \* \* \* To establish a right of way under the modern law, it must appear that it has been exercised for the statutory period, with the acquiescence of the owner over whose land the way is claimed"—citing the Virginia cases. The test of our decisions seems to be that the use must be visible, continuous, and uninterrupted for the statutory period, under a *bona fide* claim of right. We may inquire: What is such *bona fide* claim of right? In *Eells v. Railway Co.*, 49 W. Va. 65, 69, 38 S. E. 497, it is indicated that such right may originate and have its commencement in trespass. In *Garrett v. Jackson*, supra, it is said that passage by one over land of another, with special permission of the owner on every occasion, will not raise the presumption of a grant, no matter how often it may occur or how long continued; but that use of an easement at pleasure, without leave or objection, is adverse, and if uninterrupted for 21 years gives indisputable title. In *Worrall v.*

*Rhoads*, 2 Whart. (Pa.) 427, 30 Am. Dec. 274, it is said: "In the absence of evidence tending to show that such long-continued use of the way may be referred to a license, or other special indulgence that is either revocable or terminable, the conclusion is that it has grown out of a grant by the owner of the land, and has been exercised under a title thus derived. The law favors this conclusion, because it will not presume any man's act to be illegal. It is also reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it that could and ought not to be defeated. And, besides, seeing it can work no prejudice to any one excepting to him who has been guilty of great negligence, to say the least of it, public policy and convenience require that this presumption should be made, in order to promote the public peace and quiet men in their possession." Whenever, therefore, there has been such use for a long period, the *bona fides* of the claim of right is established, and the owner of the servient estate must rebut the presumption of right, by showing leave or license from him, or protest and objection under such circumstances as to repel the presumption.

It is conceded by the defendants here that the plaintiff and her predecessors have used a way over their land, though with some variation, continuously for more than 35 years; but they combat the presumption of right upon three different grounds:

First, they claim that prior to the Civil War their land over which the way is claimed was inclosed by fence and cultivated; that prior to that time the owners of the plaintiff's land used the creek bed as a right of way. But this does not account for the subsequent use, nor defeat the present claim. That during the War the fences were torn down and the land thrown out into the common and traveled over by the owners of plaintiff's land and others is no sufficient defense to her claim of right. In *Worrall v. Rhoads*, supra, the Supreme Court of Pennsylvania says that: "There seems to be no reason for making any distinction between the legal effect of a person occupying for the space of 21 years a way over the clear land of another which is inclosed by a visible fence, and his clear or woodland that is uninclosed, or inclosed merely by an ideal one; for all are considered as inclosed by the law, and the owner is entitled to be protected in the quiet, exclusive, and undisturbed enjoyment of the latter description of land as much and to as great an extent as in that of the former. \* \* \* Such an occupation of a way over either is equally opposed to the absolute right and dominion of the owner over his land." And in *Jones on Easem.* § 297, the author says: "Such an easement may as well be

exercised over an open and uncultivated field as upon one substantially inclosed and usually cultivated. Indeed, inclosure and cultivation would most likely be derogatory to the free exercise of a right of way."

Second, an attempt is made to show that such use of defendants' land was permissive, for the accommodation of the plaintiff and those who preceded her; but the evidence is entirely wanting of any proof of such permission. The bill alleges continuous, uninterrupted, and adverse use without any obstruction or permission. The defendants in their answer say such use was not under any claim of an easement over their land, but was a matter of sufferance by them and those under whom they claim. The answer does not say it was a permissive use, nor that there was a leave or license given, or any interruption or objection by them or their predecessors. R. E. Hanna, a witness for the plaintiff, resided with his father, Albert Hanna, on the plaintiff's land from about 1853 to 1872. He says he has known the way in controversy for at least 40 years. He further says: "We hauled over it some, and we traveled over it horseback and afoot and any way we had to travel. We traveled over it in all the ways that people travel over a road." That he has been over the road recently, and thinks it is about the same place it was when he lived there. That neither his father nor any member of his family, to his knowledge, ever asked permission of any one to use said road. H. W. Knight, another witness for the plaintiff, who lived on and had charge of the defendants' land from 1876 until 1903, gives testimony to the continued use of this way by the plaintiff and her predecessors during that time, substantially on its present location. He says: "No change, with one exception: There was a mud hole formed in a low place in the bottom. In order to get around that mud hole, some one broke a track through the elders for a short distance round the mud hole and back to the original track again." There is much other testimony of the same character. Opposed to this testimony of the plaintiff's witnesses, the defendants offer James C. McCoy, who says he lived on the land owned by the defendants with his father in 1849 or 1850. For how long he does not definitely state, but the record shows that his father conveyed this land to Andrew Knight October 28, 1855. He says when his father owned the defendants' land he had it inclosed and cultivated it in corn. He gives no testimony as to any permission by his father to use the right of way. This witness was employed by the defendants as a surveyor to make a plat of the different ways they claim were used over their land by the plaintiff and others. When asked on cross-examination how long he had known the road claimed by the plaintiff to have been used by the own-

ers and occupiers of the Walton land, he says: "I left the Knight farm when I was about 13 years old, and it was several years after we left there before I was back there, and I did not pay any attention to the roads. Since the War that road has been traveled up through the bottom there." And he admitted that he had traveled this road himself in going to the Walton house from the public road. There is absolutely no proof of any permissive right, or of any objection or protest by the defendants or by former owners of their lands. Jones on Easem. § 283, lays down the rule that a right of way may be acquired by prescription, although the use began under a mere license or verbal consent, provided the other requisites of a prescriptive right exist; that is, the user must have been exercised under a claim of right for the full prescriptive period, with the knowledge and acquiescence of the owner of the servient estate, under circumstances showing the user to be adverse.

Third, the defense is made that the way over the defendants' land was not confined to any one particular route, and no defined and exclusive way was acquired. There was evidence showing occasional use of the creek bottom; that occasionally the plaintiff and her predecessors varied somewhat from the usual and beaten path; that at the public road they made short turns; that at one point on the way there was a slough and mud hole in the road, and to avoid the mud the plaintiff traveled around them. But with all this evidence, the court found, upon the uncontradicted testimony considered with that which was conflicting, that the plaintiff had acquired and was entitled to a right of way over defendants' land as set out by definite description in the decree of the court. We cannot say this finding was contrary to the law and the evidence. Jones on Easem. § 296, says: "A right of way may be acquired by user, though between the termini the person claiming the right has at different times taken several different routes to avoid muddy and worn places in the route previously used. Such temporary variance of the way does not destroy it." There was evidence in this case that other persons besides the plaintiff used different routes in crossing defendants' land. Jones says (same section): "To show that one claiming a right of way by prescription had not confined himself to a definite route, it is not competent to prove that other persons had gone over the land in different directions, and that the place where they traveled was for the time being the way for such persons, and for the claimant of the right of way. The acts of strangers could not defeat or qualify his right."

For the reasons stated, we affirm the decree of the circuit court.

(61 W. Va. 489)

**DENT v. PICKENS et al.**(Supreme Court of Appeals of West Virginia.  
March 12, 1907.)**1. APPEAL—PROCEEDINGS FOR TRANSFER OF CAUSE—PROCESS—WAIVER.**

Where an appellee appears by two or more counsel, who file briefs on the merits of the cause, and by letter to the clerk join in requesting a submission of the cause, service of appellate process will be treated as waived, although one of the counsel in his brief may present the question of such want of service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2168-2172.]

**2. SAME—PRESENTATION OF QUESTIONS IN LOWER COURT—MOTIONS—NECESSITY.**

Where, in a suit against a devisee and others to have sold to pay liens a greater interest in land than was devised to him, co-devisees remotely interested therein by executory devise over in default, at his death, of living children or issue of such children, are made defendants solely for the purpose of having said will construed against their contingent interest in said land, and who appear and by their demurrer overruled challenge as matter of law the right of the plaintiff to any relief against them, and, on default of answer by them, final decree is pronounced that said devisee took by said devise such greater interest, and directing a sale thereof to pay said liens, such final decree is not a decree by default precluding such co-devisees from an appeal without motion in the circuit court to correct the error therein against them, provided by section 6, c. 134, Code 1899 [Code 1906, § 4037]; such error being necessarily involved in the decree overruling their demurrer to the bill.

**3. WILLS—CONSTRUCTION—ESTATE CONVEYED.**

A will making specific devises of lands to children and grandchildren of the testator by the tenth item gave to his son D. P. a tract of 396¼ acres, charging it, however, with \$2,000 in favor of his personal estate; and, after making said specific devises, by the eleventh item provided: "All the lands hereinbefore devised to my said children and grandchildren \* \* \* are to be taken and held by them subject to the following limitation—that is to say, that if any of my said children or grandchildren hereinbefore mentioned shall die without children, or the lawful issue of such children, living at the time of his or her death, or born within ten months thereafter, then in that case the lands herein devised to such child or grandchild so dying without such children, or the lawful issue of such children, living at the time of his or her death, or born within ten months thereafter, shall descend to each of my surviving children and the lawful issue of my deceased children and grandchildren, the descendants of each of my deceased children and grandchildren taking the portion which my deceased child or grandchild would take if living at the time of such death." Held, that at the death of the testator the said D. P. took a defeasible estate in fee in said 396¼ acres, with an estate limited thereon, by executory devise to the other persons described in said eleventh item of the will.

**4. SAME—GENERAL RULES OF CONSTRUCTION.**

Words of survivorship contained in a will will be construed according to their usual and common acceptation, unless a different meaning plainly appears to have been intended thereby; and will be referred to the event plainly intended to accomplish the purposes of the testator, whether that event be before, at the time of, or after the death of the testator.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Action by Susan C. Dent against Dever Pickens and others. From a judgment in favor of plaintiff, defendants John D. Pickens and another appeal. Reversed and remanded. See 53 S. E. 164.

John Bassel, for appellants. Haymond Maxwell and J. Hop Woods, for appellee.

MILLER, J. This case has been several times before this court upon appeals prosecuted by one or more of the parties from decrees of the circuit court. A clear understanding of the entire case may be obtained by referring to the published decisions of this court on those appeals, beginning with 34 W. Va. 240, 12 S. E. 698, 26 Am. St. Rep. 921. This is an appeal by John D. Pickens, a brother of Dever Pickens, and by May Pickens Davisson, his niece and a daughter of his deceased brother, Alexander H. Pickens, co-devisees with others under the will of the late James Pickens, from the decree of the circuit court pronounced on the 23d day of February, 1905. Other appeals from this decree have heretofore been disposed of as follows: The first by A. G. Dayton and others, decided March 18, 1906; the second by Susan C. Dent, the plaintiff, decided at the present term of court on the 28th day of January, 1907 (not officially reported).<sup>1</sup> The present appellant John D. Pickens was a co-petitioner with A. G. Dayton and others in the first appeal from said decree; but, as that appeal was limited by the order of this court awarding it to certain specified matters assigned as errors in said decree, the present appellants were, by an order of this court of March 6, 1906, as modified by a subsequent order of March 8, 1906, on their joint petition allowed an appeal from so much of said decree as adjudged that by said will an estate in fee simple indefeasible became vested in said Dever Pickens in the 396¼ acres devised to him, and adjudging the same to be sold to pay the liens of plaintiff and others thereon. That portion of the decree of the circuit court referred to is as follows: "And the court, proceeding further to pass upon and determine under said third amended bill the true estate of the defendant Dever Pickens, under the will of his father, James Pickens, deceased, in and to the 396¼ acres of land involved herein devised to him thereunder, is of opinion, and doth adjudge, order, and decree, that he the said defendant, Dever Pickens, having survived the testator his said father and having lawful issue of two children, the infant defendants Coburn Pickens and Paul Pickens, still living, born of the marriage of said Dever Pickens and the defendant Minnie Coburn Pickens, has by reason thereof, and the true construction of said will, and the intention of the testator, said James Pickens, deceased, thereunder, an indefeasible estate in fee simple therein." This decree shows that the cause was heard upon the former pleadings and proceedings,

<sup>1</sup> Rehearing pending.

upon a report of Geo. M. Kittle, commissioner in chancery, filed on the 18th day of May, 1903, with three exceptions indorsed thereon, and particularly upon the third amended bill of the plaintiff, filed at April rules, 1904, upon demurrer of the defendants thereto (overruled by the court), and upon the answers of some of said defendants (not including any answer by the present appellants so far as the record shows).

The point is made in the brief of counsel for the appellee that she is not before this court upon any process issued or served upon her, or upon any appearance by her to this appeal, and that, to save her rights in respect thereto if necessary, she appears here only for the purpose of taking advantage thereof. What the necessity here suggested is we do not quite comprehend. If by this saving it is meant to save this point only in the event of a decision adverse to her, we do not think the point should prevail. Notwithstanding this point, counsel has proceeded to discuss the case on its merits in quite an able and elaborate brief. We find, however, by reference to the papers in the cause in the clerk's office of this court, that, as a matter of fact, no process regularly issued upon this appeal. We do find, however, that copies of the order allowing the appeal were mailed at their request to counsel in the case; and it seems to have been understood between the clerk and counsel that no formal process was to issue. Aside from this, other counsel for the appellee appeared and filed a brief in the case in June, 1906, without suggestion of want of process; and there is a letter from him on file in the clerk's office, as well as from counsel for the appellants, asking that the case be submitted to the court upon the briefs filed. We think this is sufficient appearance of parties to amount to a waiver of process, and we so hold.

Counsel for the plaintiff, in one of the briefs filed, makes the point that the appellants, having failed to answer the third amended bill, or to make any motion in the court below to correct the errors now complained of, have, by section 6, c. 134, Code 1899 [Code 1906, § 4037], no standing in this court upon this appeal. The record will show that the original bill did not put in issue the quality of the estate of Dever Pickens in the 396 $\frac{1}{4}$  acres. In the first amended bill the plaintiff charged that his interest in said 396 $\frac{1}{4}$  acres under the will of his father was a defeasible estate, and that the same was wholly insufficient to pay the plaintiff's judgment. In the second amended bill the plaintiff reaffirmed in extenso all the material allegations of her original and first amended bills. The prayer of this second amended bill, among other things, was that his interest in the real estate therein mentioned might be ascertained and subjected to the plaintiff's judgment and execution. In the third or last amended bill, the plaintiff has taken a different position with respect to

the quality of said estate. After setting out the provisions of said will devising said land to said Dever Pickens and the limitations thereon, the plaintiff charges that the said Dever Pickens, having survived the testator and now having lawful issue living—namely, the defendants Coburn Pickens and Paul Pickens, born of his marriage with the defendant Minnie Coburn Pickens—has an absolute estate in fee simple in said land, and that his estate therein became such upon the death of his said testator; and the prayer of this bill, among other things, is that the said will in respect to such estate therein devised to him may be judicially construed and said estate determined. The answer which the appellants' counsel makes to this point in the brief of counsel for the appellee is that John D. Pickens and May Pickens Davison, together with all the other devisees of James Pickens, having been made parties to the third amended bill for the express purpose of having the court adjudicate the question of the estate taken by Dever Pickens under the will, whether a conditional fee or indefeasible fee, and as they would all be bound by any decree rendered in the cause, and all defendants having entered their demurrer to the bill, it is perfectly indifferent whether they filed answers or not. Because, as he claims, when the demurrer was overruled, which raised the same question presented here, that was an adjudication of the entire question as to the character of the estate vested in Dever Pickens, and was not a decree for want of appearance, and therefore it did not require a motion to reverse the decree before an appeal could be taken therefrom.

We are not referred by counsel for either of the parties to any authority upon this important question of practice. In the case of *Gates v. Cragg*, 11 W. Va. 300, this court corrected an error made by the court below in a decree subsequent to the issuing of the rule on overruling defendant's demurrer, and in default of answer, without any previous motion being made in the court below to correct such error; but, as noted in the case of *Watson v. Wiggington*, 28 W. Va. 533, 554, this error was clearly independent of those resulting merely from giving effect to the order overruling the demurrer. The case of *Gates v. Cragg* seems not to have been called to the attention of the court in *Steenrod's Adm'r v. Railroad Co.*, 25 W. Va. 133. In the latter case it was held that a demurrer is an affirmative admission of the allegations of the bill—itself a confession that, if the facts alleged in the bill entitle the plaintiff in law and equity to the relief prayed for, then such relief may be given, and, in order to avoid the effect of this admission, it is imperative that a plea or answer denying or avoiding those allegations be filed before a decree on its merits is entered, and that, when in such cases the demurrer is overruled, the bill stands in the

court overruling it precisely as if no demurrer had been entered, and that a subsequent decree is necessarily on bill taken for confessed as it originally stood at rules, and an order entered before the demurrer was filed and overruled. In *Watson v. Wiggington*, supra, Judge Green says (page 551 of 28 W. Va.): "Further examination has satisfied us that the general principles announced in *Steenrod v. Railroad Co.* are correct, but that, to avoid mistakes they should be to some extent modified; and, as these principles thus settled conflict with the opinions I expressed in the case in 11 W. Va., I ought to have assigned my reasons for changing my views." And he says: "The controlling reason for the conclusions reached in the case of *Gates v. Cragg* was that the spirit of the statute law, which we are construing, was to require parties in the court below to seek to correct all errors occurring in an appealable decree, when such decree had been made without any defense on the part of the appellant, by making a motion to correct such errors before taking an appeal to this court and incurring unnecessary expense. This was regarded as just and reasonable, inasmuch as the circuit courts were peculiarly liable to commit errors in entering such decree; they being very often the result of mere inadvertence. Such an error would often be without delay or expense corrected by the court below, if its attention was called to the error by a motion before an appeal was allowed. This I still regard as the obvious purpose of our statute; and it was obviously so regarded by this court when this contrary decision was rendered in *Steenrod v. Railroad Co.* This distinctly appears from the opinion of the court pronounced by Judge Snyder; and it is abundantly shown by that portion of this opinion hereinbefore quoted. But in carrying out this plain object of our statute this court in the case of *Gates v. Cragg* (see pages 305, 306, of 11 W. Va.) held that, if the defendant appeared and filed a demurrer, no decree could be rendered against him as on bill taken for confessed; and, if the demurrer is overruled, the court must, as required by the statute, give a rule on the defendant to answer the bill, and, if on the day specified in the rule he fail to appear and answer, the same decree must be entered against him as would before the statute required this rule have been immediately entered when the demurrer was overruled, and such a decree made after the appearance of the defendant and the overruling of his demurrer was regarded as a decree not rendered upon a bill taken for confessed, but as rendered after due consideration of the defendant's objections; and it did not, we considered, come within the spirit of the statute requiring a motion in the court below to correct certain errors before any application for an appeal could be made to the appellate court."

After further commenting upon *Steenrod*

*v. Railroad Co.*, and discussing some authorities which hold that, although the principles of the cause may be settled by the overruling of the demurrer to the bill, an appeal therefrom cannot be taken until after a decree has been entered carrying into effect these principles, Judge Green says (page 554 of 28 W. Va.): "The truth is this court in *Gates v. Cragg* failed to note the distinction, which is well pointed out by this court in the case of *Steenrod v. Railroad Co.*, between the cases where the errors complained of by the defendant in his appeal are errors necessarily resulting from the decree erroneously overruling the defendant's demurrer, and the cases where the errors complained of by the appellant, the defendant, include also other errors independent of those resulting from such order overruling the defendant's demurrer. There is to my mind after duly considering the subject a clear distinction between the two cases. In the one the only error complained of in the final decree is an error necessarily resulting from the court's correctly carrying into effect a previous interlocutory order settling the principles of a cause and erroneously overruling the defendant's demurrer to the bill; such final decree, though no answer had been filed, not being a decree on a bill taken for confessed, but really simply a decree on the previous interlocutory order. From such a final decree an appeal lies, though no previous motion has been made in the court below to correct the errors in it. In the other case the appellant complains not only of the error committed in such interlocutory order, but also of errors in the subsequent final decree, which errors are independent of those resulting merely from giving effect to an erroneous order overruling a demurrer to a bill. Such a final decree as this is where no answer has been filed, a decree on a bill taken for confessed, and therefore a decree, which cannot be appealed from, till after a motion has been made in the court below to correct such errors. Referring to the first point of the syllabus of this case for a more succinct statement of the conclusion of Judge Green under the facts stated in the first position, he says: "If he then appealed from such decree solely on the ground that the court could properly render no decree against him on the plaintiff's bill, this court could entertain such an appeal, it being regarded substantially as an appeal from a previous decree overruling a demurrer, which after this decree against him was an appealable decree if it settled the principles of the cause."

Measured by these rules, what is the position of the appellants here? Does the error in the final decree complained of necessarily arise from the error in the decree overruling defendants' demurrer? If so, under these authorities the appeal lies without motion first made in the court below to correct the error, otherwise not. The question is a close

one; but, when we consider the facts in this case in connection with the pleadings, we think that the case is within the rule authorizing appeals without previous motion to correct the error under section 6, c. 134, Code 1899 [Code 1906, § 4037]. It will be observed that the appellants are in no wise interested in this litigation, except in so far as it is the purpose, in construing the will of James Pickens, to estop them from hereafter asserting, as against the plaintiff and the prospective purchaser of the land devised to Dever Pickens by the will of his father, a different construction thereof. If, as the second amended bill of the plaintiff charged, Dever Pickens took by this will a defeasible estate, and not an estate in fee simple indefeasible as charged in the third amended bill, these appellants would have no interest in the subjects of controversy. These appellants were not parties to the original suit, nor to the first and second amended bills. They were brought in on the third amended bill, for the one purpose of having determined the estate of Dever Pickens in the tract of land to be sold. This last bill pleaded the terms and provisions of the will relating to the devise to Dever Pickens, with the limiting clause thereof, which will be hereafter more particularly referred to; and the bill then undertook, by way of conclusion from the facts pleaded in relation to said will, to charge, contrary to the allegations of the second amended bill, that Dever Pickens took by said will a fee-simple estate indefeasible. This question rested substantially upon the provisions of the will itself. An answer to this bill by these appellants would have been nothing other than an admission of the facts charged with respect to the provisions of the will. It could have denied the conclusions of law charged; but these objects were accomplished by the demurrer. The demurrer admitted the facts, but denied the conclusions of law. It said that, admitting the facts, the conclusions of law charged did not follow. All the rights of these appellants, therefore, were involved in the demurrer to the bill; and, if the subsequent decree of the court which is appealed from amounted to no more, so far as the appellants are concerned, than the carrying into effect of the error of the court in overruling their demurrer, they are entitled to this appeal without first having made a motion to correct the error in the court below. A decision upon the demurrer by the court below that Dever Pickens did not take by the will of his father a fee-simple estate indefeasible in said land would have denied the right of the plaintiff to any relief as against these appellants, and would have dismissed the bill as against them. We think, therefore, that the position of the appellants is fairly within the rule of *Watson v. Wiggington*, supra, and that this court has jurisdiction of their appeal without previous motion to correct the error complained of in the court below.

The only other question presented upon this appeal is: What estate in the tract of 396 $\frac{1}{4}$  acres of land proceeded against did Dever Pickens take by the will of his father, James Pickens? The appeal which was allowed upon the petition of the appellants confined the same to this sole and single question. The question is a legal one, presented by the testamentary document itself—coupled, of course, with the date of the death of the testator, the subjects and objects of his bounty, as presented by the record. James Pickens died testate January 22, 1887. His will was dated December 8, 1884, and was probated in the clerk's office of the county court of Barbour county March 1, 1887. He left a widow, Ann Maria Pickens, to whom he devised his household and kitchen furniture and the sum of \$5,000 in money, in full satisfaction of her distributive share of his personal estate, and provided that she was to retain dower in all his real estate, and that his several other devisees should take and hold the lands devised to them, respectively, subject to her dower right therein to the same extent as if he had died intestate in reference thereto. He declared in the second item thereof: "It is my purpose and intention in this, my will that all my children now living and the two children of my deceased son, Alexander H. Pickens, shall all share equally in the final distribution of my real and personal estate. The children of my said son, Alexander H. Pickens, or their lawful issue, and the children or lawful issue of any other of my children taking per stirpes the portion or portions which my deceased child or children would have taken if living." In the third item he says: "Having heretofore given and advanced to my son, John D. Pickens, the sum of six thousand dollars, for which I hold his receipt, and also the sum of thirty eight hundred and fifty eight dollars and sixty four cents, being the balance due to me from him on his obligation for four thousand one hundred and twelve dollars, dated the 20th day of September, 1878, I hereby release him from all liability to me for the sum of \$6,000 and \$3,858.64, and in addition thereto I devise to him all that certain tract of land conveyed to me by Simon White, containing 73 and  $\frac{1}{4}$  acres, which I charge and estimate to him at the price of twenty five hundred and fifty five dollars, making in all the sum of \$12,413.64." In the fourth item he charges his daughter, Rachel Margaret Pickens, the wife of Nathan D. Boring, with the sum of \$6,000 in money and \$6,000 in land, with which "she shall be charged in the final settlement of my estate," aggregating the sum of \$12,000. He then proceeds by the fifth, sixth, seventh, eighth, ninth, and tenth items to make specific devises of lands—to his grandchildren May Pickens and Albert Pickens, the children of his deceased son Alexander H. Pickens, 295 acres; to his daughter Jennie Pickens, 238 acres; to his

daughter Mollie Pickens, 284½ acres; to his daughter Emma Pickens, wife of Samuel Walker, four several tracts; and finally, by the tenth item, to his said son Dever Pickens the 396¾ acres involved in this suit. Item 10 of said will, omitting the descriptive boundaries, is as follows: "To my son, Dever Pickens, I devise one tract of land containing 360 acres and another tract of land adjoining the same containing 36 and ¾ acres, containing together 396 and ¾ acres, which I estimate and value to him at the price of sixteen thousand dollars, of which he is required to pay to my executors the sum of two thousand dollars, which I declare to be a lien and charge on said land, in three equal installments, payable in one, two and three years after my death, which constitute a part of my personal estate." He then proceeds, by the eleventh item, to impose a limitation upon the estates thus devised, as follows: "All of the lands hereinbefore devised to my said children and to my said grandchildren, May Pickens and Albert Pickens, except the tract of 73 and ¾ acres of land hereinbefore devised to my son, John D. Pickens, are to be taken and held by them subject to the following limitation—that is to say, that if any of my said children or grandchildren hereinbefore mentioned shall die without children, or the lawful issue of such children, living at the time of his or her death, or born within ten months thereafter, then in that case the land herein devised to each child or grandchild so dying without such children, or the lawful issue of such children, living at the time of his or her death, or born within ten months thereafter, shall descend to each of my surviving children, and to the lawful issue of my deceased children and grandchildren, the descendants of each of my deceased children and grandchildren taking the portion which my deceased child or grandchild would have taken if living at the time of such death."

As bearing upon the proper construction to be given to this will, the twelfth, thirteenth, and fourteenth items are pertinent. They are as follows:

"Item Twelfth. After the payment of all my debts and funeral expenses, including the cost of suitable monuments to mark the graves of myself and my said wife, and the charges of administration of my said estate and after the payment of the legacy of five thousand dollars and of the delivery of the property hereinbefore specifically bequeathed to my wife, Ann Mariah Pickens, I direct my executors hereinafter named out of the residue of my personal estate to pay to my said children and grandchildren such sums of money as with the value of the lands and money hereinbefore devised or advanced to them or any of them, with the price hereinbefore affixed to each devise, as will make the share of each of the value of fourteen thousand dollars—that is to say, to John D.

Pickens, fifteen hundred and eighty six dollars and thirty six cents; to Rachel Margaret Boring, two thousand dollars; to Charity Young, thirty nine hundred dollars; to May Pickens, nineteen hundred dollars; to Albert Pickens, nineteen hundred dollars; to Jennie Pickens, forty five hundred dollars; to Mollie Pickens, five thousand dollars, and to Emma Walker six hundred dollars; but in case my personal estate prove insufficient for the payment in full of the last named eight legacies, then I direct my executors to abate the deficiency from each of said legacies ratably. And in case either of my said grandchildren, May Pickens or Albert Pickens, shall die before attaining the age of twenty one years, unmarried and without lawful issue living at the time of his or her death, or born within ten months thereafter, then the legacy bequeathed to such grandchild and the interest of such grandchild in the residue of my estate so dying shall be paid to the survivor of them; but in case both of said grandchildren shall so die before attaining the age of twenty one years and without lawful issue living at the time of such death, or born within ten months thereafter, then the interest of both of said grandchildren in my estate, including both of the legacies to them, and in the interest of each in the residue of my estate, shall fall into and become a part of the residue of my estate and be disposed of as hereinafter provided; and in case my said wife, Ann Mariah Pickens, shall die during my lifetime, then in that case the legacy of five thousand dollars and the personal property specifically bequeathed to her shall also fall into and become a part of the residue of my estate.

"Thirteenth Item: All moneys that I may hereinafter advance to my said children or grandchildren shall be applied in liquidation of the several legacies hereinbefore bequeathed to them respectively.

"Item Fourteenth: All the rest and residue of my estate of every kind and character shall be equally divided between my said children, John D. Pickens, Rachel Margaret Boring, Charity Young, Jennie Pickens, Mollie Pickens, Emma Walker and Dever Pickens, May Pickens and Albert Pickens, the last two taking together an equal share with each of my surviving children."

The present position of the plaintiff is that this will gives to Dever Pickens an indefeasible fee-simple estate in the 396¾ acres of land devised to him. On the other hand, it is contended by the appellants, as originally charged by the plaintiff in the second amended bill, that the will vested in Dever Pickens, with an estate in fee simple limited thereon by executory devise upon his dying without children, or the lawful issue of such children living at the time of his death, or born within 10 months thereafter, to his surviving brothers and sisters, the descendants of such deceased brother or sister to take

such portion as such brother or sister would have taken if living at the time of such death.

The proper construction of this will, and the solving of the issue thus presented, depend upon the time to which, by the provisions of the will and the rules of law applicable thereto, the words of survivorship in the will shall be referred—whether to the date of the death of the testator, or the date of the death of the first devisee before or after the death of the deviser. The decree of the court below seems to have been based, in part at least, upon the fact that there were born to Dever Pickens after the death of the testator two children, who are still living; an event happening after the death of the testator. It is argued by counsel for the appellee, as a general rule of construction, that whenever there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during the lifetime of the testator, and, if such devisee survive the testator, he takes an absolute fee; that the words do not create a remainder over to take effect on the death of the devisee at any time, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the testator's death. It is further contended by them that this construction is uniformly adopted, unless there is some language in the will indicative of a different intention on the part of the testator. We are referred by counsel for this rule to *In re N. Y. L. & W. Ry. Co.*, 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478, opinion by Rapallo, J., and to two Virginia cases as binding upon us, namely, *Hansford v. Elliott*, 9 Leigh, 78, and *Martin v. Kirby*, 11 Grat. 67. In the case of *Martin v. Kirby*, cited, Judge Lee says: "Whatever may be the rule of the English courts, this court would seem to adopt the rule that the words of survivorship refer to the death of the testator. This is declared to be in cases in which no special intent to the contrary is manifested the safest and soundest construction and more consonant to the intention of the testator and best supported in the authorities." We are cited to the later cases of *Stone v. Lewis*, 84 Va. 474, 5 S. E. 282; *Sellers, Ex'r, v. Reed*, 88 Va. 377, 13 S. E. 754; *Gish v. Moomaw*, 89 Va. 345, 15 S. E. 868; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913; *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811; *Stanley v. Stanley's Adm'r*, 92 Va. 534, 24 S. E. 229. It would serve no good purpose to refer by way of criticism to these Virginia cases; but it may be confidently asserted that their authority has been very much shaken by the later case of *Cheatham v. Gower*, 94 Va. 386, 26 S. E. 853. One judge—Keith, P.—dissented. The provision of the will involved in that case was: "I give to my nephew, T. M. Cheatham, during his life my

mansion house, and at his death to his surviving children. My money and bonds I wish to be equally divided between L. L. Lester's and T. M. Cheatham's children. All the balance of my estate, both real and personal, I wish to be equally divided between T. M. Cheatham's and L. L. Lester's children." And it was held that the remainder, after the termination of the life estate created by the first clause, passed to the children of T. M. Cheatham at his death, whether being in the testator's lifetime or not, but the estates given by the other two clauses of the will passed to the children of Lester and Cheatham living at the death of the testator. The court, discussing the case, referring to the other Virginia cases cited by counsel, said: "In the case at bar, the word 'surviving' is not used by the testatrix except in the first clause of her will, and, had she intended that only the children of T. M. Cheatham who were living at her death should take under that clause, it would seem reasonable to suppose that she would have used such words as would show beyond question what she meant, and not such as she does use, which, by their common and ordinary meaning, in the sense in which they would be understood by persons of common understanding, mean that only such children of T. M. Cheatham as might be living at his death were to take an interest in the property." It will appear from an inspection of these Virginia authorities down to the case of *Cheatham v. Gower* that the court in Virginia has followed the earlier English decisions on this subject, and has adhered to them tenaciously, and did not until the *Cheatham Case* modify the rule of the prior cases in accordance with the later English decisions. For a history of the earlier English cases, and the later cases modifying the rule of the earlier ones, reference is made to 2 Jarman on Wills (6th Ed.) 661 et seq. Referring to the later English cases of *Brograve v. Winder*, *Newton v. Ayscough*, *Hoghton v. Whitgreave*, and *Daniell v. Daniell*, which depart from the rule of the earlier cases, Mr. Jarman says (page 671): "The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds; and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist." And he adds: "It is curious to observe in the history of this rule of construction the steps by which an established doctrine is overturned." There is an earlier Virginia case of *Burfoot v. Burfoot*, 2 Leigh. 119, one of the cases cited by counsel for the



appellants in support of his views. As we understand them, it is conceded by the appellants that this case is contrary to the Virginia decisions relied upon by them.

Inasmuch as the Virginia court in *Cheat-ham v. Gower*, supra, did not feel itself bound by the prior decisions of *Hansford v. Elliott* and *Martin v. Kirby*, neither do we feel bound thereby to adhere to the ancient rule, which is now opposed to the weight of authority; and in *Schaeffer v. Schaeffer*, 54 W. Va. 681, 46 S. E. 150, though the point is there only mooted, yet Judge Brannon, who anticipated the adoption by us of the better and more modern rule of construction, referring to the rule of *Martin v. Kirby*, says: "Speaking for myself, I am at present ready to say that the rule is not sound. Once it was, but not now. Numerous English decisions once upheld it." And, referring to the discussion by Mr. Jarman (star page 1547), Judge Brannon quotes this author as follows: "In this state of the authorities one need scarcely hesitate to affirm that the rule that reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only." He then cites numerous American authorities recognizing this change in the rule. In *Schaeffer v. Schaeffer*, at page 685 of 54 W. Va., at page 151 of 46 S. E., Judge Brannon, quoting from the same author, says in reference to the term "substitution" used by Rapallo, J., in 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478: "The term 'substitution' is generally applied to limitation intended to provide for the death of prior devisees or legatees before the period of distribution." *Summers v. Smith*, 21 N. E. 191, 127 Ill. 645, and *Smith v. Kimbell*, 38 N. E. 1029, 153 Ill. 368, Illinois cases, and *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816, are leading cases, and all in accord with the modern rule of construction. *Smith v. Kimbell* was upon a bill for specific performance of a contract for the sale of real estate. The first point of the syllabus is: "A testator devised land to his daughter in language that carried the fee, and then declared: 'Should the said daughter die leaving no heirs, I will and direct that all of the above described property shall be equally divided between my sisters.' Held, that the devise to the sisters was a valid executory devise, dependent upon the daughter dying without issue surviving her." Commenting on the New York and Pennsylvania cases cited contrary, the Illinois court says: "They are not applicable here, for the reasons involved in the observations already made. 'When the death of the first taker is coupled with other circumstances, which

may or may not ever take place—as, for instance, death under age or without children—the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, "upon death," under the circumstances indicated, at any time, whether before or after the death of the testator.'" In *Britton v. Thornton*, supra, the will of Joseph Thornton provided: "To Eliza Ann Thornton, natural daughter of my said son Nelson, I give and devise all that plantation bought of Andrew Porter and John Davis"—and, after describing it, provided: "Should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised shall revert and become a part of the residue of my estate hereinafter disposed of." "The question which lies at the foundation of this case," says Justice Gray, "is what estate Eliza Ann Thornton took in the land which Joseph Thornton specifically devised to her"; and he answers it by saying: "By this specific devise, Eliza Ann Thornton took an estate in fee, defeasible by an executory devise over." And Justice Gray further observes: "When, indeed, a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event, which is sure to occur to all living, as uncertain and contingent, has led the courts to interpret the devise over as referring only to death in the testator's lifetime. \* \* \* But, when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

It seems unnecessary to further burden this opinion, already too long, by referring to or discussing other authorities. The difference between the old and the modern rule of construction which we adopt is the difference between giving the words of the testator a technical meaning not intended by him, in order to aid the earliest possible investment of the estate devised, and construing the words of the testator according to their ordinary and common acceptation to accomplish the purposes of the testator. The old rule was not founded upon proper principles, and, as Jarman says with reference to the growth of the new doctrine, as quoted by Judge Brannon in *Schaeffer v. Schaeffer*, at page 683 of 54 W. Va., at page 151 of 46 S. E.: "The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle."

It only remains to apply the proper rule of construction to the will of the testator involved in this case. Holding this docu-

ment up by its four corners, and reading therefrom the mind of the testator, it is clear that, when he made his will, he anticipated that his living children and the children of his deceased son would all be living at the time of his death; and, as far as he could, after providing for his widow a competency in cash and for her dower in all his lands, he endeavored to make an equal division of his property between his children and grandchildren with estates therein, using the language of the limiting clause of the will, "to be taken and held by them subject to the following limitation," etc.; and that limitation was that after they should thus come into possession of the estates devised to them, if any of them should die without children, or the lawful issue of such children, living at the time of his or her death, or born within 10 months thereafter, then the lands therein devised to those so dying without such children, or the lawful issue of such children, living at the time of his or her death, or born within 10 months thereafter, whether such event should happen before or after the death of the testator, should descend to each of the survivors of them and to their lawful issue, the descendants of each of them taking the portion which their deceased ancestor would have taken if living at the time of such death—meaning, of course, the death of the first taker. This language was written in this will, as the record shows, by a careful and painstaking lawyer, at one time a distinguished judge of this court, and it can have no other meaning than to refer the words of survivorship contained therein to the time of the death of the several primary devisees, whether that event should take place before or after the death of the testator.

Several reasons attempted to be drawn from the provisions of the will are assigned by counsel for appellee against the construction we place upon this will. First. It is claimed that by the second item the testator has evinced an intention that all of his children and his two grandchildren should share equally in the final distribution of his real and personal estate. The expression is, "children now living," etc., referring to his children and grandchildren living at the date of the will; but, if the death of any of these children and grandchildren had occurred prior to the death of the testator, the literal fulfillment of this expressed wish of the testator could not have taken place. But, if it be said that the last clause of this item anticipates such death of his children before the death of the testator, by providing that said children or the lawful issue of any other of his children should take per stirpes the portions which his deceased child or children would take if living, and thereby refers the words of survivorship to a time anterior to the death of the testator, we do not think this item of the will, taken with the other provisions thereof, is sufficient to indicate an

intention on the part of the testator that the words of survivorship used in the eleventh item of the will, the limiting clause thereof, are to be so referred; for clearly this item, as before explained, refers the period of survivorship to the death of the immediate devisees who would be in a position to take and hold the land devised, at the death of the testator, subject to the contingency of such child or grandchild dying without children or lawful issue of such children living at the time of his or her death, or born within 10 months thereafter. Second. It is claimed that the provision in the devise of the 396 $\frac{1}{2}$  acres charging said land with a lien in favor of the testator's estate for the sum of \$2,000 was an inequitable provision, inconsistent with the testator's expressed desire that his estate should be divided equally between his children and grandchildren; for, it is argued, if Dever Pickens took only a life estate in the 396 $\frac{1}{2}$  acres, or took an estate in fee defeasible by an executory devise over, as claimed by the appellants, it is possible that he might have enjoyed the use of the devise for a day only. The answer to this is that the testator did not anticipate such a contingency. He was looking forward to the enjoyment by his children of the lands and property respectively devised to them for the usual term or expectancy of life, and in the division of his lands this seemed to him to be the only way of equalizing Dever Pickens with his other children, so that they might remain in enjoyment during their several lives of equal portions of his estate, subject to the contingency of the eleventh clause of the will. Third. Another argument is drawn, on the theory of inequality, against our construction of this will—that the testator in the first clause of the will bequeathed a large bequest of \$5,000 to his wife, and by the eleventh clause thereof provided that, in case she should die during the testator's lifetime, then the legacy of \$5,000 and the personal property specifically bequeathed to her should fall into and become a part of the residue of his estate, and it is said that, if this provision is read in connection with the said second clause, it is impossible to conclude that the testator meant that there should be at any time such a distribution of his estate as would give one child an interest greater than the others or greater than the interest devised to the two grandchildren. In other words, as we understand the argument, the postponement of the distribution of the residuum of his estate and of this \$5,000 bequest to the wife of the testator after his death would work an inequality upon the other children not anticipated by the testator. The same argument might be made with reference to the provision in the twelfth item, providing that in case both the grandchildren should die before attaining the age of 21 years, unmarried and without lawful issue at the time of his or her death, or born within 10 months thereafter, the interest of

both, including both legacies to them, and the interest of each in the residue of such estate, should fall into and become a part of the residue of the estate of the testator, to be disposed of as therein provided. Here is a special provision of the will plainly postponing the division of the residue, under the conditions named, to a time which may happen long subsequent to the death of the testator. We see nothing in these arguments against our construction of the will. It seems to be written in plain terms, with little room for contrariety of opinion in relation thereto.

We hold that by the terms of the will of said James Pickens the defendant Dever Pickens took and holds thereunder an estate in fee in said tract of 396½ acres, defeasible by an executory devise over upon his dying without children, or the lawful issue of such children, living at the time of his death, or born within 10 months thereafter, to his surviving brothers and sisters and the lawful issue of such deceased brothers and sisters, the descendants of such brothers and sisters to take such portion as such brother or sister would have taken if living at the time of such death. We are therefore of opinion that there is error in the decree of the circuit court in adjudging that the said Dever Pickens by the devise to him of said tract of land took thereunder an indefeasible estate in fee simple therein, and decreeing such interest therein to be sold in satisfaction of the lien decreed thereon.

We therefore reverse the said decree in this respect, with costs to the appellants; and this cause is remanded to the circuit court, with directions to modify its decree aforesaid in accordance with the opinion of this court, and to be therein further proceeded with according to the principles herein enunciated and the rules of equity.

(129 Ga. 125)

**SIMMONS v. SCARBOROUGH.**

(Supreme Court of Georgia. Oct. 3, 1907.)

**WRIT OF ERROR—BILL OF EXCEPTIONS—FINAL JUDGMENT—ASSIGNMENT OF ERROR.**

"A direct bill of exceptions to a ruling made pendente lite, which does not assign error upon any final judgment, though such a judgment was rendered, will not be entertained by this court." *Kibben v. Coastwise Dredging Co.*, 120 Ga. 899, 48 S. E. 330.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 329, 344.]

(Syllabus by the Court.)

Error from Superior Court, Lee County; *Z. A. Littlejohn*, Judge.

I. C. Scarborough obtained a *fi. fa.* on a judgment recovered against E. J. and L. B. Simmons. Mrs. L. B. Simmons filed an affidavit of illegality to the levy, and, from a judgment directing that the *fi. fa.* proceed, Mrs. Simmons brings error. Writ dismissed.

The plaintiff in error, Mrs. L. B. Simmons, filed an affidavit of illegality to the levy of a

*fi. fa.* in favor of Scarborough, transferee of Byrom, against E. J. and L. B. Simmons. Upon the trial the plaintiff in error offered an amendment to her affidavit of illegality. The bill of exceptions recites that "the plaintiff generally demurred to the amendment and objected to the same, and the court sustained the demurrer and refused to allow the amendment; thereupon defendant then and there excepted, and now excepts and assigns the same as error, and, for cause of error, says that the amendment was sufficient in law and should have been allowed. The plaintiff then introduced the *fi. fa.* with the levy on the same, and closed. No other evidence. Verdict was had for the plaintiff, and judgment entered directing said *fi. fa.* to proceed." No other assignment of error is made in the bill of exceptions, except the one above quoted, complaining of the judgment refusing and disallowing the amendment.

Allen Fort & Son, H. L. Long & Son, and Lane, Maynard & Hooper, for plaintiff in error. Shipp & Sheppard, for defendant in error.

BECK, J. Writ of error dismissed. All the Justices concur.

(129 Ga. 128)

**MERCER v. SAGER.**

(Supreme Court of Georgia. Oct. 3, 1907.)

**1. EXECUTORS—SALE OF LAND—TITLE OF PURCHASER—CAVEAT EMPTOR.**

Where land is sold by an executrix under a valid decree or judgment of a court of competent jurisdiction, directing said executrix "to sell the said several tracts of land in the foregoing petition mentioned and described at public outcry," and the same was duly advertised for four weeks before the sale, and regularly sold to the highest bidder, the purchaser at such sale takes subject to the general rule of caveat emptor. *Kirkland v. Wade*, 61 Ga. 478; *Colbert v. Moore*, 64 Ga. 502; *Wells v. Harper*, 81 Ga. 194, 6 S. E. 913, 12 Am. St. Rep. 819.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1573-1577.]

**2. SAME—SPECIFIC PERFORMANCE.**

There being no misrepresentations or fraud by the executrix or any one conducting the sale, and it appearing that the alleged defects complained of by the purchaser could have been discovered as well before as after the sale, the purchaser was bound by his bid; and no error was committed by the court in decreeing specific performance of his contract by the bidder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1577-1588.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; *Geo. T. Cann*, Judge.

Suit by L. W. Sager, as executor, etc., against J. A. Mercer, Jr. From a decree in favor of complainant, defendant brings error. Affirmed.

The second item of the will of Mary Houston, deceased, provided that her property

should be held in trust by her executor, who was directed, out of the rents, income, and profits, to educate and maintain the minor children of the testatrix, and to pay the necessary expenses of the estate. And said executor was further directed "to hold together the corpus of said estate until the youngest child shall arrive at the age of twenty-one years; and then in further trust to divide the said corpus of the trust estate among all my children living at the time of such distribution, share and share alike as tenants in common, the child or children of a deceased child to take in place of the parent, and to share per stirpes and not per capita." By a codicil the testatrix appointed Sager, defendant in error, executrix and trustee, "with all the powers therein conferred, \* \* \* any sale and reinvestment to be made by the said trustee only under the direction and decree of a court of competent jurisdiction in a proper case-made." When the two youngest children of the testatrix had arrived at the age of 20, and 17 years, respectively, they filed a petition against the executrix as such and individually, and against the other children, praying that a division of the estate among all the children be made at once, for the reason that the net income of the estate was insufficient to educate and support the minor children according to the provisions of the will. All the legatees then in life consented to the relief sought in this petition; and the court passed an order which, after reciting that all parties at interest were represented, and the jury having returned a verdict in favor of the prayer in the petition, directed that the estate of the testatrix be divided among said legatees; and it was further ordered and decreed that the executrix "sell the several tracts of land [belonging to said estate] \* \* \* at public outcry, after advertising the same once a week for four weeks before the sale on a regular sales day," and "that any sale shall be made subject to confirmation by this court." In conformity to the provisions of this decree the sale was made, and a portion of the lands was bid in by plaintiff in error, and said sale was confirmed by the court. The case at bar arose upon a petition filed by the executrix to enforce this bid. The defendant, Mercer, filed his answer, in which he admitted making the bid above referred to, but alleged that the court had no authority to decree the sale and distribution of said estate before the youngest child arrived at the age of 21 years, and that said sale was not binding upon contingent beneficiaries in said will, who were not parties to the said proceedings, nor represented therein, and prayed that he be released from his said bid. The case was heard by the presiding judge without the intervention of a jury, and it was ordered and adjudged that the defendant be required to take the property and pay the amount bid by him therefor. The defendant excepted.

Lester & Ravenel, for plaintiff in error.  
Saussey & Saussey, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(129 Ga. 74)

HARRIS v. POWERS et al. POWERS et al.  
v. HARRIS et al. NOLAN et al.  
v. SAME.

(Supreme Court of Georgia. Aug. 12, 1907.)

1. DOWER—PROPERTY SUBJECT TO DOWER—EQUITY OF REDEMPTION.

At common law a widow was not dowable of an equity of redemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, §§ 45, 57, 59.]

2. COMMON LAW—ADOPTION.

The common law of force prior to May 14, 1776, was adopted as the law of this state by the act of February 25, 1784 (Cobb's Dig. 721, § 3), except where modified by statutes or not adjusted to the conditions or system of government existing here.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Common Law, § 10.]

3. DOWER—PROPERTY SUBJECT TO DOWER.

Where an owner of land made a deed to secure an indebtedness, and took a bond for reconveyance upon payment of the debt, and died without having paid any part of the debt, or having obtained a reconveyance, his widow was not entitled to take dower either in the land as a whole or in the equity of redemption, at least not without first redeeming the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, §§ 57, 59.]

4. SAME.

Where the estate of the decedent was insolvent, and was placed in the hands of a receiver for administration by a court of equity, and the case was referred to an auditor for an accounting, creditors, whose claims would be affected by the allowance of dower, had a right to contest the widow's claim to have dower allowed to her in land to which the husband did not hold title at the time of his death, but only an equity of redemption.

5. SAME.

The principles above announced were not changed by the fact that the receiver, under order of the court, sold the land which had been conveyed to secure the debts, paid off the indebtedness, and had a surplus on hand. Nor did it alter the case that creditors assented to the payment of the secured indebtedness (with an exception as to fees, touching which the question was reserved) in order to save accruing interest on the secured debts.

6. BILLS AND NOTES—NONPAYMENT OF INTEREST—ELECTION TO DECLARE WHOLE AMOUNT DUE.

Where a promissory note was due five years from its date, with interest payable annually on a fixed day, but included a provision that, if the interest was not paid when due, the payee might declare the entire debt due; and where, after the failure to pay an installment of interest, the attorneys for the creditor gave notice to the administrator of the deceased debtor of an intention to bring suit on the note to the next term of court, and on the return day of such term suit was brought by the creditor for the entire amount of the note, this was evidence of an election to declare the whole debt due for nonpayment of the interest.

7. SAME.

This would not be altered by the fact that the maker of the note had died, and an administrator had been appointed, nor because the cred

itor did not bring a separate suit on the note, but joined with other creditors in an equitable petition, praying to have its right enforced, and also for the administration of the estate by a court of equity.

**8. SAME—ATTORNEY'S FEES—RIGHT TO RECOVER.**

Where a provision for the payment of attorney's fees is included in a note, the death of the debtor insolvent will not destroy the right to recover such fees as against the administrator, upon compliance with the statute in respect to giving notice.

**9. SAME.**

Where notice was duly given, in accordance with the act of 1900 (page 53), to an administrator of an intention to bring suit upon certain promissory notes made by the decedent, which contained a provision for the payment of attorney's fees, and where the estate was insolvent, and by reasons of complications it was necessary to place the assets in the hands of a receiver, and to have an accounting as to assets and debts, and where, on the last day for bringing suit to the next term of the superior court (in this state called the return day), the creditors holding such notes and others filed an equitable petition under which a receiver was appointed and an administration of the assets of the estate had, and where the auditor, to whom the case was referred, found that the administrator had no money with which the notes might have been paid, and could not borrow it, and in effect that no payment could have been made, the holders of the notes were not prevented from recovering attorney's fees thereon because the suit was commenced on such return day.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Action between A. De R. Harris and H. M. Powers and one Nolan and others. From the judgment, Harris brings error, and Nolan and Powers assign cross-bills. Judgment on the main bill with exceptions affirmed, and on the cross-bills reversed.

Jno. L. Norris, for A. De R. Harris. Thos. W. Milner & Sons, Jno. W. & Paul F. Akin, Joe M. Moon, Thos. C. Milner, G. H. Aubrey, and J. B. Conyers, for H. M. Powers and others.

**LUMPKIN, J.** This case arose upon an equitable petition, under which an insolvent estate of a decedent was placed in the hands of a receiver upon the application of creditors. It was referred to an auditor to take an accounting and make a report, with a view to the proper administration of the assets under decree of the court. Among the creditors who filed the original petition were the holders of deeds made by the decedent in his lifetime to secure certain debts, bonds to reconvey upon payment having been made to him by the grantees in the deeds respectively. There were also unsecured creditors. The widow claimed dower. One of the secured creditors claimed attorney's fees under a provision in the note held by it. An unsecured creditor also claimed attorney's fees. The auditor refused to allow them, and exception was taken. Pending the case, under an interlocutory decree of the court, the receiver sold the lands, paid off the holders

of the secured debts, and had in hand a surplus amounting to several thousand dollars. The auditor found that the widow was entitled to dower in the equity of redemption, or, in lieu of it, in the surplus of the proceeds of the lands after paying off the debts secured by the deeds. To this other creditors filed exception, contending that the widow was not dowerable in such equity or surplus. The widow filed exceptions, claiming that she was entitled to dower, not only in the surplus, but to be measured on the basis of the value of the entire lands. She sought to have set apart to her a sum of money in lieu of dower in the lands, alleging that this was by agreement under the statute. Civ. Code 1895, § 4695. Motions and counter motions were made to dismiss various exceptions, which were overruled. The presiding judge overruled all of the exceptions of law and fact, and entered a decree accordingly. All parties excepted; a main bill of exceptions, a cross-bill of exceptions, and two independent bills of exceptions being filed. With one of these we have dealt separately. *Pendley v. Powers*, 58 S. E. 653. The others we will consider together.

We deem it unnecessary to deal with the demurrers to exceptions and motions to dismiss them, or with exceptions to an allowance of an amendment to one set of exceptions, further than to say that we think there is enough properly before us to raise the questions above indicated, and we will deal with them accordingly.

It has been said that dower was introduced into Denmark by Sweyn, the father of Canute, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals, and that, possibly, the English dower was a relic of the Danish custom, though the reason given for its adoption in England was the more practical one of making provision for the sustenance of the wife, and the rearing and education of the younger children. 2 Bl. Com. 129. If, indeed, dower had an origin so tinged with grateful gallantry, and having for its purpose the rewarding of the generous ladies of Denmark by conferring upon them a right in respect of their husbands' lands, with or without the consent of the husbands, it is not surprising that, when it became a part of the law of England, it should have been often declared to be a favored right especially by the courts of equity, which delighted in being called "courts of conscience." The effort to harmonize the holding of the courts of law that dower was a legal right, that seisin, which was necessary to the perfection of a freehold, was necessary to dower, and that a widow could only take dower in a legal estate, with general ideas of moral duty on the part of the husband to support his wife and children, and with broad equitable views, gave rise to a series of decisions which are not easily to be reconciled on a basis of sound and consistent principle. An excellent discussion of

this subject will be found in Park on Dower, 124-140 (as contained 11 Law Lib. pp. 56, 64); *D'Arcy v. Blake*, 2 Sch. & Lefr. 388. Whatever real or apparent differences, however, there may have been among some of the decisions, the rule of the common law was ultimately determined to be that a widow could not take dower in an equity of redemption. In *Dixon v. Saville*, 1 Bro. C. C. p. 326, decided by the Lords Commissioners of the Great Seal in 1783, it was held that "a widow is not dowerable of an equity of redemption." Lord Loughborough treated the rule as so well settled that, after considering the arguments which discussed numerous cases, he dismissed the entire matter in the following brief opinion: "The argument in the cases cited has generally sprung from compassion. The case of an estate by the courtesy in a trust is the anomalous case, not the rule that the wife shall not have dower. I confess I think it so much settled that it would be wrong to discuss it much." Mr. Park says: "This has been since recognized to be the law by universal practice, and by several of the most learned judges." Park on Dower, 137 (11 Law Lib., top p. 63). As early as 1712, in the case of *Bottomley v. Fairfax*, Prec. Ch. 336, it was said that "in this case it was clearly agreed that if a husband before marriage conveys his estate to trustees and their heirs in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate the wife after his death shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such case." That the common-law rule, prior to Dower Act, 3 & 4 Wm. IV, c. 105, was that the wife was not entitled to dower in an equity of redemption, see, also, *Dawson v. Bank of Whitehaven*, L. R. 6 Ch. Div. 218; *Mayburry v. Brien*, 15 Pet. (U. S.) 20, 10 L. Ed. 646; *Stelle v. Carroll*, 12 Pet. (U. S.) 201, 9 L. Ed. 1056; 11 Am. & Eng. Enc. Law (2d Ed.) 210; 4 Kent's Com. 43 et seq.; *Bispham's Eq.* (5th Ed.) 616. In 14 Cyc. 909 the rule is thus succinctly stated: "At common law seisin of a legal estate is an essential requisite to the right of dower, and therefore the widow is not entitled to dower in lands to which her husband had only an equitable title." On page 914 it is said: "The right of redemption from mortgages being regarded as a mere equitable title, the common law did not recognize dower right of a widow in her husband's equity of redemption." In 10 Am. & Eng. Enc. Law (2d Ed.) 162, it is said: "The familiar rule of equity that all the incidents of legal estates shall attach and apply to equitable estates did not, at common law, include the right of dower. This exception, it is said, was contrary to all the analogies of legal and equitable estates, and, if it were now open to question, would be no longer recognized. It has been changed in England, Canada, and most of the United States." The revolt against the

common-law rule was greatly forwarded, if not led, by the distinguished chancellor Kent, as early as 1804, in the case of *Waters v. Stewart*, 1 Oaines' Cas. (N. Y.) 47, 68. He discussed at length the position of the holder of an equity of redemption in possession of the debtor, and held that, under the New York statute, it could be seized and sold under an execution. This was followed in 1821 by *Titus v. Nelson*, 5 Johns. Ch. (N. Y.) 452, holding that the widow was entitled to dower in the land, subject to the mortgage, and that the court would allow her dower out of the surplus proceeds of the sale of the mortgaged premises on a bill for a foreclosure and sale. In that case, however, it was still recognized that "in England dower is considered as a mere legal right, and equity follows the law, and will not create the right where it does not subsist at law." See, also, *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229. For a full development of this theory, see the authorities above cited, and also 1 Jones on Mortgages (6th Ed.) § 604, p. 658 et seq. Whatever may be the justice or injustice of the English rule as to dower in an equity of redemption, or what is analogous to it under our system, it was enacted by the Legislature of this state on February 25, 1784, that the common law of England of force prior to May 14, 1776, should be of force in this state. Cobb's Dig. 721, § 3; Pol. Code 1895, § 1, par. 3; Prince's Dig. p. 570. Thus, then, so far as the common-law rule is applicable to the present situation, it must remain of force until changed by legislation. Under the common law, dower attached to all of the lands and tenements of which the husband was seised in fee simple or fee tail at any time during the coverture, and of which any issue which the wife might have had might by possibility have been heir. Under the law of this state, "dower is the right of a wife to an estate for life in one-third of the lands, according to valuation; including the dwelling house (which is not to be valued unless in a town or city) of which the husband was seised or possessed at the time of his death, or to which the husband obtained title in right of his wife." Civ. Code 1895, § 4687. As a husband's marital rights no longer attach to his wife's property, the last clause of this definition can have no application, except to cases arising prior to what is known as "the married woman's law of 1866," and may be disregarded in the present consideration. The change authorizing the husband to convey his property free from the right of dower on the part of his wife, and without relinquishment from her except as to property which he received through her, dates back to 1826. Cobb's Dig. 171, § 29. But it will be noticed that, to entitle a widow to dower, the husband must have died seised and possessed. Except as modified by statute, and with a possible exception in 10 Ga., *infra*, the word "seised" has always been treated as referring to a

legal title, or certainly a perfect equity, equivalent thereto, relatively to applications for dower.

In *Chapman v. Schroeder*, 10 Ga. 321, dower was recognized as a legal claim. It was, indeed, there held that a widow was dowable of wild and uncultivated lands, whether in England she would have been so or not, owing to the situation and circumstances of our people, as well as and by reason of implications from certain laws. In *Bowen v. Collins*, 15 Ga. 100, it was held that a purchaser of land who held under a bond for title, with part of the purchase money paid at the time of his death, was not seised and possessed of the land within the meaning of the law. It was said that, whatever might be the meaning of the word "seisin," it included in it this ingredient: "A title which is complete." See, also, *Clements v. Bostwick*, 38 Ga. 1; *Day v. Solomon*, 40 Ga. 32; *Klinnebrew v. McWhorter*, 61 Ga. 33; *Raley v. Ross*, 59 Ga. 862; *Hill v. Hill*, 81 Ga. 516, 8 S. E. 879 (2); *Pirkie v. Equitable Mortgage Co.*, 99 Ga. 524, 28 S. E. 34 (the ruling that the clause inserted in the conveyance involved in that case made it a mortgage has since been reversed in *Pitts v. Maier*, 115 Ga. 281, 285, 41 S. E. 570); *Ferris v. Van Ingen*, 110 Ga. 102, 115, 35 S. E. 847. In *Latham v. McLain*, 64 Ga. 320, it was held that where one entered into the possession of land under a parol contract to purchase, but paid no part of the purchase money to the holder of the legal title, he was not seised as against the latter and those claiming under him; and on his death, even after he had tendered the purchase money, his widow was not dowable of the land. It was there recognized that legal seisin might be obtained by paying the purchase money in full, where a bond for titles or other written contract for sale and purchase had been entered into, or that title might be acquired by deed or prescription. *Bleckley, J.*, said: "Mere tender of money does not operate as payment, nor work a transmutation of title. The money which the complainant's husband tendered to the railroad company remained his money, and, if it was still on hand when he died, became assets of his estate. And, if he owned the money at the time of his decease, he surely did not own the land also. The tender, together with the other facts, put him in a situation where he might have filed a bill for specific performance, and obliged the railroad company to invest him with title, but he did not pursue that course. He took no steps to strip off the title with which the company was clothed. The most that can be said is that he died possessed of a right to become seised of the land by the appropriate proceeding in equity; and possibly, if the right were now actually enforced by his executors, administrators, or heirs at law, so as to render the land the property of the estate fully and completely, the widow might be dowable of it on the doctrine of relation." In *McDonald*

*v. McDonald*, 120 Ga. 403, 47 S. E. 918. It was held that where a husband borrowed money, made an absolute deed under the provisions of the Code to secure it, received a bond for titles from the lender, and at the time of his death had paid none of the notes given for the borrowed money, he had no interest in the land except the equity of redemption, and his widow was not entitled to dower therein. In that case the objection was made by the administrator, and it was held that he had a right to do so, although the holder of the security deed withdrew all objection on its part. In other cases the holder of the security deed was involved, but in the *McDonald* case it was not so; and therefore it is a direct adjudication controlling in the present case, if the creditors here had the right to make the objection. We have granted permission to review the case last cited, and have carefully considered the briefs and arguments of counsel. We cannot, however, overrule it. What has been said above will show the reason on which it rests. It was contended that the act of 1884 (Acts 1884-85, p. 92), now codified in section 4688 of the Civil Code of 1895, changed the law so as to allow dower to be assigned in an equity of redemption. That section reads as follows: "Dower may be assigned in lands held under deed, bond for titles, or other instrument in writing having like effect, where a portion of the purchase money has been paid, but the estate in dower shall be liable for the unpaid purchase money where the vendee held under bond for titles or other instrument having the same effect, or under deed where contemporaneously with the execution of the deed the vendee encumbered the land with a mortgage for the purchase money." Apparently the act was passed to meet the ruling in *Bowen v. Collins*, 15 Ga. 100, and perhaps in part *Wilson v. Peeples*, 61 Ga. 218. It is limited to the cases mentioned in it. Whether the payment of a part of the debt secured by deed with bond to reconvey would be analogized to payment of a part of the purchase money is not now before us, as there was no such payment. Nor is the law which requires seisin as a basis for dower changed by section 4696 of the Code, which allows the widow, with the assent of the executor or administrator, and the approval of the ordinary, to elect, in lieu of her dower, an amount in money to belong absolutely to her, to be estimated and determined by the commissioners appointed to assign dower, whose report shall be subject to the same objection as are admeasurements of dower in land. This simply authorized the payment of a sum of money in lieu of the dower in the land, but did not create a right of dower where none existed before. If there was no right to dower in the land, there was no right to an equivalent sum of money in lieu of it. This is made clear by the closing part of the section, which declares that the amount so awarded shall be paid in prefer-

ence to all other claims "out of the proceeds of the sale of the lands." There are some differences between our statutory deed to secure a debt, with bond for titles to be made on repayment, and a mortgage under the common law. The deed to secure a debt is a statutory creation, and has given rise to some decisions which do not very closely follow analogies. The deed conveys the title, but the grantee cannot recover possession until after failure to pay. Even then, if he recovers possession, he has not a perfect, indefeasible title, but is liable to an accounting for rents, issues, and profits to be applied to the satisfaction of the debt, and, after it has been discharged, the grantor is again entitled to the land. *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374; *Polhill v. Brown*, 84 Ga. 339, 10 S. E. 921. If the debtor remains in possession and the land is sold under execution against the grantee, the purchaser does not acquire a perfect title, but only the rights of the grantee. *Bridger v. Exchange Bank*, 126 Ga. 822, 56 S. E. 97. But to a considerable extent there is an analogy between our security deed and a common-law mortgage, and rulings in regard to the latter may be considered to furnish a guide as to the status of the former on the subject of dower. *Ashley v. Cook*, 109 Ga. 653, 657, 35 S. E. 89.

It is urged that the maker of the deed in possession should be treated, as to all the world except the grantee, as the owner of the property. This is to a large extent true. Thus, where such grantor brings an action of ejectment, the defendant cannot set up the security deed, even after maturity of the debt, as an outstanding title to defeat the action, unless his possession is connected with such title. *Ashley v. Cook*, 109 Ga. 653, 657, 35 S. E. 89. The statement is broadly made in *Wilkins v. Gibson*, 113 Ga. 31, 60, 38 S. E. 374, 84 Am. St. Rep. 204, that, as against every one except the grantee in the security deed, the maker could set up that he was the owner of the property and entitled to all the rights as such, and that his vendees could do the same. In some respects the maker of the deed, though in possession, is not the absolute owner relatively to every one save the grantee. Thus the rule laid down in New York and other states, that the equity of redemption held by the grantor is subject to levy, has not been followed. On the contrary, it has been held not to be so subject. *Groves v. Williams*, 69 Ga. 614; *Shumate v. McLendon*, 120 Ga. 398, 48 S. E. 10. Following the contention just above referred to, it was further insisted that the creditors could not assert the existence of the deed in order to defeat the widow's dower. They are not seeking to claim any right under the deed, nor do they occupy the position of a defendant in ejectment setting up an outstanding title. An insolvent estate of a decedent has been taken in charge by a court of equity for administration. If one claimant gets more than he or

she is entitled to, another loses correspondingly. What these creditors are doing is to seek to prevent the estate, which is being administered through the court of equity, from being diminished by unlawful claims, which will cause them to lose all or a part of what is due to them. We know of no reason why this cannot be done. Counsel for the widow argued that the administrator, by reason of the grant of an injunction and the fact that he had been appointed receiver, had been prevented from proceeding to handle the estate as administrator, and could not set up this defense against the claim of dower so as to protect the estate for creditors. If this is true, it surely cannot be that the court will prevent the administrator from protecting the estate for creditors, and at the same time will refuse to allow the creditors to protect themselves. See *Pendley v. Powers* (decided to-day) 58 S. E. 653. Another anomaly which has grown up in the law of dower is this: Under the English common law, a widow being entitled to dower in all the land of which her husband was seised at any time during coverture in fee simple or fee tail, with a possibility of inheritance in her issue, this right was considered as a sort of claim or quasi incumbrance or interest in her favor attaching to all such land. It was even sometimes referred to as a species of inchoate estate in her. If the husband made a mortgage, and she did not release her dower, upon his death she was entitled to dower in the land without regard to the mortgage. If she did release her right of dower in favor of the mortgagee, it was nevertheless contended that this operated only as a waiver or estoppel in favor of the mortgagee, or those succeeding to his rights, and that the inchoate right still existed as against others. Out of this situation probably arose the adjudication of some of the courts that the widow was entitled to redeem the land, replacing the title in the estate of her husband, and then by a species of relation, treating the land as having been in the seisin of her husband at his death. This redemption by the widow was, of course, with her own funds, not with the funds of others, or of the estate, which she had no right to control. It was said that, if she thus redeemed, she might claim as a creditor for the redemption money in excess of her proper proportion. There are also rulings that, if an heir or the administrator in the ordinary course of administration should redeem the land, she might claim dower, paying her proper proportion of the redemption money. In Georgia a mortgage conveys no title, but only creates a lien. Civ. Code 1895, § 2723. The wife has no inchoate right or claim of dower in respect of the lands of which her husband was seised at any time during coverture, but only as to that which he was seised and possessed of at his death. His deed carries perfect title, without any



joinder or waiver from her, except as to lands which he acquired through her prior to the married woman's act. Doubtless to prevent the great complications which arose from the old law, and in the interest of ready transmission of titles, and that they might bring full market value, unhampered by the danger of possible claims for dower at some uncertain future time, the Legislature as early as 1826 declared that the husband might convey a free and unincumbered title to his lands without the wife joining him. Cobb's Dig. 171, § 29. Nevertheless, though the wife had no inchoate interest in the property conveyed by her husband, the privilege on her part to redeem land which had been conveyed by him to secure a debt, and then to claim dower in it, was recognized and seems to have become imbedded in our law, as will be seen by consulting the authorities above cited.

In the present case there was no redemption by the widow, none by the heir, and none by the administrator in the ordinary course of administration, if either of the latter would give a right of dower. The widow did not offer to pay any part of the redemption money, but merely desired to reduce the general estate, which was insolvent, to increase her dower. At the instance of creditors, the insolvent estate was taken in custody by a court of equitable jurisdiction. The holders of the security deeds were parties, and sought to have their rights as such enforced. A sale was made by the receiver under order of the court, and the security debts were paid off, except as to attorney's fees, which will be dealt with hereinafter. Had the sale been made by regular suit, filing a deed, and levying the execution in a court of law, the payment by the sheriff of the amount due on the security debts would not have entitled the widow to dower in the surplus representing the equity of redemption. That there was a judicial sale under decree of a court of equity did not alter the case. Nor did the fact that the other creditors may have made no objection to the payment of the secured debts accomplish such a result. There is some language in the original petition which might indicate that the widow could set up a right of dower except as against the secured creditors. But other creditors evidently did not concur in this view. Exceptions were filed to the auditor's report, and the question is presented for the determination of this court as one of law.

From what has been said above, it will be seen that the common-law rule touching dower in an equity of redemption was adopted in this state, whatever may be the rulings on that subject in other states, that the Legislature has modified that rule only in certain cases, and that this is not one of them. It is our duty to adjudicate what is the law, not to amend it. If the Legislature is of the opinion that dower should be allowed in

cases like the present one, it is within their power to amend the law accordingly. Whether the law as it stands may work some hardship or not is not the question for the courts. They cannot change the law to suit what may appear to be a hardship in any particular case. It may be mentioned, however, in passing, that a year's support of \$3,000 was allowed from the estate, and that the widow and children were not left entirely without provision.

One further question remains for decision. The note held by the John Hancock Life Insurance Company, secured by deed, was dated August 23, 1902, and due August 23, 1907, with interest payable annually on November 1st, and with a provision for the payment of 10 per cent. attorney's fees. The note further provided that, if the interest was not paid when due, the payee or owner might declare the whole debt due. One installment of interest was not paid. Thereafter, on May 18, 1904, the attorneys for the company gave notice to the administrator of their intention to bring suit on the note to the June term, 1904, of Bartow superior court. Subsequently, on the return day, the company and other creditors joined in the equitable petition under which the receiver was appointed and the other proceedings had. John W. Akin, Esq., also held a note which provided for the payment of attorney's fees, and as to which notice was likewise given, and suit brought by joining in the equitable petition and praying that judgment should be rendered. The auditor held that no attorney's fees could be recovered. He said that "there was no evidence before me of the election of the John Hancock Insurance Company to declare the debt due," and also that "it does not appear to me to be equitable, or that it was the purpose of the lawmakers, to have the act of 1900 bear such a construction as to impose upon an insolvent estate a large sum for attorney's fees, as contended in this case." The giving of notice of an intention to sue for the entire indebtedness because of the failure to pay the interest, followed by the actual suit, in which it was alleged that the plaintiff had exercised its option to have the entire debt fall due and had given notice to the administrator, was evidence of an election to declare the debt due. The law does not prohibit the rendering of a judgment for attorney's fees because the debtor's estate is insolvent. Such a condition may make it more difficult, and sometimes impossible, for a creditor to realize upon his judgment; but he is not debarred from the privilege of obtaining it.

It was urged before us that, under the act of 1900 (Acts 1900, p. 53), the debtor had the entire return day in which to pay the debt and thus avoid a judgment for attorney's fees; that this included until the very end of the return day; that the equitable suit was filed and the receiver appointed before

the expiration of that day; that, therefore, these creditors took part in a proceeding to remove the assets from the custody of the administrator as such, and place them in the hands of a receiver, and thus destroyed any right which they might have had to recover judgments for attorney's fees. Prior to the act of 1900 the law provided that "obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless a plea or pleas be filed by the defendant and not sustained." Civ. Code 1895, § 3667. By the act of December 12, 1900 (Acts 1900, p. 53), the requirement that a plea or pleas should be filed and not sustained was stricken, and the section quoted was amended so as to read as follows: "Obligations to pay attorney's fees upon a note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same; provided, the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought of his intention to bring suit, and also the term of the court to which suit will be brought." The intention of the old law was to prevent the collection of attorney's fees provided for in a note, unless the debtor should file a defense and fail to sustain it. The amending act adopted a different scheme, which was to require notice of an intention to sue to be given at least 10 days before suit should be brought, to allow the debtor until return day to pay the debt, and thus to save the creditor the necessity and expense of bringing suit at all. If he should voluntarily bring suit before return day, it would be at his own risk of being paid subsequently. To put the construction upon the act of 1900 which is insisted upon by counsel opposing the allowance of fees would make the act in substance conflict with itself. Thus it is required that the notice shall specify the term of the court to which suit will be brought. In order to bring suit to that term according to the notice, it must be brought on the return day at the latest. If it is not then brought, it cannot be brought to that term, and a new notice would have to be given of a suit to another term. If the debtor is allowed until the last instant of the return day to make payment in order to avoid the necessity for the bringing of a suit, the incurring of attorney's fees, and the right to recover them, then the creditor could not know whether to bring his suit until after the return day had expired, and it was too late to sue. If the view above expressed of the purpose of the amendment is correct, it ought to be construed as a whole in harmony there-

with. The right of the debtor to pay on or before return day, and the necessity for the creditor to sue on that day should both be considered in construing the act. In this light we think that the proper construction is that the debtor shall have until return day, and as much of that day as may elapse until the suit is actually filed.

But it is said that the filing of this petition operated to render it impossible for the administrator to pay the debt. The petition alleged that the estate was insolvent; that the administrator could not pay the debts; that there was an unpaid judgment for a year's support, which could not be paid without the interposition of equity to bring the estate into a condition to be wound up; and that the administrator had no funds on hand with which to pay, and had failed to pay the indebtedness on which attorney's fees were claimed after due notice. The auditor found that there was a judgment of \$3,000 for the 12 months' support of the family, which was a lien of the highest dignity against the assets of the estate, except that conveyed to creditors to secure debts; that all of the property of the estate not conveyed to secure debts was not worth half enough to pay the 12 months' support and other claims of first dignity having priority over ordinary debts; that the administrator could not, without the consent of the security deed holders, sell the incumbered lands of the estate; that the estate had no money, and he could not borrow it, to pay the note of Judge Akin, or the interest on the insurance company's note. This finding negatives the contention that the plaintiffs prevented the administrator from making payment. The death of the debtor did not affect the law as to attorney's fees. They could be recovered against his legal representative as they could against him. It made no difference that the plaintiffs did not bring separate suits, but joined in a common equitable proceeding in which they prayed judgments for the amounts due them.

The judgment on the cross-bill (Nolan et al. v. Harris et al.) is reversed, and the judgment complained of in the main bill of exceptions, being controlled by this ruling, is affirmed. In the case of Powers et al. v. Harris et al. the judgment is reversed. All the Justices concur.

(129 Ga. 267)

#### SOUTHERN RY. CO. v. THOMPSON.

(Supreme Court of Georgia. Oct. 8, 1907.)

#### 1. RAILROADS — FIRES — ACTIONS — INSTRUCTIONS.

The charge did not accurately state the contention of the defendant as set out in the answer.

#### 2. SAME.

A railroad company is liable for damages to property proximately caused by a fire negligently set out by the running of one of its engines.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1657.]

**3. SAME—NEGLIGENCE—PRESUMPTION.**

If, without more, it should be shown by evidence that a fire was set out by the operation of an engine of a railroad company, a presumption would arise that the company or its agents were guilty of the acts of negligence alleged in the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1710-1712.]

**4. SAME—REBUTTAL.**

If such a presumption arises, it may be rebutted by evidence. This may be done by evidence introduced by the plaintiff, as well as that introduced by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1710-1712.]

**5. SAME.**

If the presumption of negligence arises against the defendant, it must show that it and its agents used all ordinary and reasonable care and diligence in regard to the matters charged against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1709-1712.]

**6. SAME—SAFE APPLIANCES—OPERATION.**

Such ordinary care and diligence must be used as well in the equipping of its engine with proper appliances for preventing fires, and keeping them in proper condition, as in the operation of the engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1668-1671.]

**7. SAME—DEGREE OF CARE REQUIRED.**

The measure of diligence which the law places upon a railroad company, in respect to the providing and keeping in repair of spark arresters or other appliances for the prevention of fire, is to use ordinary care and diligence to apply to its engines the best appliances in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1657-1671.]

**8. SAME—RIGHT OF WAY—NEGLIGENT CONDITION.**

If the company is wanting in ordinary care in allowing grass, weeds, rotten wood, and other combustible material to accumulate on its right of way, and as a result thereof damage by fire occurs, this would also furnish a ground for holding the company liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1673-1676.]

**9. TRESPASS—DAMAGE TO FREEHOLD—POSSESSION.**

Actual possession will support an action of trespass against a wrongdoer. If nothing appears to the contrary, such actual possession is sufficient prima facie evidence of title to authorize a recovery of damages to the freehold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, §§ 32-47.]

(Syllabus by the Court.)

Error from Superior Court, Wayne County; T. A. Parker, Judge.

Action by Ely Thompson against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Thompson brought suit against the Southern Railway Company to recover damages caused by a fire which was alleged to have burned certain cross-ties, a number of panels of a fence, a dwelling house, a cornercrib, and standing timber. The negligence alleged was that the defendant, by itself, agents,

servants, or employes, in the careless and negligent handling of the cars, engines, or other machinery upon the railroad, or in the negligent and careless use of defective engines, cars, and other machinery operated thereon, permitted and allowed fire to ignite the weeds, grass, rotten wood, trash, and other combustible material that had been carelessly allowed to accumulate upon the right of way of the railroad, by the throwing out or emission of fire, sparks, live coals, or cinders from the engines, cars, or other machinery, which said fire so kindled was communicated to and upon the land of the petitioner, and thus injured, damaged, and destroyed his property, etc. Negligence was also alleged in allowing the right of way to grow up in grass and weeds, and to have on it trash and other combustible matter. The defendant denied all the allegations of negligence. The jury found for the plaintiff \$250. A motion was made for a new trial, which was overruled, and the defendant excepted.

Bennet & Conyers and Littlefield & Poppell, for plaintiff in error. Jas. R. Thomas and C. C. Tindall, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. One ground of the motion for a new trial complained that the court incorrectly stated the contentions set out in the defendant's answer, and placed upon it a heavier burden than it assumed, or than the law put upon it. The presiding judge charged that the defendant had filed a plea; that it denied liability, or "that it was in any manner negligent"; that, if the fire was set out by the engine, "it could not be avoided"; and that the company had used all ordinary and reasonable care and diligence in operating, equipping, and providing the engine with the most modern and best known appliances for the purpose of preventing the emission of sparks and fire, and was therefore not liable. The plaintiff alleged certain acts of negligence. The defendant denied them. This charge elaborated the issue thus made in the pleadings, and, in doing so, attributed to the defendant certain positions which were stronger than its denial of the plaintiff's allegations. The plaintiff did not deny that "it was in any manner negligent." It denied that it was guilty of the acts of negligence charged by the plaintiff. Nor did it state in its answer that, if its engine set fire to the property, "it could not be avoided"; nor did it make the affirmative allegation in regard to its appliances mentioned above. It is probable that the presiding judge in charging on these subjects had in mind some of the developments of the evidence, and the contentions which he thought arose out of it. But, as delivered, the charge apparently had reference to the pleadings. Even with reference to the evidence, as will be seen from what has been said above, it placed the defendant in the attitude of making a more rigid conten-

tion than was necessary to defeat the plaintiff's action.

2-4. The court also charged that, if the engine set out the fire which burned the property of the plaintiff, "then the law would presume that it was negligently done, unless the company introduces evidence which shows that they did, through their agents, servants, and employes, exercise all ordinary and reasonable care and diligence, and that they had their engine properly equipped with the most modern and best known appliances for the prevention of the setting out of fire," etc. The law declares that a railroad company shall be liable for any damage done to persons or property by the running of its locomotives, cars, or other machinery, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company. Civ. Code 1895, § 2321. This statute has been held to apply to cases of fire set out by the running of an engine. When it has been shown that the operation of the engine set out the fire, a presumption arises against the company that it or its agents were guilty of the acts of negligence charged in the petition and connected with the injury; and the burden is shifted to it to show the exercise of all ordinary and reasonable care and diligence in respect thereto. *Talmadge v. Central of Ga. Ry. Co.*, 125 Ga. 400, 54 S. E. 128. The plaintiff cannot recover except upon the acts of negligence set out in the petition. *Georgia Brewing Association v. Henderson*, 117 Ga. 480, 43 S. E. 698; *Hudgins v. Coca Cola Bottling Co.*, 122 Ga. 695, 50 S. E. 974; *Western & Atlantic Railroad Co. v. Branan*, 123 Ga. 692, 51 S. E. 650; *Augusta Ry. & Elec. Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444. And it has been held that the presumption which arises against a railroad company, upon proof of damage to property by the operation of its engine, is that it was guilty of the acts of negligence alleged in the petition. *Cen. of Ga. Ry. Co. v. Weathers*, 120 Ga. 475, 479, 47 S. E. 956; *Ga. Ry. & Elec. Co. v. Reeves*, 123 Ga. 698 (8), 51 S. E. 610. In the absence of a request for more specific instructions on this subject, the charge in general terms as to a presumption of negligence arising from proof of damage by fire from the engine, taken in connection with the entire charge, would not require a new trial. *Cen. of Ga. Ry. Co. v. Bagley*, 121 Ga. 781, 49 S. E. 780. If the presumption arises, it must be rebutted by evidence; but this may be done by evidence drawn from the plaintiff or his witnesses, as well as by that introduced by the defendant. In *East Tenn. Ry. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828, it was held that, upon proof that the plaintiff's property was burned by a fire resulting from the emission of sparks by one of the defendant's locomotives whilst running on the road, a presumption of negligence arose, and the burden was on the

company to show the exercise of all ordinary and reasonable care and diligence, and that "such care and diligence would include keeping the locomotive in proper condition to be run with ordinary safety, as well as properly managing and operating it whilst the running was in progress at the time and place in question." In *Gainesville R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213, Mr. Justice Little in the opinion said that, after proof of damage from sparks from a running locomotive and the raising of the presumption of negligence, the burden was on the company to show that the emission of such sparks, or the escape of the fire from the engine, "was not due to the want of ordinary diligence on the part of itself or its servants, either as to the condition of the locomotive or in its management or operation." See, also, *Sou. Ry. Co. v. Williams*, 113 Ga. 335, 38 S. E. 744. In the case at bar there was involved an additional allegation in regard to whether the defendant had been negligent in allowing grass, weeds, rotten wood, and other combustible material to accumulate on its right of way. The rule is often stated to be that it is the duty of a railroad company, in equipping its trains, to use such appliances as are up to the standard of those in general use and reasonably adapted to the purposes for which they were intended. *Alabama Midland Ry. Co. v. Gullford*, 119 Ga. 526 (concurring in by five justices), 46 S. E. 655; *Higgins v. Cherokee Railroad*, 73 Ga. 149 (9b); 2 *Thomp. Neg.* § 2253, and citations. In the last-cited authority it is said: "It may be collected from many recent holdings that the measure of diligence which the law puts upon a railroad company in this respect is to apply to its engines the best improvements in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in good order. While it has been inadvertently said that they are bound to adopt the latest improvements in general use, yet the better view is that they are not to be charged with negligence in not adopting such an appliance until it has become well known, and until its efficiency has been demonstrated by actual use. The doctrine on which many of the decisions unite cannot better be formulated than by saying that railroad companies, while not bound to use every possible precaution to prevent the escape of fire from their locomotives that the highest scientific skill may have suggested, are required, in the exercise of reasonable care, to avail themselves of the most approved practicable appliances for the purpose."

In the supplement to *Thompson on Negligence*, edited by Mr. Edward F. White, referring to the above quoted section, it is said: "The recent decisions support the rule that a railroad company in the operation of its locomotives is only required to use ordinary care to provide the same with appli-

ances to prevent the escape of fire. It is not an insurer of the completeness or perfection of the devices adopted. It is not demanded that the company should equip its engines with the 'best approved' spark arrester, but merely with such approved appliances as are in general use." In Texas there is a statute requiring issues of fact to be submitted to the jury, and prohibiting the judge from charging or commenting on the weight of the evidence. The Supreme Court of the state held that it was error to charge that it was the company's duty to equip its engines with the best approved spark arresting devices in use. *Missouri Ry. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159. In *Missouri Ry. Co. v. Hopkins* (Tex. Civ. App.) 80 S. W. 414, it was held that "an instruction authorizing recovery if the locomotive setting out a fire was not equipped with the most approved spark arrester in use is erroneous; the duty of the railroad company being only to exercise ordinary care in the selection of spark arresters." See, also, *Missouri Ry. Co. v. Jordan* (Tex. Civ. App.) 82 S. W. 791; *Anderson v. Oregon R. Co.*, 45 Or. 211, 77 Pac. 119; *Frankfort, etc., Turnpike v. Philadelphia, etc., R. Co.*, 54 Pa. 345, 93 Am. Dec. 708; *Hoye v. Chicago, etc., Ry. Co.*, 46 Minn. 269, 48 N. W. 1117, 1118. In *Lesser Cotton Co. v. St. Louis Ry. Co.*, 114 Fed. 133, 52 C. C. A. 95, it was said that "It is the duty of a railway company to exercise reasonable care to provide itself with the most effective mechanical contrivances in known practical use to prevent the escape of sparks and coals from its engines; but the law does not impose upon it the duty to absolutely provide such contrivances, or make it the insurer of their completeness or perfection." In many of the decisions which state generally that the company must furnish appliances of a certain kind, the question discussed was whether certain evidence authorized a recovery. The form of the charge was not considered. In some states the presiding judge is not prevented from expressing an opinion on the facts, or stating what, in his opinion, would constitute negligence, even when there is no violation of a statute or ordinance. Here he is prevented from so doing by a statute which is so stringent that it has come to be known among the members of the legal profession as the "dumb act." Civ. Code 1895, § 4334; *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29, and cases there cited. Under our statute, if the evidence has raised a presumption of negligence, it may be rebutted by showing the use of all ordinary and reasonable care and diligence. This rule, requiring the use of ordinary care and diligence, applies to the equipping of the engine with proper appliances to prevent fire, as well as to keeping them in proper repair and to the operation of the engine, and also as to the condition of the right of way. A railroad company is bound to use all ordi-

nary and reasonable care and diligence "to apply to its engines the best improvements in general use, the use of which is consistent with the practicable operation of its engines, and to use reasonable care and skill in keeping the same in order." The charge complained of in effect required the defendant to rebut the presumption against it by proving both the use of all ordinary and reasonable care and diligence, and also that it equipped its engines "with the most modern and best known appliances." This was too stringent.

9. The court charged substantially that actual possession of one claiming as owner would furnish a basis for recovery in favor of the possessor against a wrongdoer, and that, if the company was Mable, "the plaintiff would be entitled to recover such damages as he sustained by reason of the burning of those houses and the burning of that 315 panels of fence, and the cross-ties that he cut and had there upon this land." Actual possession, under claim of ownership, is prima facie evidence of title, and is sufficient, in the absence of anything appearing to the contrary, to authorize a recovery against a wrongdoer for damages to the property. If there is nothing to show that the title or interest of the possessor is less than a freehold, he may recover for damages to the freehold. The contention is that the possessor might be a mere tenant or lessee or owner of an estate less than the fee, and that he should not be allowed to recover except for the injury to his possession. But, in the absence of anything to the contrary, his possession is apparently that of the owner in fee, and would sustain a recovery as such. *Southern Ry. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285. The language of the charge as to "those houses, the burning of that 315 panels of fence and the cross-ties he cut and had there on his land," is near to, if not actually, an intimation on the facts. As to the measure of damages in that part of the case relating to the loss of standing timber, see *Southern Ry. Co. v. Herrington*, 128 Ga. 438, 57 S. E. 694.

5. The other grounds of the motion do not require a new trial.

Judgment reversed. All the Justices concur.

(129 Ga. 353)

LYNDON v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. On Rehearing, Oct. 3, 1907.)

# 1. WRIT OF ERROR—ASSIGNMENTS OF ERROR.

Where the case brought to this court or the Court of Appeals is not one in which a judgment on a motion for a new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968-2972.]

**2. SAME—EXCEPTION TO JUDGMENT.**

If exception is taken to a final judgment as being erroneous in itself, the assignment of error should specifically set forth the error or errors in it which are complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968, 3025-3027.]

**3. SAME—GENERAL EXCEPTIONS.**

If the ruling or decision complained of as erroneous is one preceding the final judgment, and, if it is specifically made the subject of exception and of proper assignment of error, and the final judgment is excepted to, not because of additional error in it, but because of the antecedent ruling complained of, which entered into and affected the further progress or final result of the case, a general exception to the final judgment and an exception to and a specific assignment of error on the antecedent ruling will suffice, relatively to the point now under consideration, to give the reviewing court jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1626.]

**4. SAME—AMENDMENT OF PETITION—MATERIAL RULING.**

A petition was filed for the recovery of damages on account of personal injuries received by a passenger on a street car by being thrown down by a jerk of the car. The plaintiff offered an amendment, alleging that the conductor refused him equal accommodation with other passengers by failing to furnish him a seat while other passengers were so furnished, and that by reason of being required to stand, he was not able to resist the jerk of the car as he would have done had he been seated, and also that these circumstances and other things alleged created circumstances of aggravation. The trial court refused to allow the amendment. *Held*, that this ruling cut off a part of the case which the plaintiff claimed the right to set out in his petition as a basis for recovery, and prevented him from relying on a ground of recovery which he sought to set up. It was such a ruling as necessarily controlled the final judgment in the sense that it prevented the plaintiff from placing before the jury at all a substantial allegation of duty violated, constituting negligence, on the basis of which a recovery was claimed. A fortiori it was a material and substantial ruling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 706.]

(Syllabus by the Court.)

Action by Oscar Lyndon against the Georgia Railway & Electric Company. A judgment was rendered in favor of defendant, and plaintiff brought error to the Court of Appeals, which certified questions to the Supreme Court.

This case was transmitted to the Supreme Court with the following certificate:

"The Court of Appeals desires the instruction of the Supreme Court as to the following questions of law for the proper decision of the above-stated case, to wit:

"(1) Has this court jurisdiction of a case where the bill of exceptions, brought by the plaintiff in the court below, contains only the following assignments of error: (1) An assignment that the court erred in refusing to allow an amendment to the petition. (2) An assignment upon the final judgment as follows: 'After said rulings the case went to trial regularly on its merits, with submission of evidence and charge of the court, and a verdict was rendered for the defendant, and

judgment entered thereon. Having refused to allow the petition to be amended as above recited, and such rulings being controlling, as plaintiff in error contends, in the result of the case, the court erred in permitting said verdict to be rendered and said judgment to be entered. To the action of the court in permitting said verdict to be rendered and said judgment to be entered the plaintiff in error excepted, and now excepts and assigns the same as error, upon the ground that the same was contrary to law, and that the court having refused to let the petition be amended, and such refusal, as plaintiff in error contends, being controlling in effect, the said verdict and judgment could not be a legal termination of the case.'

"(2) Is the assignment of error last mentioned above a sufficient assignment of error upon a final judgment, as contemplated by the decision of the Supreme Court in *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621, and cases therein cited?

"(3) Where a petition is filed for the recovery of damages on account of personal injuries received by a passenger on a street car by being thrown by a jerk of the car, and the plaintiff offered amendments alleging that the conductor refused him equal accommodations with other passengers by failing to furnish him a seat while other passengers were so furnished, and that, by reason of being required to stand, he was not able to resist the jerk of the car as he would have done had he been seated, and also that these circumstances and other things therein alleged created circumstances of aggravation, and the trial court refused the amendments, is an exception to the refusal of the court to allow the amendments a necessarily controlling ruling within the purview of the act approved December 20, 1898, relating to practice in the Supreme Court (Acts 1898, p. 92)? The petition, proposed amendments, and the other portions of the record necessary to the determination of this question are set forth fully in the bill of exceptions and record herewith transmitted; and request is made that the Supreme Court have reference to the same in connection with this question. Counsel for plaintiff in error requests the court to consider and review the case of *Hendricks v. Reid*, 125 Ga. 775, 54 S. E. 747, and the cases which it follows, and the case of *Henderson v. State*, 123 Ga. 739, 51 S. E. 764, and any case it may follow, and, pursuant to the rule of this court, the request is transmitted herewith for the action of the Supreme Court."

Henry A. Alexander, for plaintiff in error.  
Rosser & Brandon, W. T. Colquitt, and Ben J. Conyers, for defendant in error.

**LUMPKIN, J.** It is of great importance that rules of practice should be settled, so that attorneys may know how to comply with them in bringing their cases to this court or the Court of Appeals. In the past there has

been some difference of views in regard to the sufficiency of certain exceptions and assignments of error; and, where the decision has not been unanimous, it has sometimes resulted in a lack of harmony in rulings. We deem it desirable to arrive at a unanimous decision on the question of practice before us. In a matter not involving substantive law touching the rights of parties, but a matter of practice, it is sometimes better to mutually somewhat modify individual views, where it can be conscientiously done, than to adhere to the letter of former utterances. The holder of each view may contribute something to make a consistent and harmonious rule of practice. The main point involved in the questions certified by the Court of Appeals may be resolved into three questions: (1) Is it necessary to except to a final judgment in order to reverse such judgment, or can it be done by merely excepting to a ruling during the trial? (2) What kind of exception or assignment is required, where the error is in the final judgment itself—in its form or substance? (3) Is the same particularity of exception and assignment as to the final judgment requisite where the error does not arise in the judgment itself, but where the judgment is infected with error by reason of some antecedent error committed during the pendency of the case, or during the trial, which is material, or is controlling, and which enters into the final result?

In *Harrell v. Tift*, 70 Ga. 730, it was said that "there must be a valid exception to some final ruling of the court below, on which to predicate other assignments of error." In that case the bill of exceptions excepted to and assigned error on the rejection of certain evidence. It then recited the returning of a verdict, and that the bill of exceptions was tendered within 30 days from the end of the term. Apparently there was no exception at all to the final judgment; and the question of what would have been a sufficient exception and assignment of error was not discussed. In *Rodgers v. Black*, 99 Ga. 142, 25 S. E. 20, it was ruled that "a bill of exceptions which does not complain of any ruling or decision of the trial judge, and contains no assignment of error except the following: 'And the defendant assigns said verdict and judgment as error, the same being contrary to law'—is palpably without merit. As has been repeatedly ruled, a verdict cannot be thus reviewed in the Supreme Court." Here, also, there was not a question as to what exception to or assignment of error upon the final judgment would have sufficed to furnish a basis for exceptions to and assignments of error upon rulings during the trial. It may be mentioned, in passing, that the judgment entered was one of affirmance, rather than dismissal. In *Kibben v. Coastwise Dredging Co.*, 120 Ga. 899, 48 S. E. 330, it was sought to bring to this court a ruling striking an amendment to a petition alone,

without any exception being taken to the final judgment. It was held that this could not be done; but what kind of exception to the final judgment was necessary, or what sort of specification of error, was not dealt with. Then came *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621, where it was held that a general statement in a bill of exceptions that "plaintiff excepts to said verdict and judgment as being contrary to law" was not valid; that a direct bill of exceptions to a ruling *pendente lite*, which did not assign error upon any final judgment, would not be entertained, and therefore that where all the assignments of error were to the rulings *pendente lite*, except that as to the final judgment, which was as above indicated, the case could not be heard. This went further than the preceding decisions. Only headnotes were filed. They were made by putting two rulings already noticed together, and from them drawing a conclusion. We are not wholly satisfied with a part of it, and we shall modify it and the cases following it. The point of dissatisfaction is this: In order to get rid of a judgment, the plaintiff in error should ask in a legal way to get rid of it; that is, should except to it. If error inherent in the judgment itself is complained of, not only should it be excepted to, but the assignment should specify the error. To illustrate: If the error claimed should be that it did not follow the verdict, or was rendered in vacation without authority of law, or if the case were submitted to the court without a jury, and he decided it on the law and the facts, an assignment of error should not merely generally allege that the judgment was wrong, but show wherein it was wrong. It may be wrong on the law for some reason. It may be wrong on the facts. If the judgment is erroneous, not in itself, but because of antecedent error which entered into or infected it, then there can be no separate and distinct assignment of error on the judgment for other reason than because it was so infected or controlled thereby. If the final judgment is excepted to, and exception is made to an error duly assigned upon the ruling complained of, specifications of error in the ruling need not be repeated in the exceptions to the final judgment, if they alone are relied on as making the judgment erroneous. *Hendricks v. Reid*, 125 Ga. 775, 54 S. E. 747, merely followed the ruling in *Newberry v. Tenant*, as to the sufficiency of the assignment, without approving it, but holding it binding until reviewed and reversed or modified. The same is true of *Montgomery v. Reynolds*, 124 Ga. 1053, 53 S. E. 512. In the *Hendricks Case* there was no exception at all save to interlocutory rulings.

The case of *Henderson v. State*, 123 Ga. 739, 51 S. E. 764, not only produced a diversity of opinions among the members of this bench, but it is feared has been somewhat misapprehended by some of the members of the bar. The writer of the majority opinion, in dealing

with and having in view the specific subject before him—an effort to segregate a ruling and bring it up apparently under the act of 1898 (Acts 1898, p. 92)—and in referring to the “short form” of bill of exceptions under that act, as contrasted with bringing up the case “in the usual form,” did not describe or state in detail what was meant by “the usual form.” On page 749 of 123 Ga., on page 768 of 51 S. E., it was said that: “There are two ways by which a case may be brought to this court. One is by the usual and ordinary methods of procedure. The other, for convenience, may be called the ‘short form.’” The expression “short form” referred to excepting to the judgment, decree, or verdict, segregating a certain ruling, assigning error on it, and bringing it up as a necessarily controlling ruling in the brief mode set out in the act of 1898. What was the “usual form” referred to in the second headnote, or the “usual and ordinary methods of procedure” referred to in the excerpt from the opinion above quoted, as contrasted with the short form mentioned? Obviously it referred to some form or methods for bringing cases to this court which were usual before or aside from the act of 1898. What were they? The forms and methods under the act of 1889 (Civ. Code 1895, § 5528 et seq.), which are published in the Code in a chapter headed, “Of Taking Cases to the Supreme Court,” and in an article entitled, “Mode of Procedure.” The majority of this court did not hold that these sections were repealed or any right of exception under them was cut off by the act of 1898; but that the act sought to provide a brief method for excepting to a verdict or judgment and assigning error on rulings which were necessarily controlling. Thus ordinarily, to determine whether rulings on evidence, or as to matters of practice in the trial of the case, or charges and the like, are erroneous, or, if so, are of such materiality as to cause a reversal, it is necessary to have a brief of evidence in the bill of exceptions or the record under the general law. The question of what exceptions to rulings require the presence of evidence is not here involved. This question arises on a ruling as to pleading. By the act of 1898, the majority of the court thought that the Legislature intended to provide a briefer mode of procedure in certain cases, but that, in order to proceed under that act, the case must be brought within its terms; and that, while the act of 1889 provided for omitting the evidence where it is unnecessary, and certifying to that fact, the two acts were not identical in all respects, and the Legislature had not merely re-enacted the sections of the Code. In the opinion in the Henderson Case, it was also stated, though not elaborated, that there was no brief of the evidence, and no exception at all to the final judgment—nothing, in fact, but an effort to except to two rulings pending the trial. Apparently it was sought to except under the act of 1898, but the majority of this

court thought the bill of exceptions was not sufficient. Our learned Brother Cobb differed from the majority. He thought that the act of 1898 added nothing to and detracted nothing from the law as it already stood, but merely redeclared the existing law. His views will be found in his dissenting opinion stated fully and more cogently than the writer can state them.

This extended reference to the Henderson Case is made not with the intention of again discussing the two views there presented, but in order to show that there may have been some misunderstanding of what was said in that case, and that in fact, the two views are not so wide apart or so irreconcilable as may have been supposed, or as to preclude a conscientious reconciliation and meeting on a common ground, at least as to the questions now presented by the Court of Appeals. Briefly, then, we may say that we all concur in holding that the act of 1889, codified as stated above, has not been repealed or restricted by the act of 1898, and that what could have been done before the act of 1898 can still be done. Whether or not there are cases as to which the act of 1898 authorizes a short or brief form of bill of exceptions, which might not suffice under the prior law, is immaterial to the question now in hand.

Section 5526 of the Civil Code of 1895, reads as follows: “No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending, in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto; but, at any stage of the cause, either party may file his exceptions to any decision, sentence, or decree of the superior court; and if the same is certified and allowed, it shall be entered of record in the cause; and should the case at its final determination be carried by a writ of error to the Supreme Court by either party, error may be assigned upon such bill of exceptions, and a reversal and new trial may be allowed thereon, when it is manifest that such erroneous decision of the court has or may have affected the final result of the case.” As to the rulings prior to the original Code, see *Carter v. Buchanan*, 2 Ga. 337; *Jones v. Dougherty*, 11 Ga. 305; *Johns v. Fuller*, 13 Ga. 506; *Allen v. Ball*, 9 Ga. 286 (3), 293 (cited by Mr. Justice Cobb, in *Kelly v. Strouse*, 116 Ga. 884, 885, 43 S. E. 280). It is unnecessary to discuss decisions as to what judgments fall within the meaning of this law. Nor are we dealing with what assignment is sufficiently specific as to judgments on applications for injunctions, and the like. In Civ. Code 1895, § 5528, it is said that “the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed.” In the case before us a verdict was found and final judgment



was rendered. Exception was taken to and error assigned on the ruling rejecting the amendment. Exception was also made and error assigned on allowing the verdict to be taken and judgment entered, because the erroneous ruling entered into and affected the final judgment, or, as the bill of exceptions alleged, controlled it. Was this sufficient? What more could the plaintiff in error have said? If taken alone and disconnected from the ruling which the plaintiff thought erroneous, he did not contend that the judgment was error, or that he could assign some other error in it. He could do nothing truthfully but what he did, and we think the law required no more. In such a case we think it would suffice to keep the plaintiff in error in court to show how the case terminated, to except generally to the final judgment, and duly assign error in the ruling really complained of.

As a result of what has been said, we answer the questions certified to us by the Court of Appeals as follows:

(1) The assignment of error upon the refusal to allow the amendment to the petition, and that upon the final judgment was sufficient to give the Court of Appeals jurisdiction.

(2) The assignment of error on the final judgment in this case is sufficient in specification, even under the decision in *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621, and cases therein cited; but we think that the decision in that case laid down too stringent a measure as to the requirement of specification of an assignment of error on the final judgment, where the only real error complained of is in some antecedent ruling or decision, and the final judgment is not complained of for some independent error inhering in itself, but because the ruling claimed to be erroneous controlled or affected the final result. Of course, a general exception and assignment of error would not alone suffice, nor would it raise any question as to errors other than those pointed out.

(3) The refusal to allow the amendment to the petition involved in this case, if erroneous, was such a controlling error as could be brought up under the act of 1898, and a fortiori a substantial ruling, which, if erroneous, would be a material error, reviewable under the provisions of the Code, upon a proper bill of exceptions brought up in accordance therewith. We do not hold broadly that all rulings on amendments to pleadings are necessarily controlling rulings, or even substantial, but that the ruling here complained of is so. It cut off a material part of the case the plaintiff sought to set up in his pleading and to base a recovery upon, and thus limited the range and scope of his case. *Wright v. Hollywood Cemetery Corporation*, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621.

If anything which may have been said in any of the cases referred to, or those cited in

them, or following them, conflicts with what is here ruled, it is modified accordingly. But we think, as stated above, such conflict is often more apparent than real, when the cases are carefully considered, and results from expressions here and there which were not really necessary to the points decided.

#### On Rehearing.

Just before the close of the March term, 1907, of this court, which by operation of law must end, at the latest, on the Saturday before the beginning of the October term, counsel for defendant in error in the Court of Appeals applied for a reopening of the decision made by us, and a further hearing, on the ground that, if the Court of Appeals should decide that there was error at all in the rejection of the amendment offered, yet, comparing it with the original petition of the plaintiff and the amendment allowed, after the parts stricken on demurrer were eliminated, no injury could have resulted to the plaintiff, because there was enough in his pleading to raise all the questions which he could legitimately make with the aid of the amendment. We must decline the motion. No such question as this was made by the questions certified to us by the Court of Appeals, as we construe them. The merits of the case were not before us. We only passed upon the questions presented. We cannot reopen the case for argument on a point thus suggested.

It was further asked that counsel have leave to have additional record sent to this court to indicate that the evidence submitted on the trial, and the charge of the court would throw any light on the question of whether any injury was done to the plaintiff. There are several reasons why we cannot grant this request, among them being what has just been said, and that the case was carried from the trial court to the Court of Appeals, not to this court, and comes here on questions certified and the record sent from that court; and also that, on inquiry, counsel frankly admitted that neither the evidence nor the charge had ever been written out or filed and become a part of the record, and therefore the suggestion was not to have an existing record sent up, but to add to the record now on file in the trial court, and have the addition transmitted.

(129 Ga. 403)

#### GILLIS v. POWELL.

(Supreme Court of Georgia. Oct. 8, 1907.)

#### 1. WRIT OF ERROR—RECORD—NEW TRIAL—REVIEW.

A ground of a motion for a new trial, which contains an assignment of error upon the refusal of the judge to continue the case, will not be considered when the evidence introduced on the motion to continue is not set forth in the motion for new trial, nor attached thereto as an exhibit, but reference must be had to the

brief of the evidence in order to ascertain the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2944-2946.]

## 2. NEW TRIAL—GROUNDS—AMENDMENT TO PETITION.

Exception to the allowance of an amendment to the petition cannot properly be made in motion for a new trial.

## 3. SAME—DEMURRER—MOTION TO DISMISS—EXCEPTION.

Exception to a judgment overruling a demurrer to the petition or motion to dismiss a case, for the reason that the petition is insufficient in law, cannot be properly made the ground of a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 25.]

## 4. SLANDER—MALICE—EVIDENCE—AGE.

Where the matter under investigation is whether the words or conduct of a person is malicious, the age of the person may not, in some circumstances, be an immaterial fact.

## 5. SAME—PRIVILEGE.

Words uttered in good faith, for the sole purpose of securing or preserving evidence to be used in the prosecution of one for a crime of which the speaker was the victim, are privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 149.]

## 6. SAME—TRIAL—INSTRUCTIONS—APPLICABILITY TO PLEADING.

The answer of the defendant, when properly construed, did not contain any admission that the defendant had uttered the words charged in the petition, and an instruction having the effect to convey to the mind of the jury the impression that the answer contained such admission was erroneous.

## 7. SAME.

Some of the instructions complained of were calculated to weaken the defense of privileged communications, even if they did not entirely take away the defense.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by S. A. Powell against W. D. Gillis. From a judgment for plaintiff, defendant brings error. Reversed.

Powell sued Gillis for slander, laying his damages in the sum of \$2,000. The petition alleged that the defendant "did maliciously say of and concerning your petitioner, on the 2d day of August, 1902, the following false and defamatory words, to wit: 'S. A. Powell swore a lie.'" It is alleged that the defendant on the date named, in the presence of divers good and worthy citizens, used language of and concerning the plaintiff, the purport of which was to charge him with the offense of perjury, which is a crime punishable under the laws of this state; that the plaintiff is a poor, hard-working man, respected by his neighbors, and filling offices of trust and responsibility, to wit, constable and postmaster; that being charged with an offense of the grave character above referred to is calculated to injure him in his standing in the community, and especially when used by a person of the standing and character of the defendant, who is a man of great wealth and influence; that the charge against plaintiff was made immediately after the de-

fendant had lost a case in which he was the plaintiff and the plaintiff was the defendant; that the defendant was merely venting his malice when he uttered the words; that the use of the words, under the circumstances and with this motive, was an aggravated injury, both in the act and in the intent. By amendment the plaintiff alleged that in August, 1902, the defendant, in a certain discourse of and concerning the plaintiff, in the presence of Lott Branch and other good and worthy citizens, falsely said of and concerning the plaintiff the following false and malicious words: "Bink Powell [meaning the plaintiff] swore a lie, and I will prosecute him when the grand jury meets." The defendant filed an answer, in which he denied using the language charged in the petition. He averred that all that he said of the plaintiff was in his testimony on the trial of the case in the justice's court, so far as he recollected, and he did not use the language charged, or anything of like purport, and what was said on the trial was without malice, and was true. It is also averred that defendant stands ready to prove the truth of any utterance made concerning the plaintiff on that day, and that whatever the defendant said was privileged and made in good faith, with a view to protecting his own interest, without malice and with no purpose whatever to injure or defame the plaintiff. In an amendment to the answer, the defendant denied that he used the language stated in the amendment, or any language of like purport, to Lott Branch or in his presence, or in the presence or hearing of any person whatever, and here reiterated the statement made in the original answer, that whatever the defendant said to Lott Branch, or any other person, was true, and said in good faith and with a view to preserving the testimony to be used in a then contemplated prosecution of the plaintiff. The trial resulted in a verdict in favor of the plaintiff for \$2,000, and the defendant assigns error upon the overruling of the motion for a new trial.

T. R. Perry and J. H. Tipton, for plaintiff in error. Sam S. Bennet, Claude Payton, and Frank Park, for defendant in error.

COBB, P. J. (after stating the facts as above). 1. One ground of the motion for a new trial assigns error upon the refusal of the judge to continue the case. The complete showing for the continuance is not set out in the ground; but for the evidence introduced on the showing reference is made to the brief of the evidence filed in the case. Under repeated rulings of this court, this ground cannot be considered. This court will not consider an assignment of error in a ground of the motion for a new trial which is not complete in itself, or which may not be rendered complete by an exhibit to the motion itself. It is not permissible to refer to the brief of the evidence, or other parts

of the record, in order to complete the ground of the motion.

2. Another ground of the motion complained of the ruling of the judge allowing the amendment to the petition. An assignment of error of this character cannot properly be made a ground of a motion for a new trial. It is only necessary to cite one of the more recent cases on this question. *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51.

3. Another ground of the motion for a new trial assigns error upon the judgment overruling the demurrer to the petition and motion to dismiss the same. Such a ruling cannot properly be made a ground of a motion for a new trial. It is only necessary to cite one of the more recent decisions on the question. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794 (1).

4. Error is assigned upon the refusal of the judge to allow the defendant to prove, by himself, when he was on the stand, that he was 72 years of age. The court rejected this testimony, upon the ground that it was irrelevant. The contention is that the evidence should have been admitted to be considered by the jury on the question as to whether, considering the age of the defendant in connection with the other circumstances in the case, the words uttered by him were uttered with malice, or, as contended by the defendant, in good faith, and for the purpose of enforcing a criminal law in a matter where he was interested. While we do not think that it would have been erroneous for the judge to admit the testimony, still we do not think that his refusal to do so was an error of such a character as would necessarily require the granting of a new trial. The defendant was before the jury. They could judge themselves as to his condition, both mental and physical; and these were proper matters for them to take into consideration. The exact number of years that he had lived would not have aided them materially in determining whether, from his condition, mental and physical, and his temperament, as indicated by his manner and testimony, the charge made against the plaintiff was likely to have been malicious or made in good faith. The important elements in the case were before the jury; that is, the general appearance of the man, the state of his mind and body, and his temperament, as indicated by what he said and the manner in which it was said.

5. The original petition alleged the words to be, "S. A. Powell swore a lie," and that they were uttered on August 2, 1903. These words standing alone would import the crime of false swearing rather than perjury. *Smith v. Wright*, 55 Ga. 218. But it is also alleged that the words were uttered immediately after the trial of a case between the parties, and the inference is that the plaintiff had testified as a witness. The words of the character indicated, uttered in such circumstan-

ces, would be equivalent to a charge of perjury. The amendment alleged the words spoken were: Powell "swore a lie, and I will prosecute him when the grand jury meets." These words import the offense of false swearing, and there is nothing to indicate what were the circumstances in which they were uttered. The witness Branch testified that he was the justice who tried the case between the parties, and that when Gillis, who had lost the case, paid the costs, he said that Powell swore a lie, and wanted him "to bear it in mind," but he did not say anything about the grand jury. Another witness, Taylor, testified that, soon after the trial in the justice's court, Gillis said to him that Powell swore a lie, and he was going to get a bill against him when the grand jury met. Hall, a constable, testified that he was present when Gillis paid the costs to Branch, and he heard him say to Branch that Powell had sworn falsely and he was going to prosecute him, and that he wanted Branch to bear in mind what Powell had sworn. The defendant testified that he remembered the conversation with the justice of the peace, and that he intended to have the plaintiff arrested for perjury, and he told the justice to be sure and keep in mind what the plaintiff had testified. He also swore that he presented the case to the grand jury, but they did not act on it. He said that to the best of his recollection he told the justice that he intended to prosecute the plaintiff for perjury, and he wanted him to keep fresh in his mind all of the testimony in the case; that he did not want to injure anybody, but that the plaintiff certainly owed him on the notes that he had sued on. He denied having any conversation with the witness Taylor. It appears, from the evidence, that in the suit in the justice's court the plaintiff in the present case was the defendant, and that he swore that he had paid the notes. That he had not paid them with money is now admitted; but it is claimed that what was meant by payment in the testimony thus delivered was a transaction between the plaintiff and defendant, which was incomplete at the time of the trial, but which one party considered as satisfying the obligation and the other party did not. The evidence is of such a character as to authorize a finding that each side could be honestly mistaken in their statement when one swore that the notes were paid and the other that they were not. There could have been an honest difference of opinion as to the legal effect of the transaction as it stood on that day. While all the evidence indicates that the plaintiff in the present case, when he swore that he had paid the notes, was mistaken, and the notes were not paid, the effect of the charge made by the defendant against the plaintiff, when he said that he swore to a lie in the trial, was that he had committed willful perjury. And there was evidence in the pres-

ent case from which the jury could find that the testimony of the witness, although not true, was not willfully false. When the character of the words uttered and the circumstances in which they were spoken are considered, the effect of the words was to charge the plaintiff with the crime of perjury. *Bryan v. Gurr*, 27 Ga. 378; *Salmons v. Tait*, 31 Ga. 676; *Brown v. Hanson*, 53 Ga. 632. To utter of another words which impute to him a crime punishable by law is slander, and the wrong thus committed is actionable without proof of special damage. Civ. Code 1895, § 383. From motives of public policy, however, the law will sometimes relieve a person who makes a false charge against another from liability for damages. Communications which would otherwise be slanderous are protected as privileged, if made in good faith and in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal. *Chapman v. Battle*, 124 Ga. 574, 52 S. E. 812. There is no crime known to the law which is more odious than the crime of perjury, and the law authorizes a prosecution for this offense, as well as all others, either at the instance of the person aggrieved or any other citizen who may be interested in the preservation and maintenance of the law. Therefore, in a well-defined case, where it appears that the words were uttered in good faith and for the sole purpose of bringing to punishment the supposed perjurer, and the element of malice is not at all present, and the communication is made at a time and place and to a person when all the circumstances indicate purely an intention to vindicate the law, one who makes a statement which may afterwards develop to be false will be protected, and not rendered liable to be mulcted in damages. But one who intends to prosecute another for the crime of perjury must make known his intentions in reference to the same at a time and place and to persons that are proper. If made at other times and other places and to other persons, the communication is made at his peril; and, if what is stated is false, he must bear the consequences resulting from the slander. See, in this connection, *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. (N. S.) 1189; *Holmes v. Clineby*, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103; *Sheftall v. Central of Ga. Ry. Co.*, 123 Ga. 589, 51 S. E. 646. Whether the communication is made at a proper time and proper place and to a proper person is a question for the jury in the particular case. If the time and place are not proper, there is no privilege. If the person is not one to whom the communication is necessary to be made to effectuate the purpose of vindicating the law, there is no privilege. If the time and place and person are all appropriate, but the man-

ner and form of the communication are such as to indicate, not a desire to vindicate the law, but to injure and defame the person whose name is disclosed in the communication, the privilege does not exist. The privilege is given by the law for a wise purpose, and the law will not tolerate its being used to vent the malice of any individual, even though he may be one who thinks he has been grievously wronged.

6. The judge charged the jury: "You have the right to show that the language was used by admissions or confessions either in the pleadings or from the witnesses." The error assigned upon the charge is that, as there were no admissions in the pleadings, it was misleading to the jury and prejudicial to the defendant. The answer and amended answer each denied that the defendant had uttered the words charged in the petition, or any words of like import. It is true that the answer alleged that the defendant was ready to prove the truth of any words that may have been spoken by him on the day of the trial in the justice's court, but there was no evidence as to any words spoken on that day. Properly construed, we do not think that the answer contained any admission that the words charged in the petition were uttered by the defendant. In the circumstances of the present case, we are of the opinion that this erroneous interpretation of the plea was prejudicial to the defendant.

7. The judge charged the jury: "In considering that question [the question as to whether the defendant used the language that he is shown to have used bona fide, in an effort to preserve the testimony of the witnesses with a view to instituting criminal prosecution against the plaintiff], gentlemen, you will take into consideration the nature of the crime charged against the plaintiff, see what the nature of it was, and see whether the evidence shows that the plaintiff really did commit any crime; see whether he, the defendant, had the knowledge of whether the plaintiff had really committed the crime of perjury; see whether it rested with the defendant in this case, or whether he—so as to determine—see whether he had personal knowledge of it, or whether he didn't have personal knowledge of it, so as to see whether he was acting in good faith, bona fide, in good faith, intending to institute a prosecution against the defendant for perjury, or whether he was simply using that as a slander to perpetrate the slanderous words or defame the character of the plaintiff." This charge is assigned as error for various reasons, but it is only necessary to refer to the assignment setting up that the effect of the charge was to deprive the defendant of his main defense, that of privileged communication. The judge, in effect, says that Gillis would not be protected under his plea

of privilege unless Powell had really committed the crime and Gillis had personal knowledge of it. The plea of privilege is broader than this. If Gillis had no personal knowledge in reference to the matter, but honestly and in good faith believed that Powell was guilty of perjury, and there were reasonable and probable grounds upon which to base this belief, and he took steps to inaugurate a prosecution with no other purpose than a vindication of the law, words spoken by him at proper times and places and to proper persons, for the sole purpose of effectuating the prosecution, would be privileged, even though it should finally develop that Powell was innocent. There is in this charge, and also in some other portions of the charge, an indication that the judge had construed the answer as in the nature of a plea of justification, and some of the instructions place upon the defendant the onerous burden resulting from such a plea. As we construe the answer, it contained both a general denial and a plea of privilege. It is true that these are inconsistent, but that is permissible under our practice. The defendant, in effect, says: "I do not remember what I said, but I did not say what is charged, and whatever I did say was solely for the purpose of preserving evidence to effectuate a prosecution for crime." The plea of privilege should have set forth the words admitted to have been used, and then alleged the circumstances showing that they were privileged; but this defect was one that was subject only to special demurrer, and the judge did not err in submitting the defense of privilege to the jury. In fact, it would have been erroneous to do otherwise, as the evidence under the plea had been admitted without objection. *Bryan v. Gurr*, 27 Ga. 378.

We think the errors above referred to are such as to require a reversal of the judgment, in order that the defendant may receive the full benefit of his plea of privilege. If, on another trial, it should appear that the defendant had probable cause to institute a prosecution of Powell for perjury, and what he said in reference to his testimony at the trial in the justice's court was said in good faith and without malice, and to the proper persons, at proper times and places, he would be entitled to a verdict in his favor. On the other hand, if it should appear that he was animated by malice in his statements, the plaintiff would be entitled to recover. There are assignments of error upon the charge other than those that have been commented upon, but we do not consider it necessary to discuss them in detail. From what has been said it can be readily seen whether any of these instructions will be appropriate to the case on another trial.

Judgment reversed. All the Justices concur.

(129 Ga. 143)

# ROBERT R. SIZER & CO. v. G. T. MELTON & SONS.

(Supreme Court of Georgia. Oct. 5, 1907.)

## 1. REFERENCE — REPORT — EXCEPTIONS — AMENDMENT.

Since the passage of the act of 1894 (Civ. Code 1895, § 4589), requiring exceptions to an auditor's report to be filed within 20 days, if an amendment can be allowed at all after the expiration of that time so as to add a new and distinct exception to those already made, it would at least be necessary to show some good and sufficient reason why the exception was not filed with the others in due time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 159.]

## 2. SAME.

No such reason appears in the present case.

## 3. EVIDENCE — ADMISSION — INTERROGATORIES — ANSWERS — DIFFERENT CASE.

A party's answer to interrogatories are evidence against him as admissions, though the interrogatories may belong to a different case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 739-743.]

## 4. DISCOVERY — ANSWERS TO INTERROGATORIES — ADMISSION.

The mere fact that a corporation sued out interrogatories for its "vice president and southern manager" in one case would not of itself render his answers admissible in another case as admissions of the company; and this is specially true where it did not appear that they were introduced in evidence by the principal.

## 5. WITNESSES — REFRESHING RECOLLECTION — MEMORANDUM.

A witness may refresh and assist his memory by the use of a written instrument or memorandum, provided he finally speaks from his recollection thus refreshed, or is willing to swear positively from the paper. In order to swear positively from the paper, it is essential that the witness should at some time have had personal knowledge of the correctness of the memorandum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 803-892.]

## 6. SAME — SUBPENA DUCES TECUM — SUFFICIENCY.

If a subpoena duces tecum was served in a case pending before an auditor, and the papers called for were produced and used in evidence, the sufficiency of the subpoena to require the production and the ruling of the auditor on that subject became immaterial questions.

## 7. SALES — CONTRACT TO DELIVER — BREACH — MEASURE OF DAMAGES.

The general rule is that the measure of damages recoverable of a seller for failure to deliver goods sold is the difference between the contract price and the market value at the time and place for delivery; and it is incumbent on one who seeks to recover such damages to submit evidence as to the market price at the time and place for delivery, in order to recover compensatory damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174-1201.]

## 8. SAME — ABSENCE OF MARKET VALUE.

To this general rule as to the measure of damages there are some exceptions, as, for instance, growing out of contracts in relation to the sale or furnishing of things which are not dealt with in the market, and have no market price in the ordinary sense of that term, or contracts in regard to the manufacture of certain articles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1182.]

**9. SAME.**

It cannot be held as matter of law that the lumber, the sale of which is involved in the present case, had no market value, and that the auditor erred in referring to the market value in considering the measure of damages.

**10. REFERENCE—REPORT—IMMATERIAL ERRORS.**

Where it was found in an auditor's report that a seller was not liable at all for alleged breaches of contracts to deliver lumber, if this finding should be affirmed, inaccuracies in his report, in discussing what would have been the measure of damages if the liability had existed, would be immaterial.

**11. TRIAL—MISCONDUCT OF JURY—VERDICT—PUBLICATION—OBJECTIONS—WAIVER.**

Where, in a civil case, after the judge had concluded his charge to the jury, by agreement of counsel he instructed the sheriff that, if the jury found a verdict by a certain hour, the judge and counsel should be notified, and that the court would reconvene to receive the verdict, but, if it should be found after that hour, they should prepare a sealed verdict and disperse for the night, and the verdict should be returned in to court on the following day, and where the jury found a verdict before the hour designated in the judge's instructions, but without communicating with the court or counsel, sealed it up, delivered it to the clerk, and dispersed, and the verdict was returned into court on the following morning, the jury were called into the box, and in their presence and that of the court and counsel the verdict was published by the clerk, if counsel knew the facts, it was incumbent on them to object to the reception and publication of the verdict before it was done. If they failed to do so, it was a waiver of the irregularity.

**12. WRIT OF ERROR—REVIEW.**

None of the other rulings complained of require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Action by G. T. Melton & Sons against Robert R. Sizer & Co. From a judgment in favor of plaintiff, defendant brings error on separate bills of exceptions. Reversed.

G. T. Melton & Sons sued out an attachment against Robert R. Sizer & Co., a corporation of the state of New York. The declaration in attachment alleged, in brief, as follows: During the year 1901 Robert R. Sizer, doing business under the name and style of Robert R. Sizer & Co., was engaged in buying and selling lumber, and shipping it from the port of Brunswick, Ga., and had an office in that city. While so engaged, the plaintiffs entered into certain contracts with the defendant for the manufacture, sale, and delivery of certain lumber. The agreements were originally entered into verbally with Sizer, doing business under the name of Robert R. Sizer & Co., during the latter part of the year 1901. On or about January 1, 1902, Robert R. Sizer, without the knowledge of or notice to the plaintiffs, surreptitiously, clandestinely, and with intent to cheat and defraud the plaintiffs, incorporated the business under the laws of New York under the same name and style as that which he had been using previously. No change in letterheads or stationery was made, so as to put the

public on notice of any incorporation. Plaintiffs did not know of the fact of the incorporation. The company gave written orders for the lumber under the same name and style, and the plaintiffs furnished it. The corporation, having thus ordered the lumber, received, used, and converted it. Defendant only paid for a part of the lumber so furnished, leaving a balance due of \$1,665.45. Subsequently to the delivery of the lumber the plaintiffs learned that Sizer had transferred his business to Robert R. Sizer & Co., as a corporation, including all existing contracts and liabilities connected with the business, which were assumed and accepted by the company. After January 1, 1902, the corporation was the only person engaged in the lumber business in Brunswick under the name and style stated. It was alleged in a second count that the plaintiffs sold and delivered to the defendant the lumber, and that the defendant accepted it at the prices stated. In a third count it was alleged that the plaintiffs delivered the lumber to the corporation and the latter received it; that it was of the fair market value of the prices charged, as set out in an exhibit; and that the defendant made certain payments, but refused to pay the balance. Defendant demurred to the declaration, and objected to the amendments adding counts. The case was referred to an auditor. He found in favor of the plaintiffs \$1,664.93 principal. A motion was made to re-refer the case for fuller report, which was overruled. Exceptions of law and fact were filed by the defendant. It was allowed to amend by adding an exception of law, which complained of the overruling of the demurrer. To this the plaintiffs excepted pendente lite. The exceptions of law were overruled. The exceptions of fact were submitted to a jury, who found against them. Defendant moved for a new trial, which was refused, and it excepted.

Kay, Bennet & Conyers, for plaintiff in error. N. J. Holton and Harry F. Dunwoody, for defendant in error.

LUMPKIN, J. (after stating the facts as above). In musical parlance, this case may be said to comprehend a theme and variations. The theme is the question of the liability of a corporation which obtained a charter in the same name as that in which an individual (previously conducting the business) had agreed to buy lumber, gave orders for the lumber in that name, without any notice of change to the vendors, received and used it, recognizing the prices charged as proper, partly paid for what it received, and then declined to pay the balance due. The principal variation arises from a claim of recoupment set up by the defendant on account of an alleged noncompliance by the plaintiffs with their contracts as to the furnishing of the lumber. Minor variations in-

clude a motion to recommit the case to the auditor, objections to amendments, exceptions to the report, a motion for a new trial after verdict of the jury on the exceptions of fact, and a bill of exceptions and a cross-bill (all forming a sort of double chromatic scale, extending up and down, with the addition of a few extra notes beyond the 26 which would suffice to constitute a complete double scale).

1, 2. The auditor to whom the case was referred found in favor of the plaintiffs. The defendant filed exceptions to his report. After the lapse of 20 days, an amendment was tendered, making an additional exception. This amendment was allowed over objection, and this ruling has been brought here by a cross-bill of exceptions filed by the defendant in error. The ground of the exception was as follows: The auditor's report stated that "at the time appointed to take testimony, and before hearing the same, I heard argument upon the demurrers filed by the defendant, and I overruled the demurrers on all the grounds therein, all of which is a matter of record in said cause." The errors assigned were (a) that this was contrary to law; (b) because there is no record or entry made by the auditor overruling said demurrers; (c) because there could be no overruling of the demurrers, except by a formal order signed by the auditor for that purpose; (d) because the auditor should have found in favor of the demurrers, and should have passed and signed an order sustaining each and all of the grounds thereof. If the auditor failed to pass on some necessary question, the proper remedy was by a motion for a re-reference, rather than by exception to the report. *Fricker v. Americus Improvement Co.*, 124 Ga. 165, 52 S. E. 65. The auditor stated in his report that he had overruled the demurrers, and we incline to think that this amounted to a ruling on that subject. But, whether it did or not, what the auditor did was just as clear and complete when he filed his report; and gave notice of it as it was at any time thereafter. It is very doubtful whether, after the expiration of the 20 days allowed by law for filing exceptions, a new and distinct exception can be added to those already filed by way of amendment. If it can be done at all, such an amendment is not a matter of course, but some good and sufficient reason must be shown for its allowance. To permit a party to file a formal exception to an auditor's report within 20 days, and then add new grounds of exception at any time thereafter when he may so desire, as matter of right, would practically destroy the purpose of the statute. *Civ. Code 1895, § 4589; Moss v. Chappell*, 126 Ga. 196, 199, 54 S. E. 968, and citations. Here no sufficient reason was shown why this exception should not have been filed in due time. If what the auditor did was erroneous and furnished ground for exception, it was just as erroneous when he

did it as it ever became. The presiding judge erred in allowing the amendment; but he corrected the error, as far as he could, by overruling the exception and adding to his order a statement that the demurrers themselves were overruled.

3, 4. In another case than that on trial the evidence of the vice president and southern manager of the defendant had been taken by interrogatories. In the present case these interrogatories and answers were offered by the plaintiffs to show admissions of material facts. Objection was made to this evidence, but it was overruled, and this furnished a ground of exception to the auditor's report. "A party's answers to interrogatories are evidence against him as admissions, though the interrogatories may belong to a different case." *Whitlock v. Crew*, 28 Ga. 289 (3); *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385 (5). The interrogatories and answers offered in this case were not those of a party, but of an officer and agent of a corporation taken in another case. For them to be admissible against the principal, it must be on one of two theories—either because the agent had authority to make the admissions for his principal, or else because his testimony was taken and so dealt with by the corporation as to become a quasi admission by it. Testifying as a witness in a lawsuit is no part of the *res gestæ* of the transaction involved in the litigation, and, as a general rule, the declarations of an agent, to affect his principal, must be a part of the *res gestæ*. *Savannah, Florida & Western Ry. Co. v. Flannagan*, 82 Ga. 580 (5), 587, 588, 9 S. E. 471, 14 Am. St. Rep. 183. The title of vice president does not in itself imply authority to make admissions for a corporation. The title of southern manager may imply authority to manage business in the south. But testifying as a witness is not such a normal part of the lumber business as that testimony given by him as a witness is impliedly an admission of the lumber company. The decision in *Krogg v. Atlanta & West Point Railroad*, 77 Ga. 202, 4 Am. St. Rep. 77, probably went as far as any case in this state on the admissions of an agent. It has been since criticised, explained, and differentiated. *Carroll v. East Tenn. Ry. Co.*, 82 Ga. 452, 476, 10 S. E. 163, 6 L. R. A. 214; *Electric Ry. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Chattanooga R. Co. v. Liddell*, 85 Ga. 492, 11 S. E. 853, 21 Am. St. Rep. 169. In the *Krogg* Case the statement of the general manager was said to have been made while acting in the line of his duty. And so likewise of the president in *Imboden v. Etowah Mining Co.*, 70 Ga. 86 (12c). In *Dobbins v. Pyrolusite Manganese Co.*, 75 Ga. 450, the admission of the president was apparently made in connection with the business of the company. On the other theory, the matter might be disposed of by saying that it was stated in the record that the interrogatories were sued out in another case, but it was not

shown that they were introduced in evidence by the corporation, and the mere suing out by a party of the interrogatories or taking the depositions of a witness does not render them admissible against him as an implied admission in a subsequent litigation. *Hovey v. Hovey*, 9 Mass. 216; *Hallett v. O'Brien*, 1 Ala. 585, 589. But, had it appeared that they were introduced on the former trial, would this alone have made them admissible? We think not. If a party makes an express admission, or if he expressly states that a certain piece of evidence given by another is correct, it may be introduced against him. The ground on which the admissibility of implied admissions rests is this: If the conduct of a party is such as to amount to or imply an admission, this may be shown; thus if one conceals evidence, or seeks to bribe a witness, or remains silent when he should deny a statement, or the like. And so, in a lawsuit, if one knowingly offers a particular statement for a specific purpose, he may impliedly make it his own admission. But a litigant does not by implication approve and adopt as his own all statements in depositions, testimonies, and affidavits offered in his behalf, so that afterwards they may be used against him as admissions. Such a rule would breed great confusion, and tend to hamper, rather than aid, the free investigation of questions involved in litigation. A party may often prove some facts by one witness and others by another. The two may not coincide in some respects. Has he admitted both ways? He may not impeach his own witness, unless entrapped by him, but may show that the facts are different from the statement of the witness. Civ. Code 1895, § 5290; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143 (3).

In *Richards v. Morgan*, 4 Best & Smith, 641, 660, et seq. (10 Jur. N. S. 559, 564), is an able and elaborate discussion of the subject by Cockburn, C. J. He declared that merely calling a witness does not render all he says admissible against the party calling him; and, after reviewing previous cases, said: "It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground that the statements of the witness must be taken to be his. Bearing in mind that the true ground on which such evidence is admissible is that a party seeking to establish a fact by evidence in a court of justice must be taken to assert the fact if he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it, as an assertion of that fact; and, on the other, that written evidence will be admissible against the party using it in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may

contain, but only so far as it shall appear to have been used to establish a given fact or facts. It is not because a witness may have been called or a deposition may have been used, that all the statements made are to be considered as having been adopted by the party using the evidence. In order to render this species of evidence admissible as the assertion of a particular fact by the party using it, it must appear, either from the evidence itself, or from the extrinsic circumstances, that it was used for the purpose of proving such fact." *Crompton, J.*, concurred in the judgment. *Blackburn, J.*, dissented. A simple illustration may make the position clearer: On a trial, suppose a question involved is whether the defendant was at the city of A. on a given date. He introduces a witness for the purpose of showing that he was not at A., but at the town of B. This amounts to an implied assertion that he was at B., and not at A. Subsequently, in another litigation, he claims not to have been at B., but at A. It may be shown that in the former case he introduced the evidence of the witness to prove his absence from A., and his presence at B. The basis for admitting such evidence at all is that, under the circumstances, there was an implied assertion of a fact. And a party does not broadly assert by implication everything said by a witness whom he puts on the stand, or examines by interrogatories. The distinction at one time sought to be made between the two modes has been repudiated. These interrogatories and answers were not offered for the purpose of impeachment, or to show notice of any fact, but as containing admissions. Under what has been said above, as the case now appears in the record, the admission of this evidence was erroneous. See, on the general subject, 2 *Wigmore, Ev.* § 1075, and notes; *Evans v. Methyr, et al.*, Council (1899) 1 Ch. 241, 250, 251; *Bageard v. Consolidated Traction Co.*, 64 N. J. Law, 316, 45 Atl. 620, 49 L. R. A. 424, 81 Am. St. Rep. 498; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Martin v. Root*, 17 Mass. 227.

5. A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he finally speaks from his recollection thus refreshed, or is willing to swear positively from the paper. Civ. Code 1895, § 5284. In order to swear positively from the paper, it is essential that the witness should at some time have had personal knowledge of the correctness of the memorandum. *Lenny v. Finley*, 118 Ga. 427, 430, 45 S. E. 317; *Hematite Mining Co. v. East Tenn., Va. & Ga. Ry. Co.*, 92 Ga. 268, 18 S. E. 24. The evidence made out such a case as authorized the witness to swear from the memoranda. Where a lumber raft was made up at one point on a river and floated down to another and delivered, it was relevant evidence, on the ques-



tion of what lumber was delivered, to show what lumber went into the raft at the starting point.

6. Exception was taken to an order of the auditor requiring certain papers to be produced under a subpoena duces tecum; but the papers were in fact produced and put in evidence, and the sufficiency of the subpoena, and the ruling of the auditor as to it, became immaterial questions. *Starr v. Mayer*, 60 Ga. 546 (3).

7-10. The general rule is that the measure of damages recoverable of the seller for failure to deliver goods sold is the difference between the contract price and the market value at the time and place for delivery. Where the vendee seeks to recover damages for a failure to deliver such goods, under the general rule, it is incumbent on him to submit evidence as to the market price at the time and place for delivery, in order to recover actual damages. *Bloom v. Americus Grocery Co.*, 116 Ga. 784, 43 S. E. 54. Where the delivery is to be made in instalments, the measure of damages is the sum of the differences between the contract price and the market price at the several times for delivery. 24 Am. & Eng. Enc. Law, 1152(c), and note 1. To this general rule there are some exceptions. Thus the thing contracted for may be such as cannot be bought in the market, or of a kind as to which there are no dealings, so as to fix a market price. The property may be of a character which has to be specially made for the particular purpose for which it is ordered—as a machine or a part of a machine needed to meet a special purpose or requirement, and which is not of such a character as is kept for sale on the market, or as has a market value or price in the usual sense of that term. In such cases the general rule cannot be applied, but the “damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated when the contract was made, as the probable result of its breach.” Civ. Code 1895, § 3799. Any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages. Civ. Code 1895, § 3806. As to the measure of damages, where the contract contemplates the manufacture of certain articles, and is not an ordinary contract of bargain and sale, see *George Delker Co. v. Hess Spring & Axle Co.*, 138 Fed. 647, 71 C. C. A. 97; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. In *Den Bleyker v. Gaston*, 97 Mich. 354, 56 N. W. 763, it was held that lumber of a particular grade, cut into strips for a special purpose, and as to which there was no market price, did not fall within the general rule. We need not discuss the subject of damages in mutual contemplation of the parties. We cannot say as matter of law that the lumber ordered in this case did not have a market price. In the *Southwestern R. Co.*

*v. Rowan*, 43 Ga. 411, there was evidence of a difference in market price. In discussing the subject *McCay, J.*, said: “The case of *Bryan v. Southwestern Railroad Company*, 41 Ga. 71, was a case of cross-ties, an article the market value of which it is almost impossible to fix, since there is ordinarily but one purchaser in a community. The case of stringers stands on a different footing. Sawed lumber has a distinct market value in almost every community.” In *Fontaine v. Baxley*, 90 Ga. 416, 426, 17 S. E. 1015, the subject under discussion was whether there was mutuality, so as to make certain contracts binding. In dealing with this question *Bleckley, C. J.*, remarked that: “It must be remembered, in behalf of both these contracting parties, that cross-ties are not a commodity of general commerce; that they are neither to be procured at all times in the market by one wishing to buy them, nor to be disposed of readily and quickly by one wishing to sell them. On the contrary, demand must prearrange for supply, and supply before becoming abundant must prearrange for demand.” The question of the measure of damages was not there directly under consideration. Whether lumber of the character involved in the present case was a commodity having a market value, and to which the general rule could be applied, seems rather to be a matter of fact than one of law. There may be clear cases where the courts can take judicial cognizance that a thing has or has not a market, and a market value; but there are also cases where this information must be derived from the facts. The courts will need no proof that corn, flour, hay, and other things of like character are commonly dealt with on the market, and have a market value. There are other things which at first may not be kept on the market, but with an increased dealing in them may come to be marketable things, with a market price. Some of the auditor's discussion in regard to the measure of damages was not strictly accurate. But he only made a report on the measure of damages in case his finding in regard to the right to recover damages should be reversed. On that subject he said: “I do not find, therefore, that any of the contracts were broken by the plaintiffs, and do not therefore reduce plaintiffs' recovery any amount for damages.”

11. The court finished charging the jury just at the hour for adjournment in the afternoon. By agreement of counsel, the court instructed the sheriff to take the jury out, and, if they found a verdict by 9 or 10 o'clock at night, to communicate with the judge and counsel, and the court would reconvene to receive the verdict; that, if the verdict was not found until after that time, then the jury might disperse after preparing a sealed verdict to be returned into court the following day. The jury found a verdict before 7 o'clock in the evening, and, without communicating with the court or counsel, sealed

it up, delivered it to the clerk, and dispersed. The sealed verdict was returned into court the following morning, the jury were called into the box, and the clerk opened and read the verdict in the presence of the jury, the court, and counsel. It does not appear that counsel were not aware of all the facts, or that they made any objection to the publication and recording of the sealed verdict. If they knew the facts, and sat quietly by and permitted the verdict to be received and published without objection, this operated as a waiver of the defect. A party cannot wait to see which way the jury finds, and then, if the verdict is adverse to him, object to some mere irregularity in the mode of receiving or publishing it, of which he has knowledge in advance. *Adkins v. Williams*, 23 Ga. 222; *Stix v. Pump*, 37 Ga. 332 (3); *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647; *Bowdoin v. State*, 113 Ga. 1150, 39 S. E. 478.

12. The various other objections, exceptions, and grounds of the motion for a new trial do not require a discussion in detail. Suffice it to say that none of them necessitate a reversal.

Judgment reversed on both bills of exceptions. All the Justices concur, except ATKINSON, J., disqualified.

(2 Ga. App. 620)

MURRAY v. STATE. (No. 645.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

1. CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE—WEIGHT.

No fact or circumstance in the evidence raised a reasonable inference of guilt. The hypothesis of guilt was entirely hypothetical, and fully overcome by positive testimony and several reasonable hypotheses of innocence.

2. SAME—NEW TRIAL.

The verdict, being wholly without support of evidence, is without foundation of law, and the refusal to grant a new trial was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2297, 2298.]

(Syllabus by the Court.)

Error from Superior Court, Stephens County; J. J. Kimsey, Judge.

Carrie Murray was convicted of an offense, and she brings error. Reversed.

Termor Barrett and R. A. Naves, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(2 Ga. App. 607)

MANDEVILLE MILLS v. DALE (two cases). (Nos. 453, 454.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

1. NEGLIGENCE—DANGEROUS PREMISES—DUTY OF OWNER.

The elements of legal liability of the owner or proprietor of premises for injuries occasioned to persons thereon vary according to whether the person injured was, at the time of the injury, a trespasser, a licensee, a visitor under invitation

express or implied, or a person standing in some special relation recognized by law.

(a) Under the allegations of the petition in the present case, the injured person was a visitor by invitation upon the defendant's premises.

(b) When the owner or proprietor of premises by invitation, express or implied, induces or leads others to come upon his premises for a lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe for such use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42-47.]

2. SAME—DEATH—PETITION.

The petition in the present case is good against general demurrer.

3. PLEADING—TIME—SPECIAL DEMURRER.

A petition which does not aver a time as to every material or traversable allegation is subject to special demurrer pointing out the defect. (Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Consolidated actions of S. J. Dale and Ella Dale for the wrongful death of their son, Roy Dale, deceased, against the Mandeville Mills. From judgments for plaintiffs, defendant brings error. Affirmed.

For the homicide of Roy Dale, his father and mother brought separate suits against the Mandeville Mills. The allegations of both petitions, so far as matters material to the questions here made are concerned, are identical. In substance, the petitions state that Roy Dale was at the time of his death 12 years old; that he was learning the profession of a mill operative in defendant's factory, but was off duty on temporary leave that he might attend school; that on the day of his death he came into the defendant's mill to see his father, who was employed there, and who worked on the second floor, on a matter of business; "that there was a narrow stairway leading from the room below up to the floor upon which the father was at work; that there was no banisters, or railing, to said stairway, and the steps upon the same from long and constant use had become very slick; that the said Roy Dale, after having visited his father, left him to return to his home, and started to descend said stairway; that when he had gone some two or three steps down said stairway his feet slid from under him, and there being no banisters, as aforesaid, to protect persons ascending and descending said stairway, he fell violently to the floor below and was so injured, maimed, and bruised, that he died some 36 hours thereafter; that defendant, the said Mandeville Mills, through its agents, officers, and employes, were well informed and aware of the dangerous condition of said stairway, and had made no effort to remedy the same, notwithstanding its attention had been frequently called to the same; that defendant was guilty of gross negligence in erecting said stairway and not putting a banister or hand railing upon the same; that they were guilty of gross negligence for permitting said stairway to re-

main in said dangerous condition after having ample opportunities to learn of its dangerous condition having increased by means of the steps wearing slick and dangerous."

By amendment it is alleged, among other things, "that at the time Roy Dale visited his father, as set out in the original petition, he entered the room downstairs in which his father discharged some of the duties necessary as an employé of defendant, and was informed that the latter was upstairs. Whereupon he ascended the stairway hereinbefore described; that being the only means by which he could go from said room upstairs. Defendant through its agent and employé, S. T. Pitts, was aware of the presence of said Roy Dale, and of his ascending and descending said stairway at the time of said injuries, and made no objection, notwithstanding it had full knowledge of the danger incurred and the tender years of the said Roy Dale. That the said Roy Dale was invited by the defendant, through its agents and employé, Sank Lovvorn, who had authority so to do, to visit his father while at work in said mill at any time on business. Said stairway heretofore referred to was erected for the purpose of furnishing a way for persons upon the lower floor and in the room first entered by the said Roy Dale to ascend to the second floor and descend from the second floor to the first floor, and was being used for that purpose. The slick and slippery condition of said stairway was a latent defect in the same, which was unknown to the said Roy Dale, and which could not have been discovered by him in the exercise of ordinary care."

The defendant filed a general demurrer; also, special demurrer to the paragraph of the petition alleging the invitation, on the ground that no time was averred. The defendant's demurrers having been overruled, it brings error.

S. W. Harris and Brown & Root, for plaintiff in error. Hamrick & Smith, for defendants in error.

POWELL, J. (after stating the facts as above). 1. The liability of the owner or proprietor of premises for injuries received by persons while present upon such premises may be viewed in four aspects: (1) Where the person injured is there as a trespasser; (2) where he is there as a licensee; (3) where he is there by invitation of the owner or proprietor; (4) where he is there under some other special relation.

In the first case, that of the trespasser, liability arises only where the injury has been occasioned by the willful and wanton negligence of the proprietor or owner. No duty of anticipating his presence is imposed, and as was pointed out by this court in *Charleston & W. C. Ry. Co. v. Johnson*, 1 Ga. App. 441, 57 S. E. 1064, the duty to use ordinary care to avoid injuring him after his presence and danger is actually known is in

point of fact merely the duty not to injure him wantonly or willfully. So, in the first case, wanton or willful negligence is essential to liability.

In the second case, that of the licensee, there is a slightly higher duty on the part of the owner or proprietor of the premises. He must not wantonly and willfully injure the licensee, and since his presence as a result of his license is at all times probable, some care must be taken to anticipate his presence, and ordinary care and diligence must be used to prevent injuring him after his presence is known or reasonably should be anticipated. The fundamental concept in this class of cases, as in that of trespassers, is of a liability only for willful or wanton injury; but it is usually willful or wanton not to exercise ordinary care to prevent injuring a person, who is actually known to be, or reasonably is expected to be, within the range of a dangerous act being done. See *Southern Ry. Co. v. Chatman*, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283. To the licensee, as to the trespasser, no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pit-falls, man-traps, and things of that character.

In the case of persons on the premises by invitation of the owner or proprietor a higher degree of care is demanded. "Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe." Civ. Code 1895, § 3824. The definition of the word "invitation," as given in leading cases, shows why this should be so. We quote from *Sweeney v. Old Colony R. Co.*, 92 Mass. (10 Allen) 373, 87 Am. Dec. 644: "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or one in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way

or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by the owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." It is likewise said in *Turess v. New York R. Co.*, 61 N. J. Law, 314, 40 Atl. 614: "'Invitation' is a term whose legal import is known, and may be used to express the relation between an owner or occupier of land, and one who comes thereon under certain circumstances. The invitation which creates such a relation may be express, as when the owner or occupier of lands by words invites another to come on it, or make use of it or something thereon. Or it may be implied as when such owner or occupier by acts or conduct leads another to believe the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used." The distinction between the duty to a licensee and to one entering the premises under invitation is thus expressed in *Beehler v. Daniels*, 18 R. I. 563, 565, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790: "There is a clear distinction between a 'license' and an 'invitation' to enter, premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation."

Mere permission to enter the premises creates the relation of licensee; invitation, express or implied, is necessary to create the more responsible relation and the consequent higher duty upon the owner or proprietor. In this class of cases, willfulness and wantonness is not necessary to the existence of liability; but merely ordinary neglect either through act of omission or of commission. See *Atlanta Cotton Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; *Archer v. Blalock*, 97 Ga. 719, 25 S. E. 391; *Central R. Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551. The case of *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203, and 92 Ga. 706, 19 S. E. 713, is not authority for the proposition that mere permission is equal to an invitation, but for the proposition that a duty is owing to a licensee.

The fourth class we shall not take up in detail; but it consists of those cases wherein, by reason of contract, public policy, or

otherwise, there is imposed upon the owner or proprietor of the premises extreme care and caution. The duty owing by a carrier to his passenger is within this class.

The plaintiff in error asserts that young Dale was within the second class mentioned above—was a bare licensee. The defendant in error says that he was within the third class—was upon the premises of the mill company by invitation. If the petition had not been amended, the contention of the plaintiff in error would have been well founded; but taking the unequivocal statement of the amendment, "that the said Roy Dale was invited by defendant, through its agent and employé, Sank Lovvorn, who had authority so to do, to visit his father while at work in said mill at any time on business," coupled with the further allegation that with the full knowledge and consent of the defendant company he did upon the day of the fatal injury enter upon the premises of the defendant to visit his father on business, we are constrained to hold, under the admissions of the demurrer, that he was not a bare licensee, but was a person lawfully on the defendant's premises by invitation. As to this feature of the case the general demurrer was therefore properly overruled.

2. We come therefore to the question whether the petition shows a failure on the defendant's part to exercise ordinary care and diligence to make his premises reasonably safe for his invited visitor. Ordinary care and diligence, as applied to the keeping of premises in safe condition, is a very elastic term, varying the quantum of actual caution to be exercised according to the nature of the use to which the property is devoted. We think, however, that the allegation as to the worn and slippery condition of the stairway makes an issuable question as to the defendant's negligence. If the stairway was no more worn and no slicker than those in ordinary use in other mills and similar places, the defendant was guilty of no breach of duty. We must confess that our greatest doubt in the case has arisen over the question as to whether the allegations as to the stairway show a case of negligence at all; but we have finally concluded that enough is alleged to authorize submission to the jury on this point.

The question of the failure of the boy that was killed to use ordinary care to protect himself is also a jury question, not to be decided on demurrer. The jury may take the fact of his previous acquaintanceship with the premises into consideration, not only in determining whether he could by the exercise of ordinary care have avoided the fatal injury, for if he knew of the condition of the stairway, and was capable of appreciating its condition, a recovery cannot be had; but also in determining whether the owner of the premises was negligent in inviting him in, under the circumstances, for it might be reasonably safe to allow a person acquainted

with the condition of things to enter where it would be wholly unsafe and correspondingly negligent to allow the same privilege to persons ignorant of the conditions.

3. A special demurrer raises the point that no time is alleged as to the allegation that the defendant's agent invited young Dale to enter. The petition must "aver a time when every material or traversable fact transpires." This ancient rule of pleading has been recognized by our Supreme Court in its earliest utterances (*Bond v. Central Bank*, 2 Ga. 92, 100) as well as in its later rulings (*Warren v. Powell*, 122 Ga. 4, 49 S. E. 730). Usually any date may be alleged, due regard being had for the statute of limitations, where applicable, for in ordinary cases the pleader will not be confined to the actual day named; but some specific time must be averred. Direction is therefore given that the trial court require the plaintiff to amend accordingly, and in default thereof the petition be dismissed.

Judgment affirmed, with direction.

(2 Ga. App. 626)

#### JENKINS v. STATE. (No. 675.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

##### 1. CRIMINAL LAW — TRIAL — INSTRUCTIONS — ASSUMED FACTS.

To instruct a jury in a case where the defendant is charged with carrying a concealed pistol, and where the defendant's defense was that he had no pistol at all, "that if the pistol was carried so exposed to view that it could be readily recognized as a pistol, he carried it in legal contemplation in an open manner; if he carried it concealed even for a minute, the offense of carrying concealed weapons is complete"—is, in the absence of any instructions to the jury that they must determine from the evidence whether the defendant actually had a pistol or not, such an intimation of opinion on the part of the judge that the defendant had a pistol as practically eliminates the defendant's defense and demands the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754-1764.]

##### 2. SAME—APPLICABILITY TO EVIDENCE.

It is erroneous to instruct the jury that a witness, sought to be impeached, may be sustained by proof of general good character, in the absence of any evidence as to the good character of such witness. The law should fit the facts.

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

John Jenkins was convicted of carrying concealed weapons, and he brings error. Reversed.

Jas. H. Pate and J. J. Forehand, for plaintiff in error. J. A. Comer, Sol., for the State.

**RUSSELL, J.** The defendant was convicted of the offense of carrying concealed weapons. Outside of the general grounds of the motion for new trial, the assignments of error all relate to alleged errors in the charge of the court.

The first instruction complained of is as follows: "I charge you, gentlemen of the

jury, that, if the pistol was carried so exposed to view that it could be seen and readily recognized as a pistol, he carried it in legal contemplation in an open manner; if he carried it concealed, even for a minute, the offense of carrying concealed weapons is complete." The objection raised is that this instruction contained an intimation of opinion, unless it had been qualified by the appropriate charge that it would be the duty of the jury first to determine whether or not the defendant did have a pistol at the time and place charged in the accusation. It is possible to construe the language of the judge, taken by itself, so as to infer that he had in contemplation the pistol mentioned in the evidence, but the instruction complained of must be considered in connection with its context. The sentence complained of follows immediately a quotation of section 341 of the Penal Code of 1895, defining the defense, and immediately precedes the proper instruction of the court on the presumption of innocence. The only criticism, therefore, that can be passed upon the excerpts of the charge complained of, when taken by itself, is that the definite article, "the," is used, instead of the indefinite, "a." The charge would have been more exact had the judge said, if "a" pistol is carried, etc., and the substitution of "a" for "the" would have relieved this first difficulty. But this does not reach the root of plaintiff in error's complaint. The essence of defendant's defense was that he did not have a pistol at all, concealed or not concealed. The court omitted anywhere in the charge to clearly present this defense to the jury. The language used in the instruction complained of, if nothing else, made it absolutely necessary that this theory should be presented. If the court had instructed the jury that unless they were satisfied that the defendant had a pistol they should acquit him, or, if they were not satisfied that he had a pistol at the time and place alleged, the language used would have not amounted to such an intimation of opinion as to constitute reversible error. If the judge had even inserted parenthetically into the first portion of the charge complained of the words, "if you believe from the evidence that defendant had a pistol at the time alleged," the jury might not have been influenced, the charge might not have been error. See *A. & B. A. L. Ry. v. McManus*, 1 Ga. App. 302, 58 S. E. 258. But with the theory of the defendant's statement not presented, although in the absence of request it need not be generally be presented, the language used could convey to the jury the impression that the defendant had a pistol at the time and place alleged, and that the jury had only to determine the single question whether it was concealed.

The second portion of the charge excepted to is that relating to the impeachment of witnesses. It was inapplicable to the facts. The portion excepted to was as follows:

"When thus impeached, he may be sustained by proof of general good character. The effect of the evidence is to be determined by the jury." This charge was inappropriate and erroneous, because no testimony was introduced as to the general good character of the witness sought to be impeached, nor was there any other testimony by which the impeached witness could have been corroborated.

There is no proper assignment of error as to the third portion of the charge to which exception is taken, and therefore the exception cannot be considered.

Judgment reversed.

(2 Ga. App. 624)

MCCLURG v. STATE. (No. 669.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

1. CRIMINAL LAW — TITLE TO LAND — PAROL EVIDENCE.

Parol evidence is not admissible to prove title to real estate, and it was error to refuse to repel the statements of witnesses as to the ownership of land when such evidence was properly objected to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 882.]

2. MALICIOUS MISCHIEF—EVIDENCE.

The time, place, and the circumstances of the act are all relevant for the purpose of disproving malice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Mischief, § 14.]

(Syllabus by the Court.)

Error from City Court of Moultrie County; R. L. Shipp, Judge.

H. J. McClurg was convicted of maliciously destroying property belonging to another, and she brings error. Reversed.

D. W. Rountree, W. C. McCall, and J. D. Wade, Jr., for plaintiff in error. W. F. Way, for the State.

RUSSELL, J. The turning point in this case is whether the trough or gutter which the plaintiff in error was alleged to have maliciously destroyed, and which she admitted she cut to pieces, was rightfully on the land of another, or whether it was being used (apparently wantonly) to stop up the only road plaintiff in error had to go to her home, and thus to destroy her only means of ingress or egress from her property. The destruction of the property alleged in the accusation was admitted. The only other question that could arise in the case was whether the destruction was malicious. If the gutter was on land on which it properly belonged, the law might infer malice from the fact of the destruction. If it were on a roadway, the circumstances leading up to the destruction might rebut the presumption of malice. Over the objection of defendant's counsel, the court permitted parol evidence as to the ownership of the land where the gutter was alleged to

have been placed, and in this we think the court erred. As stated by the Supreme Court in *Bleckley v. White*, 98 Ga. 598, 25 S. E. 592: "The law goes quite far enough to presume possession rightfully." The bare statement of a witness that he owns certain real estate is no proof of title. It is uncontradicted in the evidence that the gutter or water trough from Jones' well to the horse lot was built across what had been used for from 18 to 21 years as a private road leading from the public road to Mrs. McClurg's home. This being true, Jones and Christian would have had no right to close this road by building a trough 35 feet in length, leading from the well to the horse lot, even though by changing her course of travel Mrs. McClurg could have gone around the well and back into the road beyond the trough, and as it appears that Mrs. McClurg had frequently been compelled, at no little trouble and inconvenience as well as the exercise of physical force, to lift the middle portion of the trough or gutter, which was 15 or 16 feet long, out of the road in order to effect a passage, and as this road was her mill road, market road, and road to her mail box, it cannot be said that this blocking of her only means of ingress and egress to her home was not vexatious. Whether the destroying of this heavy obstacle was or was not malicious is, of course, a question for the jury. As to whether, when Mrs. McClurg cut this gutter to pieces she was influenced by ill will towards the owners of the gutter, or whether, even though illegally, she was endeavoring to relieve herself from an unwarranted and aggravating invasion of her right of locomotion, is to be determined by the jury. To show that the gutter is on land owned by a private individual overcomes the presumption of innocence, and in every criminal case the law requires that this can only be done by legal evidence. The evidence of Jones and Norman, as set out in the fourth, fifth, and sixth grounds of the motion for new trial, was not such legal evidence. The objections offered to the admission of this testimony were proper and timely. Title to land cannot be shown by the statement of a witness that he owns the land. There was therefore no proof to contradict the testimony in behalf of the plaintiff in error that the gutter was erected across a private road, and the verdict was, for that reason, without evidence to support it.

Judgment reversed.

(2 Ga. App. 622)

BRADLEY v. STATE. (No. 646.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

1. CRIMINAL LAW — ACCESSORY—CORROBORATION.

Although a person may have had information of the defendant's intention to commit the crime under investigation prior to the time of its commission, and may afterwards have concealed it, he is not an accomplice of the defendant.

within the meaning of the rule requiring corroboration of the testimony of an accomplice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1082-1088.]

(a) An accessory after the fact is not an accomplice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 71, 1085.]

(b) Nor is a receiver of stolen goods an accomplice of the principal thief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 57; vol. 14, Criminal Law, § 1088.]

## 2. BURGLARY—INDICTMENT—OWNERSHIP OF PROPERTY.

The ownership of personal property, in an indictment for larceny or for burglary, may be laid in the person having actual lawful possession of the same, although he may be holding it as agent or bailee of another. *Wimbish v. State*, 89 Ga. 294, 15 S. E. 325.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 65.]

## 3. CRIMINAL LAW—APPEAL.

No reversible error appears in the record. (Syllabus by the Court.)

Error from Superior Court, Walker County; *Moses Wright*, Judge.

G. W. Bradley was convicted of burglary, and he brings error. Affirmed.

Jno. W. Bale and F. W. Copeland, for plaintiff in error. W. H. Ennis, Sol. Gen., and Walter B. Shaw, for the State.

POWELL, J. 1. The defendant was convicted of burglary. The witnesses upon whose testimony the conviction rested was that of his accomplice, House, and the latter's wife. Certain assignments of error raise the question as to whether Mrs. House was not also an accomplice. She heard the defendant and her husband planning the burglary, and advised them against it; but after the crime had been committed, and a portion of the stolen money had been left in her house, she attempted to secrete it from the officers who were searching for it. She was not a principal, for she did not directly or indirectly participate in the crime. She was not an accessory before the fact, because she did not procure, counsel, or command it to be done. She may have become an accessory after the fact, or may have been guilty of the independent offense of receiving stolen goods; but neither of these relations to the case makes her an accomplice. *Lowery v. State*, 72 Ga. 649; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Allen v. State*, 74 Ga. 772.

2. The indictment alleged the ownership of the property to be in one Berry. The proof showed that the money actually belonged to a Tennessee corporation by whom Berry was employed, but that it had been intrusted to Berry for the purpose of paying off hands, and that it was stolen from Berry's trunk, where he had placed it for safe-keeping. This is sufficient.

3. There are other assignments of error in the case, but we find none of them merito-

rious. The testimony against the defendant did not come from a very satisfactory source, and he may not be guilty; but he has had a fair trial, and we have no power or inclination to interfere in such cases.

Judgment affirmed.

(2 Ga. App. 637)

## DAWSON v. STATE. (No. 723.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

### 1. HOMICIDE—ASSAULT TO MURDER—EVIDENCE.

The evidence justified the conviction.

### 2. CRIMINAL LAW—INSTRUCTION—CREDIBILITY OF WITNESSES.

The charge of the court upon the impeachment of witnesses was substantially correct; especially so in view of the fact that the testimony of the witness alleged to have been successfully impeached was corroborated.

### 3. HOMICIDE—ASSAULT TO MURDER—INSTRUCTIONS.

While it is improper for the judge to instruct the jury, without qualification, in a case of assault with intent to murder, that the offense would be complete if an assault were made which, if death had ensued, would have been murder; yet it is entirely correct for the court to charge: "Where a defendant is under the charge of an assault with intent to murder, in order to make out the charge of an assault with intent to murder, the proof made by the state must show that, if the act had resulted in death, the killing would have been murder. If it was not done under such circumstances that the killing would have been murder, the offense of assault with intent to murder would not be made out." *Duncan v. State*, 1 Ga. App. 118, 58 S. E. 248; *Burris v. State*, 58 S. E. 545.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 597-603.]

(Syllabus by the Court.)

Error from Superior Court, Early County; W. C. Worrill, Judge.

John Dawson was convicted of assault with intent to murder, and he appeals. Affirmed.

Park & Collins and Pottle & Glessner, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

POWELL, J. We shall discuss only the matters referred to in the second headnote. There was an attempt to impeach one of the state's witnesses by proof of contradictory statements. There was other testimony corroborating him as to the facts concerning which he testified. The court instructed the jury: "One of the modes of impeaching a witness [is] by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case. When a witness is successfully contradicted as to a material matter, his credit as to other matters is for the jury. But if a witness swear willfully false, his testimony ought to be disregarded entirely, unless corroborated by circumstances, or other unimpeached evidence. It is for the jury to determine the credit to be given his testimony where impeached for general bad character or for contradictory statements out of court. You will

understand now, where an attempt is made to impeach a witness by proof of contradictory statements made out of court, and that is one of the modes of impeachment under the law, it is for the jury to say whether or not that attempt has been successful. If the jury believe that the attempt has been successful, the jury ought to disregard the testimony of the witness, if you believe that the witness was impeached for contradictory statements made out of court. If the jury do not believe that the attempt has been successful, why then the jury will not regard the evidence in the case so far as it relates to the impeachment of the witness." This, we hold, correctly states the rule. See *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; *Smith v. State*, 109 Ga. 479, 35 S. E. 59.

Judgment affirmed.

(2 Ga. App. 632)

**ZEIGLER v. STATE.** (No. 686.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

**1. CRIMINAL LAW—APPEAL—GRAND JURY—BAILIFF IN CHARGE—QUALIFICATION—PRESUMPTIONS.**

Where it appears from an inspection of the minutes of the superior court that a named person was selected as bailiff of the grand jury, a presumption arises that as such bailiff he was duly sworn and qualified to act in such capacity. *Bird v. State*, 53 Ga. 603.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3024, 3033.]

**2. SAME—RECORD.**

There is no law requiring the bailiff of the grand jury to be sworn in open court and the fact entered on the minutes of the court. The solicitor general can properly administer the oath to such bailiff in open court or before the grand jury. Pen. Code 1895, § 798(3).

**3. WITNESSES—COMPETENCY—MEMBERS OF GRAND JURY.**

A member of the grand jury who was present and saw and heard the oath administered to the bailiff in open court is competent to prove that fact. *Elliott v. State*, 1 Ga. App. 113, 57 S. E. 972.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 186.]

(Syllabus by the Court.)

Error from City Court of Sylvania; H. A. Boykin, Judge.

Charlie Ziegler was convicted of an offense, and he brings error. Affirmed.

E. K. Overstreet, for plaintiff in error. T. J. Evans, for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 620)

**RUMSEY v. STATE.** (No. 643.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

**1. COURTS—RULES OF DECISION—PREVIOUS DECISION AS CONTROLLING.**

Upon the general grounds this case is controlled by *Plummer v. State*, 1 Ga. App. 507, 57 S. E. 969.

**2. CRIMINAL LAW—NEW TRIAL—GROUNDS—EXCESSIVE SENTENCE.**

The contention that the sentence is excessive cannot properly be made a ground of a motion for a new trial. *Baldwin v. State*, 75 Ga. 482; *Sturkey v. State*, 116 Ga. 526, 42 S. E. 747; *Bellinger v. State*, 116 Ga. 545, 42 S. E. 747; *Burgamy v. State*, 114 Ga. 852, 40 S. E. 991.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2292.]

**3. SAME—DISQUALIFICATION OF JUROR—RELATIONSHIP.**

"A new trial will not be granted in a criminal case because of the relationship within the prohibited degrees of a juror to the accused, although such relationship was unknown to the accused and his counsel until after verdict." *Downing v. State*, 114 Ga. 30, 39 S. E. 927, wherein previous decisions to the same effect are expressly approved after review. See, also, *Olliff v. State*, 1 Ga. App. 553, 554, 57 S. E. 941.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2225, 2230.]

(Syllabus by the Court.)

Error from Superior Court, Stephens County; J. J. Kimsey, Judge.

Minnie Rumsey was convicted of an offense, and she brings error. Affirmed.

R. A. Naves and McMillan & Erwin, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 638)

**SIMMONS v. STATE.** (No. 747.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

**LARCENY—ELEMENTS OF OFFENSE—ANIMUS FURANDI.**

A conviction for larceny cannot be sustained when all the circumstances are inconsistent with the existence of an animus furandi.

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

Louis Simmons was convicted of larceny, and he brings error. Reversed.

Blalock & Cobb and H. B. Simmons, for plaintiff in error. Zach Childers, for the State.

POWELL, J. The defendant was charged with larceny from the house, in that he stole from the house of George Oliver a bushel of oats, a bushel of corn, and 90 pounds of hay, the property of said Oliver. Oliver did not prosecute, but one Charlie Burke, an employé of his, did so. The undisputed evidence shows that the defendant was a team driver for Oliver, who was a contractor, and who was engaged in having some dirt moved at what is called in the record the "gully," or "fill." Oliver kept in Americus a store and warehouse. It was the duty of the defendant to feed the stock, and he had been bringing them to the stables at the warehouse and feeding them there. On the morning of the alleged larceny, he went to the warehouse,



and in the presence of Oliver's clerk or superintendent, a white employé in the store, whose business it was to overlook the feeding of the stock, took out a bushel of oats, a bushel of corn, and the bundle of hay, put them on the wagon at the side door, and drove around to the front of the store, where Burke, another clerk of Oliver's, stopped him and told him to put the feed back. The defendant stated at the time that he was taking the feed stuff in order that he might feed the mules down at the "gully," where they were working, instead of bringing them back to the warehouse at noon. This occurred in December. The defendant continued to work for Oliver, and Oliver paid him his wages. Afterwards he quit working for Oliver, and at that time was indebted to him in the sum of \$3. After the defendant quit work, thus indebted, Burke, at Oliver's instance, so Burke says, though Oliver denied remembering this instruction, in the April following instituted this prosecution.

That an intent to steal is essential to the existence of the crime of larceny is so elementary as to require no citation of authorities. While this intent may be circumstantially proved, and may be inferred from a state of facts capable of supporting that inference, yet there must be some legal proof of it in every case. We have no hesitancy at all in saying that the facts in this case are utterly inconclusive of any such inference. In fact, the record much more strongly indicates malice in the prosecution than it does guilt on the part of the defendant. *Mitchell v. State*, 103 Ga. 17, 29 S. E. 435; *Causey v. State*, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447.

Judgment reversed.

(2 Ga. App. 638)

#### McDONALD v. STATE. (No. 689.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

#### 1. CRIMINAL LAW—EVIDENCE—JUDICIAL NOTICE—MONETARY STANDARD.

The courts will judicially recognize that the word "dollar" is the money unit of the United States of the value of 100 cents, and will also recognize the different kinds and denominations of the currency issued by the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 714.]

#### 2. SAME—"GREENBACK."

The courts judicially know that the term "greenback" is the popular name used to designate a certain species of the currency of the United States.

#### 3. LARCENY—MONEY—DESCRIPTION.

The description of the property stolen in an accusation for larceny as "ninety dollars of the lawful currency of the United States of America" is sufficiently proved by evidence that the money was in \$10 and \$20 bills; that one of the bills had the word "gold" on it, and the rest of the money was "greenback."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 155.]

#### 4. SAME—EVIDENCE.

The evidence required the judgment rendered, and there was no error of law.

(Syllabus by the Court.)

#### 5. WORDS AND PHRASES—"DOLLAR."

The word "dollar" is used to signify the money unit of the United States of the value of 100 cents. It imparts to the common understanding the meaning of a thing of value.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2160-2164.]

#### 6. SAME—"GREENBACK."

The term "greenback" is a popular name applied to all United States treasury notes.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3164-3165.]

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Joe McDonald was convicted of larceny, and from an order vacating a writ of certiorari he brings error. Affirmed.

Kenan Crawford, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Carl Vinson, for the State.

HILL, C. J. Plaintiff in error was tried by the judge of the county court of Baldwin county without a jury, on an accusation charging him with the offense of simple larceny. He was adjudged guilty, and thereupon petitioned for a writ of certiorari. His petition was sanctioned, and the writ granted. On the hearing of the certiorari by the judge of the superior court of said county, the same was overruled, and to this judgment error is assigned.

There is but a single question made by the record for the decision of this court. Was the property alleged to have been stolen sufficiently proved as described in the accusation? The accusation describes the property feloniously taken and carried away as "ninety dollars of lawful currency of the United States of America of the personal goods of one Jordan Lord of the value of ninety dollars." The evidence pertinent to said allegation and descriptive of the property stolen was as follows: The prosecutor testified "this money (referring to the stolen money), was in \$10 and \$20 bills. I counted it, and there was \$90. This money was given me in payment of a check on the Merchants' & Farmers' Bank at Pelham at said bank. This money was in my pocketbook, a black leather book with Merchants' & Farmers' Bank of Milledgeville stamped on it. I don't know just what kind of money was in the book. It was paper bills, tens and twenties, such as I have used every two weeks for the last few years and passed as money. I never read any of the bills except the figures on them showing the amount of these bills. I do not know whether they were issued by the United States government or the Bank of England, or any other bank. All I can say about that is that it was the kind of money that I had gotten from the bank and used and other people have used. It was worth \$90." Another witness described the money as follows: "I counted the money twice. There was \$90 in all, three \$20 bills and three \$10 bills. One of the

bills had 'gold' on it. The rest of it was greenback."

It is well settled that the accusation need not have alleged that the property or money stolen was lawful currency of the United States, yet, if alleged, the description must be proved as laid. *Watson v. State*, 64 Ga. 61; *Fulford v. State*, 50 Ga. 591. "If a necessary allegation is made unnecessarily minute in description, the proof must satisfy the description as well as main fact, since the one is essential to the identity of the other." 1 Bishop, *New Criminal Procedure*, § 484; *Clark, Crim. Procedure*, 182. In our opinion, the proof sustained the allegation as laid in the accusation. In other words, we think that the evidence sufficiently shows that the property alleged to have been stolen was lawful currency of the United States of America.

The prosecutor described the property stolen as \$90 in money in \$10 and \$20 bills, such as he had used every two weeks for three years and passed as money; the same kind of money that he had gotten from banks and used and other people had used. The courts will judicially recognize that the word "dollar" is the money unit of the United States of the value of 100 cents. The word "dollar" imparts to the common understanding the meaning of a thing of value, and when the charge is that the defendant stole \$90 in lawful currency of the United States, it means by common understanding that that amount of money in coin, banknotes, or notes issued by the government of the United States, was stolen by him. *Leonard v. State*, 115 Ala. 80, 22 South. 564. The courts also will judicially recognize that among the denominations of currency issued by the government of the United States are \$10 and \$20 treasury notes and national bank notes. Under the allegations of the accusation, the currency in question might either have been coin or notes or bills issued by authority of the United States. Under the evidence, it is definitely shown that the currency in question was either the notes or bills issued by the national banks of the United States or Treasury notes of the United States. It matters not which, for both are lawful United States currency. No other money of the denomination of \$10 and \$20 bills is current in and circulated throughout the United States as a medium of trade except the foregoing. The evidence is that these bills were procured at a bank and were similar to the money which had been used by the prosecutor for years, as well as by other people. There can be but one rational conclusion from the foregoing evidence: That the \$90 stolen was lawful currency of the United States.

Another witness describes the money as three \$20 bills and three \$10 bills. One of the bills had the word "gold" on it, and the rest were greenbacks. The term "greenback" is a popular name applied to all United States Treasury notes. This being the case,

it is as certain in the description of the property stolen as if the phrase "Treasury notes" had been used. *Hickey v. State*, 23 Ind. 21. United States notes are commonly known as "greenbacks." *United States v. Howell* (C. C.) 64 Fed. 110. In an indictment which alleges the larceny of \$80 in money, consisting of \$10 bills and \$20 bills currency of the United States of America, if the evidence shows that the money stolen consisted of "greenbacks," without any other description, there is no variance. *Gady v. State*, 83 Ala. 429, 8 South. 429; *Levy v. State*, 79 Ala. 259. Where the indictment charged larceny of Treasury notes, it was held sufficient to prove that the property stolen was "greenbacks." *Hickey v. State*, 23 Ind. 21. Treasury notes of the United States, or in common parlance "greenbacks," are lawful currency of the United States, and a legal tender in the payment of all debts, private or public. Act Cong. May 31, 1878, c. 146, 20 Stat. 87 [U. S. Comp. St. 1901, p. 2397]; *Legal Tender Case*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. We think also that the fact, as testified to, that one of the bills had the word "gold" printed on it, strongly indicated that such bill was a "gold certificate," or lawful currency issued by authority of the United States. Besides, the court judicially knows that Treasury bills or greenback and gold certificates, as matter of law, are prima facie of the commercial value equal to that imported by their face; but there was both allegation and positive proof that these bills were of the value of \$90.

In short, we are clearly of the opinion that the evidence in this case sufficiently established the allegations made in the accusation that the money stolen was lawful currency of the United States. To hold otherwise would be absurd, and, under the undisputed facts in this case, a palpable miscarriage of justice. The judgment of the lower court in overruling the certiorari is therefore affirmed.

Judgment affirmed.

(3 Ga. App. 651)

CARLISLE v. STATE. (No. 698.)

(Court of Appeals of Georgia. Oct. 15, 1907.)

FALSE PRETENSES—INDICTMENT—MISREPRESENTATIONS OF OWNERSHIP.

In a prosecution for cheating and swindling through the making of false representations as to the ownership of property, an allegation in the indictment that the defendant knew that the representations made by him were false is a material allegation and must be supported by the proof in the case. As to this element of the charge in the present case, the testimony, which was circumstantial only, was too inconclusive to justify a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 37, 62.]

(Syllabus by the Court.)

Error from City Court of LaGrange; Frank Harwell, Judge.

Stanmore Carlisle was convicted of cheating by false pretenses, and he brings error. Reversed.

E. T. Moon and D. B. Whitaker, for plaintiff in error. Henry Reeves, for the State.

POWELL, J. The indictment charged that the defendant "unlawfully did defraud and cheat W. A. Holmes in the sum of one hundred and twenty-five dollars by reason of the following means and artful practice, to wit: Said Carlisle and Burpee represented to said Holmes that said Carlisle owned a certain red colored horse mule for the purpose of selling said mule to said Holmes, and, relying upon said representation being true, he, the said Holmes, bought said mule from said Carlisle and Burpee, and paid him therefor the sum of one hundred and twenty-five dollars, when said representations were false, and said Carlisle and Burpee then and there knew were false, and intended to be false, the truth being that said Carlisle did not own said mule, which truth said Carlisle and Burpee then and there well knew, and because of said false and fraudulent representations said Holmes sustained loss as aforesaid, which was intended by defendant." The evidence for the state shows that the defendant and one Burpee came to town leading the mule behind a buggy. The prosecutor asked the defendant what he would take for the mule, and made him an offer for it. The defendant said that he had bought the mule out of a drove, and that no one else had owned it since. He said that it was his own mule. In response to an inquiry as to the mule's eyes he said that he had worked the mule on his farm; that he bought it two or three years ago. Burpee also told the prosecutor that he had better buy the mule, that it would be a good trade, and finally the trade was closed at the original offer of \$125. The prosecutor then delivered the mule into the care of one Cameron. About 12 months later, two men, one of them claiming to be the sheriff of an adjoining county, came and got the mule from Cameron. One Hendricks then testified that he was the man who went with the sheriff to Cameron's and got the mule. That it was his mule. That shortly before the time the defendant sold the mule to the prosecutor the mule had disappeared from his home in the adjoining county. That he did not know how he got away; that he had mortgaged the mule to Burpee and also to his cousin. The mule was taken from Cameron's under the foreclosure of the mortgage which he had given his cousin. That while he did not know how the mule got away from his place, yet it was taken away without his consent. That he got home one night about 11 o'clock and found the lock to his barn broken and the mule gone. This was all the evidence for the state. The defendant stated that he bought the mule from Burpee

out of a drove which Burpee had, and gave him \$100 for it; that he did not know anybody had an interest in the mule, or that anything was wrong with it; that he bought it in good faith, and believed that it was his mule; that he told the prosecutor that he had bought the mule out of Burpee's drove, which was a fact.

In a prosecution of this kind, knowledge on the part of the defendant that the representation made by him is false is material. A mere false statement by the defendant, accompanied by loss to the prosecutor, is not sufficient. While such knowledge may be proved indirectly or inferentially, yet the burden is upon the state to make it appear, and if the facts proved are consistent, reasonably consistent, with the defendant's lack of knowledge, he cannot be convicted. The defendant, it is true, did state that he owned the mule, but he stated in connection therewith that he bought it out of a drove, and, according to the undisputed testimony, bought it out of Burpee's drove. Burpee was present when this statement was made, and, so far as the record shows, made no denial of this fact. While the testimony of the defendant that he had owned the mule for two or three years was false, and under the testimony probably knowingly false, yet the length of time that he owned the mule was not material in the state of his title. And while ordinarily the falsity of this statement might have had some probative value as tending to show a fraudulent design on the defendant's part for the purpose of concealing the true state of his title, yet in the present instance this inference cannot be legitimately indulged, because this statement as to the length of time he had owned the mule was not made in response to any inquiry as to the state of his title, but in response to an inquiry in regard to a defect in the eyes of the mule. If the prosecution had been based upon any fraud in connection with the condition of the mule's eyes, then this statement would have been material and of strong probative value; but not so in the present case. There was no proof that the defendant did not buy the mule out of Burpee's drove, just as he said he bought it; that he paid \$100 for it; and that he believed he owned it. That he did buy it out of Burpee's drove is corroborated somewhat by the fact that Burpee had a mortgage on the mule, as well as in the fact that while the mule was taken from Hendrick's lot, in Hendrick's absence, he did not appear to set up the contention that the mule had been stolen from him, and this fact would further indicate that he recognized that the mule had probably been taken by Burpee under the mortgage; the act of seizure being made in Hendrick's absence. If the state had shown that the defendant did not buy the mule from Burpee's drove, or had shown circumstances indicating that he and Burpee had conspired and colluded together to sell a mule which he knew to have been unlawfully taken by Burpee, a

conviction could be sustained; but not so in the present state of the record. See *Crawford v. State*, 117 Ga. 247, 252 (4), 43 S. E. 762.

Judgment reversed.

(2 Ga. App. 649)

**THARPE v. STATE.** (No. 676.)

(Court of Appeals of Georgia. Oct. 15, 1907.)

**CRIMINAL LAW—COMMISSION OF OFFENSE—TIME.**

It is essential to a conviction that the proof show that the offense was committed prior to the returning of the indictment or the filing of the accusation. *Davis v. State*, 92 Ga. 458, 17 S. E. 336.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1270.]

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

Landy Tharpe was convicted of an offense, and he brings error. Reversed.

R. L. Tipton and J. H. Tipton, for plaintiff in error. J. A. Comer, for the State.

**POWELL, J.** Judgment reversed.

(2 Ga. App. 657)

**BROWN v. STATE.** (No. 732.)

(Court of Appeals of Georgia. Oct. 15, 1907.)

**1. LANDLORD AND TENANT—CROPPERS—OFFENSES—DISPOSAL OF CROP.**

A prosecution under Pen. Code 1895, § 680, will not lie for the protection of the landlord as to any indebtedness other than advances necessary to make the crop.

**2. SAME—EVIDENCE.**

The conviction is not justified by the evidence.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

G. W. Brown was convicted of selling a crop without the consent of his landlord, and brings error. Reversed.

H. B. Strange, for plaintiff in error. Fred T. Lanier, for the State.

**POWELL, J.** The defendant was a cropper of the prosecutor, and he was tried and convicted of a violation of section 680 of the Penal Code of 1895, which provides: "Any cropper who shall sell or otherwise dispose of any part of the crop grown by him, without the consent of the landlord, and before the landlord has received his part of the entire crop and payment in full for all advances made to the cropper in the year the crop was raised, to aid in making it, shall be guilty of a misdemeanor." The accusation alleged a loss of \$31.25.

The only items definitely shown by the evidence to be owing by the defendant to the prosecutor were for an old buggy, \$15, and for a doctor's bill of \$16, not contracted with the prosecutor, but bought up by the prose-

cutor from the physician. The Code section does not protect landlords as to indebtedness due them other than advances necessary to make the crop. The buggy was primarily not such an article of necessity to make the crop, nor was it shown to be by the evidence. The physician's bill was not an advancement by the landlord at all. *Elliott v. Parker*, 94 Ga. 620, 20 S. E. 106; *Brimberry v. Mansfield*, 86 Ga. 794, 13 S. E. 132; *Scott v. Pound*, 61 Ga. 579; *Barge v. Weems*, 109 Ga. 685, 35 S. E. 65. There are other indications in the record that the prosecution did not come up to the true spirit of the section cited from the Penal Code, but the above reason alone is sufficient to require a reversal. Judgment reversed.

(2 Ga. App. 659)

**LEWIS v. STATE.** (No. 649.)

(Court of Appeals of Georgia. Oct. 16, 1907.)

**1. RIOT—ELEMENTS OF OFFENSE—EVIDENCE.**

Where three men in front of a citizen's house at night curse and threaten him in loud voices, repeatedly firing a gun thereby greatly frightening him and members of his family, each participating in such conduct, they are all guilty of the offense of riot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Riot, § 1.]

**2. SAME—INSTRUCTIONS.**

The excerpts objected to, when considered in connection with the entire charge, contain no material or hurtful error of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1990.]

**3. SAME—EVIDENCE.**

The evidence supported the verdict, and the judgment of the court refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from City Court of Waynesboro; P. P. Johnston, Judge.

Tom Lewis was convicted of riot, and he brings error. Affirmed.

Brinson & Davis and H. J. Fullbright, for plaintiff in error. F. S. Burney and Lawson & Scales, for the State.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 648)

**KOLMAN v. STATE.** (No. 672.)

(Court of Appeals of Georgia. Oct. 15, 1907.)

**1. INTOXICATING LIQUORS—OFFENSES—KEEPING OPEN ON SUNDAY—EVIDENCE.**

The evidence is legally insufficient to justify the conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 158, 231.]

(Syllabus by the Court.)

**2. WORDS AND PHRASES—"TIPPLING HOUSE."**

A barroom is a "tippling house," within the law requiring tippling houses to be closed on Sunday.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6976-6978.]

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Mary Kolman was convicted of keeping her tippling house open on Sunday, and she brings error. Reversed.

Gordon & Charlton, for plaintiff in error.  
W. W. Osborne, Sol. Gen., for the State.

POWELL, J. Mrs. Kolman and one Johnson were jointly indicted, tried, and convicted of the offense of keeping open a tippling house on the Sabbath. Mrs. Kolman alone excepts. The testimony upon which the conviction against Mrs. Kolman rests is substantially as follows: Mrs. Kolman ran a barroom and grocery store at the corner of Bryan and Jefferson streets in Savannah. One Sunday a man named Green saw two men standing at a gate to the rear of her premises, and he approached them and said he wanted some whisky. Johnson took the money and went off across the yard in the direction of the bar, and soon came back with a pint of whisky, which he delivered to Green. The witness was unable to say whether he entered the bar or not. So far as he knew, the bar was closed. Mrs. Kolman made a statement in which she said that her bar and grocery store were closed throughout the entire Sabbath, and that she had the key in her pocket. Johnson made a statement in his behalf in which he said that he had the whisky on his person, and that though he worked for Mrs. Kolman he did not open the bar. The state in rebuttal proved that Johnson after his arrest had admitted that he went into the bar and got the whisky.

As a matter of law, the barroom was a tippling house. If the room was opened on the Sabbath day, even for a moment, by Mrs. Kolman or by her clerk or agent, with her consent, actual or tacit, she was guilty. *Klug v. State*, 77 Ga. 737, and cases cited. If it was opened by her clerk or employé, the burden was on her to show both lack of knowledge and lack of consent as to the fact. *Klug's Case*, supra. But where is the legal evidence that the room was opened, or that Johnson was her employé? Johnson's statement that he was her employé, and his admission that he had entered, was evidence solely against him and has no probative value against her. *Berry v. State*, 122 Ga. 429, 50 S. E. 345. Johnson was properly convicted, but as to Mrs. Kolman the Scotch verdict of "not proven" needs be entered.

Judgment reversed.

nature of the offense, the accusation is not demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 182.]

## 2. CRIMINAL LAW—EVIDENCE—JUDICIAL NOTICE.

The court judicially knows that the land lots in what was formerly Irwin county, then Worth, and now Turner county, contained 490 acres of land. The words "two hundred and forty acres of land, second district, lot of land No. 70," would not indicate in what portion of land lot No. 70 the premises lay. Consequently, an objection to this evidence, as contained in the register of posted land, should have been sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 705.]

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

John, alias Will, Williams was convicted of fishing on posted land after he had been forbidden by the owner, and he brings error. Reversed.

John B. Hutcheson, for plaintiff in error.  
J. A. Comer, for the State.

RUSSELL, J. The defendant was convicted of misdemeanor—fishing with hook and line on land duly posted according to law after he had been forbidden by the owners thereof. Before trial he demurred to the accusation and filed exceptions pendente lite to the order of the court overruling the same. The overruling of the demurrer and the judgment refusing a new trial are the errors presented for our consideration.

1. We think the demurrer was properly overruled. The accusation sets forth the offense charged with sufficient clearness for the defendant to be enabled to prepare his defense and for the jury to clearly understand the charge against him.

2. We think that the court erred in admitting the register of posted lands for Turner county. The objection of defendant's counsel that the register failed to describe the lands posted and identify them as the lands on which defendant was alleged to have illegally fished was well taken. The court judicially knows that the land lots in what was formerly Irwin county, then Worth, and now Turner, contained 490 acres of land. The description in the register of the land posted was too vague and indefinite for purposes of description. "Two hundred and forty acres of land, second district, lot of land No. 70," would not indicate the location of the land or in what portion of the lot of land it lay. The 240 acres might be on the north side of the lot, the east side of the lot, west side, south side, or in the center of the lot. The evidence should have been repelled, and for this reason a new trial should have been granted.

The second ground of the motion, as stated, presents no reason why the court should

(2 Ga. App. 629)

WILLIAMS v. STATE. (No. 678.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

## 1. INDICTMENT AND INFORMATION—REQUISITES.

Where every essential ingredient of the offense charged is set forth with sufficient clearness to enable the defendant to prepare his defense and the jury clearly to understand the

have ordered a mistrial, and the grounds complaining of the judge's charge present no such assignment of error as can be considered by this court.

The fourth ground cannot be considered, because it is well settled that the overruling of a demurrer is not a proper ground of a motion for a new trial. For these reasons it is unnecessary to consider any of the remaining grounds of the motion for new trial. Judgment reversed.

(2 Ga. App. 639)

**WILLIAMS v. STATE. (No. 677.)**

(Court of Appeals of Georgia. Oct. 14, 1907.)

**1. CRIMINAL LAW—WRIT OF ERROR—SCOPE OF REVIEW—NEW TRIAL—GROUNDS—VERIFICATION.**

The grounds of error set out in the amendment to the motion for a new trial, not having been approved or verified by the trial judge, will not be considered by this court. *Jackson v. State*, 116 Ga. 834, 43 S. E. 255; *Dunn v. State*, 116 Ga. 515, 42 S. E. 772; *Taylor v. Brown*, 114 Ga. 290, 40 S. E. 281; *Long v. Scanlan*, 105 Ga. 424, 31 S. E. 436.

**2. SAME—PLEA IN ABATEMENT—EXCEPTIONS.**

A judgment sustaining a demurrer to a special plea in bar to an indictment cannot be made a ground of a motion for a new trial. Exception to such judgment must be taken either by a bill of exceptions sued out within twenty days from the date of the judgment, or by exceptions pendente lite properly allowed and certified on which error is duly assigned. *Rogers v. State*, 1 Ga. App. 527, 58 S. E. 236; *Long v. State*, 118 Ga. 319, 45 S. E. 416.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2152.]

**3. SAME—EVIDENCE—REVIEW.**

The statutory grounds of the motion for a new trial are without merit; there being some

evidence to support the verdict which was approved by the trial court.

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

George Williams was convicted of an offense, and he brings error. Affirmed.

R. L. Tipton and J. H. Tipton, for plaintiff in error. J. A. Comer, Sol., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 639)

**HARRIS v. STATE. (No. 674.)**

(Court of Appeals of Georgia. Oct. 16, 1907.)

**1. CRIMINAL LAW—WRIT OF ERROR—ASSIGNMENTS OF ERROR—APPROVAL—REVIEW.**

The assignments of error made in the amendment to the motion for a new trial, not being approved by the trial judge, will not be considered by this court.

**2. SAME—BRIEF OF EVIDENCE.**

There being no approved brief of evidence in the record, the statutory grounds for new trial cannot be decided.

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

Emanuel Harris was convicted of an offense and he brings error. Affirmed.

R. L. Tipton and J. H. Tipton, for plaintiff in error. J. A. Comer, Sol., for the State.

HILL, C. J. Judgment affirmed.

(145 N. C. 232)

McCASKILL et al. v. WALKER et al.

(Supreme Court of North Carolina. Oct. 16, 1907.)

**NONSUIT—MOTION—CONSTRUCTION OF EVIDENCE.**

Upon a motion for nonsuit, the evidence must be taken in its most favorable view for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 374.]

Appeal from Superior Court, Robeson County; Webb, Judge.

Action by J. C. McCaskill and another against Sarah E. Walker and others. From a judgment of nonsuit, plaintiffs appeal. Reversed and remanded for new trial.

McIntyre & Lawrence and J. D. Proctor, for appellants. R. H. Battle & Son and McLean & McCormick, for appellees.

**BROWN, J.** It is admitted that John Walker, Jr., was seised and possessed of the lands in controversy. The evidence shows that he conveyed the land by deed dated June 2, 1869, to Hector J. MacLean, under whom plaintiffs claim. The record evidence tends to prove that plaintiff McCaskill claims three fourths of the land by purchase from the heirs of Hector J. MacLean, and the other fourth is claimed by plaintiff Lola Wright, the remaining heir at law of said MacLean. The defendants pleaded adverse possession, and that Hector J. MacLean obtained the deed to the land from John Walker, Jr., by fraud, and that defendants are the heirs at law of Walker and claim the land as such.

The ground of the nonsuit, as we understand the record, is that the evidence offered by the plaintiffs proves title in the defendants by adverse possession, and that therefore the plaintiffs, upon their own showing, are not entitled to recover. We do not think that the evidence as set out in the record is sufficient to sustain his honor's ruling. The evidence tends to show that there were two tracts of land owned by John Walker, a 40-acre tract, which is the one in controversy, and a 32-acre tract, whereon John Walker lived, and died in 1872, and where, according to the evidence of one witness, the widow and children of John Walker have lived ever since. The evidence, taken in its most favorable view for plaintiff, as is the rule upon a motion to nonsuit, tends to prove that the 40-acre tract is woodland and was used for getting firewood and straw very generally from 1888 to 1901 by those claiming under Hector J. MacLean. There is some evidence also of a like use by defendants during same period, but it is not sufficiently definite, certain, and exclusive to justify a court in holding as matter of law that it establishes adverse possession for 20 years.

His honor erred in sustaining the motion. New trial.

58 S.E.—68

(146 N. C. 203)

BRICK v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1907.)

**1. JUDGMENT—RES JUDICATA.**

A judgment of the Supreme Court, affirming a judgment for defendant rendered on appeal from a justice's judgment on the ground that the justice had no jurisdiction of the subject-matter, is not a bar to a subsequent suit on the same cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1001, 1009.]

**2. CARRIERS—TRANSPORTATION OF BAGGAGE—LIABILITY.**

A carrier is an insurer of the personal baggage of a passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1519.]

**3. SAME—PERSONAL BAGGAGE—WHAT CONSTITUTES.**

The personal baggage of a passenger includes jewelry carried for his personal use, but not that carried for sale or for the use of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1520–1523.]

**4. SAME—CARRIAGE OF BAGGAGE.**

The carriage of the personal baggage of a passenger is incident to the ticket purchased, and is personal to the user of the ticket, except where several members of a family are traveling together, in which case articles belonging to them may be checked as the baggage of one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1507.]

**5. SAME—LOSS OF BAGGAGE—RIGHT OF ACTION.**

Where the user of a ticket was not the owner of the goods checked as baggage, and he and the owner were not traveling together, the owner was the proper party to sue for loss of the baggage, and not the user of the ticket.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1559.]

**6. SAME—LIABILITY OF CARRIER.**

Where goods not the personal baggage of a passenger are checked as his baggage without the fact being brought to the knowledge of the carrier, the carrier is liable only as a gratuitous bailee, and to recover for a loss gross negligence or willful injury must be clearly shown.

**7. APPEAL—REVIEW—HARMLESS ERROR.**

In an action against a carrier by the owner of lost baggage, which had been checked on a ticket bought for another person, a charge that plaintiff could not recover, while error, because the carrier, being a gratuitous bailee, was liable for gross negligence, was harmless; there being no evidence of gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219–4228.]

Appeal from Superior Court, Robeson County; Webb, Judge.

Action by A. B. Brick against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Affirmed. See 55 S. E. 194.

The plaintiff sued to recover the value of the contents of a trunk by him delivered to the defendant. It was in evidence that the plaintiff, who was a merchant, packed the trunk with certain wearing apparel, and also placed therein certain jewelry. The plaintiff purchased a ticket and checked the baggage and delivered the ticket to his brother, who

was a clerk in the employ of plaintiff, and who was going to Chadbourne for the purpose of clerking in the plaintiff's store. Plaintiff's brother used the ticket. The jewelry was to be sold in plaintiff's store at Chadbourne. Demand was made upon the defendant for the baggage, and it has failed to produce same or account for its nonproduction. It is admitted that the defendant had no knowledge of the contents of the trunk. The value of the wearing apparel was \$46.75, and the jewelry \$207.83. On the trial of a former action before the justice, plaintiff remitted all of his claim in excess of \$200. The justice rendered judgment for plaintiff, and defendant appealed. Upon the trial in the superior court, his honor charged the jury that in no event could the plaintiff recover the value of the jewelry. Thereupon a verdict was rendered for \$46.75, the value of the wearing apparel, and plaintiff appealed to the Supreme Court. This court affirmed the judgment below, declaring that the justice had no jurisdiction of the cause of action for the value of the jewelry, inasmuch as this demand was in tort and in excess of \$50. 142 N. C. 359, 55 S. E. 194. Thereupon the plaintiff instituted this new action in the superior court, founded in tort, asking for the recovery of the value of the jewelry. A jury trial was waived, and thereupon the court found the facts to be as testified to by the plaintiff on the former trial. His honor further found the value of the jewelry to be \$207.83. Upon the uncontroverted facts his honor, being of opinion that the plaintiff could not recover, consulted the plaintiff, and he appealed.

McIntyre & Lawrence, for appellant. McLean, McLean & McCormick, for appellee.

CLARK, C. J. The plaintiff is not estopped by the former judgment (142 N. C. 359, 55 S. E. 194), because it was held therein that the court of justice of peace (in which that action began) had no jurisdiction as to the tort for nondelivery of the jewelry. The subject-matter of this action was not passed upon, and could not have been, in that action. *Harrington v. Hatton*, 130 N. C. 89, 40 S. E. 848; *Smith v. Garris*, 131 N. C. 34, 42 S. E. 445.

The common carrier is "insurer of the personal baggage of the passenger, and this includes jewelry, carried for the personal use of the passenger, to a reasonable extent, but not when it is carried for the purpose of sale or for the use of some one else." 3 A. & E. Encyc. (2d Ed.) 534; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587. This last case, citing many others (page 642, of 148 U. S. [13 Sup. Ct. 711, 37 L. Ed. 587]), holds that in such case the carrier is chargeable merely with the duty of a gratuitous bailee and liable not in contract, but in tort, and hence only for gross negligence or willfulness. "Articles carried for sale are not

baggage, whatever the articles may be." 2 Fetter, Carriers of Passengers, § 587, p. 1440, and cases cited. Nor is the carrier insurer of merchandise delivered to the carrier by a passenger as personal baggage, without notice of the contents. Id. § 602, p. 1459; 6 Cyc. 668; 3 A. & E. Encyc. (2d Ed.) 539; 3 Thomp. Neg. § 3417, and cases cited.

Even when it is personal baggage, the carriage is incident to the ticket purchased, and is personal to the user of the ticket. There are exceptions, as where several members of a family or husband and wife are traveling together, and articles belonging to both are in a trunk. 3 Thomp. Neg. 3424. The user of the ticket in this case was not the owner of the trunk and contents, nor were he and the owner traveling together. He could not recover for the baggage of another. 3 A. & E. Encyc. 533; 2 Fetter, Carriers, § 600, p. 1455. This action is properly brought by the party in interest, the owner of the property.

Where the baggage is not personal baggage, or, if such, when it is not the personal baggage of the passenger, it is a fraud on the carrier, unless that fact is made known, and the baggage is notwithstanding accepted for carriage. Unless this is done, there is no contract, and the liability of the carrier is that of a gratuitous bailee, responsible only for gross negligence or willful injury. 1 Fetter, Carrier of Passengers, § 607, p. 1470; 3 A. & E. Encyc. 533. In such cases, negligence must be clearly shown and cannot be presumed by the mere fact of loss or injury, as in the ordinary case of loss of, or injury to, the personal baggage of a passenger. 3 A. & E. Encyc. (2d Ed.) 542; *Young v. Railroad*, 116 N. C. 936, 21 S. E. 177. It would be otherwise if the carrier received the trunk with knowledge of its contents. *Trouser Co. v. Railroad*, 139 N. C. 382, 51 S. E. 973, where the subject is fully discussed by Walker, J.

The plaintiff here can maintain the action, though he was not the passenger using the ticket, but only by showing gross negligence or willful misconduct.

The court erred in holding that in no event could the plaintiff recover; but, as there was no evidence of gross negligence, this was harmless error, and the judgment is affirmed.

(145 N. C. 234)

#### FLOWERS v. KING.

(Supreme Court of North Carolina. Oct. 16, 1907.)

#### 1. JUDGMENT—VACATING—VOID JUDGMENT.

Where the summons was not served on defendant, and he did not enter an appearance nor have any knowledge of the action until after default judgment, the judgment was void and might be set aside on his motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 686.]

#### 2. SAME—PROOF OF MERITS—NECESSITY.

A judgment which is void because of want of jurisdiction of the party against whom ren-



dered may be set aside without proof of merits, though an irregular judgment is ordinarily not disturbed without proof of facts making a valid defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, §§ 751, 752.]

Appeal from Superior Court, Wayne County; E. B. Jouis, Judge.

Ejectment by Charles Flowers against Lewis King. From a judgment setting aside a default judgment for plaintiff and restoring defendant to possession, plaintiff appeals. Affirmed.

Aycock & Daniels and Isaac F. Dortch, for appellant. Stevens, Beasley & Weeks, for appellee.

HOKE, J. It appears from the facts found by the judge on the hearing that defendant has been ejected from a piece of land by virtue of final process of the court issued on a judgment by default in the present cause; the original process having been served on a different man of the same name as the defendant. In regard to service on defendant, the court finds the facts to be as follows: "The court finds that the summons in this action had never been served upon the real defendant, Lewis King, a negro, and the said Lewis King has never entered an appearance in said suit, either in person or by attorney, and had no knowledge of the pending action until the writ of possession was served upon him." On these facts it is well established with us that the judgment against the defendant is absolutely void, and may be set aside on motion of defendant or treated as a nullity when and wherever the entire lack of jurisdiction is made to appear. Card v. Finch, 142 N. C. 140, 54 S. E. 1009; Carter v. Roundtree, 109 N. C. 29, 18 S. E. 716; Doyle v. Brown, 72 N. C. 398; Copper Co. v. Martin, 70 N. C. 300; Black on Judgments, § 807. It is urged that the judgment should not be set aside because the affidavits have failed to disclose any facts which would enable the defendant to make a valid defense against the plaintiff's demand. This is usually required before a court will disturb an irregular judgment. As said in Becton v. Dunn, 137 N. C. 559-562, 50 S. E. 289, 290, speaking of irregular judgments: "The authorities are all to the effect that an irregular judgment may be set aside at a subsequent term, independent of section 274 of the Code. Wolfe v. Davis, 74 N. C. 597. This is not done as a matter of absolute right in the party litigant, but rests in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time." But no such requirement exists when the judgment is void by reason of an entire lack of jurisdiction of the party. In that case the judgment is a nullity, and the party affect-

ed is entitled to have same set aside, whenever such fact is made to appear, and without proof or suggestion of merits. Black on Judgments, § 348, citing Dobbin v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; Roberts v. Pawley, 50 S. C. 491, 27 S. E. 913. The doctrine of the text is fully supported by the authorities cited and is in accord with the principles established by our own decisions.

There is no error, and the judgment of the court below is affirmed.

Affirmed.

(145 N. C. 218)

## MODLIN v. ROANOKE R. & LUMBER CO.

(Supreme Court of North Carolina. Oct. 16, 1907.)

### 1. DEEDS—CONSTRUCTION—RECONCILING DIFFERENT DESCRIPTIONS.

The rule of construction of deeds that a specific description will control a former more general description only obtains to the extent required to reconcile the two descriptions, in subordination to the principle that all the clauses of a deed should be given effect as far as they can be harmonized by fair interpretation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 267-273.]

### 2. LOGS AND LOGGING—SALE OF STANDING TIMBER—DEED—CONSTRUCTION.

A deed conveyed "all the pine, oak, ash, cypress and poplar timber \* \* \* upon" a certain tract, "containing forty-two acres more or less, all the pine, poplar, and cypress timber on said land on the southern side of Cooper swamp, and in said swamp and ravines." Held, that the deed conveyed all the pine, oak, ash, cypress, and poplar on the entire tract, except as to that portion of the timber lying on the south side of Cooper swamp, and as to that only the pine, poplar, and cypress timber was passed.

### 3. FRAUD—ACTIONS—REMEDY.

One who has been induced to convey property by fraud may elect to sue to set aside the conveyance, unless the property has passed to a purchaser for value without notice, or he may allow the conveyance to stand and sue for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 27.]

### 4. SAME—CONDITIONS PRECEDENT.

Where one has been induced to convey property by fraud, a return or offer to return what he has received under the contract is not a condition precedent to his suing for deceit, since he is entitled to the benefit of the contract plus the damage caused by the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 29.]

### 5. DEEDS—EXTRINSIC EVIDENCE—CONSTRUCTION.

An option on property given prior to a deed of it is inadmissible in aid of the description in the deed, where the latter stands alone as embodying the contract, and makes no reference to the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 239.]

### 6. FRAUD—DECEPTION CONSTITUTING FRAUD—FRAUDULENT REPRESENTATIONS.

One who intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable, where another is thereby injured, as one who

makes an assertion which he knows to be untrue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 3-5.]

#### 7. SAME—ACTIONS—NATURE OF REMEDY.

Where one has been induced to convey timber by fraud, and the timber has been again conveyed to a bona fide purchaser, the right of the original seller to an action for deceit is not affected by the fact that the timber has not yet been removed.

#### 8. SAME—LIMITATIONS—ACCRUAL OF ACTION.

The registration of a fraudulent deed which conveyed property other than that intended by the donor was not sufficient notice of the fraud to set in motion Revisal 1905, § 395, subsec. 9, providing a limitation of three years for an action for fraud, and that the cause of action shall not be deemed to have accrued until discovery of the fraud.

Connor, J., dissenting.

Appeal from Superior Court, Martin County; Biggs, Judge.

Action by C. S. Modlin against the Roanoke Railroad & Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence tending to show that on the 15th of November, 1899, plaintiff contracted to sell to defendant company that portion of the pine, cypress, and poplar timber on a tract of land belonging to plaintiff, and known as the "Harmon-Modlin land," which was situated on the south side of Cooper swamp, "as far as the muck and mire" comes, for the sum of \$60; that plaintiff was an ignorant man, being unable to read or write, and that on the 18th of November following the defendant company, by false and fraudulent representations as to its contents, and making plaintiff believe that it was in compliance with the contract, induced plaintiff to execute a deed conveying to defendant company a much larger amount of the timber on the said tract than was included in the terms of the contract; that defendant afterwards sold the timber to the Dennis-Simmons Lumber Company, and conveyed same to that company by deed in the exact terms of the said deed to defendant, and by reason of the fraud and deceit so practiced on plaintiff he was damaged to the amount of \$1,000. The action to recover damages for said wrong was commenced on the 3d day of April, 1906, and that the fraud practiced on plaintiff by defendant and the sale to Dennis-Simmons Lumber Company was not discovered until December, 1905. The deed to defendant company was registered January 9, 1900, and that to Dennis-Simmons Company was registered February 24, 1902, and no timber has yet been cut by either company. Defendant company denied the fraud, claimed that the deed in effect only conveyed the lumber embraced under the terms of the contract, and that no injury had been wrought to plaintiff, and pleaded the statute of limitations. The jury rendered a verdict as follows: "(1) Did defendant procure the execution of the deed of date November 18, 1899, by false and fraudulent

representation, as alleged in the complaint? Answer: Yes. (2) What damage, if any, has the plaintiff sustained in respect to the highland timber? Answer: \$250, with interest from November 18, 1899. (3) What damages, if any, has the plaintiff sustained in respect to the swamp and ravine timber? Answer: \$40, with interest from November 18, 1899. (4) Is the plaintiff's cause of action barred by the statute of limitations? Answer: No." There was judgment for plaintiff, and defendant excepted and appealed.

Winston & Everett and B. A. Critcher, for plaintiff. A. O. Gaylord, for defendant.

HOKE, J. (after stating the facts as above). The verdict, when considered in connection with the allegations and the admissions and testimony, establishes the proposition that, under a contract to convey the pine, poplar, and cypress timber on the tract which was situated on the south side of Cooper swamp as far as the muck and mire comes, the plaintiff has been induced by fraud and deceit to convey to defendant company the timber described in the deed as follows: "All the pine, oak, ash, cypress, and poplar timber of and above the size of twelve inches in diameter on the stump when cut in and upon the following described tracts of land, situated in Jamesville township in the aforesaid county of Martin, adjoining the lands of S. L. Wallace, H. M. Modlin and others, and known as the Harmon-Modlin tract, containing forty-two acres more or less, all the pine, poplar and cypress timber on said land on the southern side of Cooper swamp, and in said swamp and ravines." And the damage fixed at \$290.

Defendant objected to the validity of this recovery, for the reason chiefly that, by correct interpretation, the deed only conveys to the defendant the timber specified in the contract, and on the principle that the latter part of the description, "All the pine, poplar and cypress timber on said land on the southern side of Cooper swamp," being more specific, will control the former and more general description, "all the pine, oak, ash, cypress and poplar timber on said tract," and so restrict the timber conveyed to that which was actually embraced within the terms of the contract, citing *Peebles v. Graham*, 128 N. C. 220, 39 S. E. 24. The principle contended for by the defendant is well recognized, but we do not think its correct application to the terms of the deed will sustain the position of defendant. Conceding that the latter part of the description is more specific, it would only control the former to the extent required to reconcile the two, and in subordination to the principle that all the clauses of the deed should be given effect as far as they can be harmonized by fair and reasonable interpretation. *Jones v. Casualty Co.*, 140 N. C. 265, 52 S. E. 578, 5 L. R. A. (N. S.) 982, 111 Am. St. Rep. 842. To apply.

therefore, both of these rules of construction, we think it clear in the instrument now before us the former and more general clause conveyed to the grantee all the pine, oak, ash, cypress, and poplar of the dimensions specified within the boundaries of the entire Harmon-Modlin 42-acre tract, except as to that portion of said timber lying on the south side of Cooper swamp, and as to that only the pine, poplar, and cypress timber was passed, allowing the latter and more specific description to limit the kind of timber conveyed on the portion of the tract south of the swamp, leaving out the oak and ash. This being the true significance of the deed, the plaintiff has been wrongfully deprived of all of his timber in excess of that described in the original contract, which was only the "pine, cypress, and poplar within that portion of the tract on the south side of Cooper swamp as far as the muck and mire ran." It is right, therefore, on the issue as to defendant's responsibility, that the verdict be sustained, for it is well established that one who has been induced to convey his property by fraud and deceit has an election of remedies, and may either bring an action to set aside the conveyance, unless the property has passed into ownership of a purchaser for value, and without notice (*Summers v. Mfg. Co.*, 143 N. C. 102, 55 S. E. 522), or he may allow the conveyance to stand and sue to recover damages for the pecuniary injury inflicted upon him by the fraud (*May v. Loomis*, 140 N. C. 350, 52 N. E. 728).

And it is further held that retaining the purchase price is not such a ratification of the contract as prevents the injured party from maintaining his action for damages to recover for the injury over and above the amount already received under the contract. 20 Cyc. p. 91; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 407, 60 Am. St. Rep. 390; *Shinnabarger v. Shelton et al.*, 41 Mo. App. 147. As said in Cyc. supra: "As indicated above a return or an offer to return what plaintiff has received under the contract, induced by the fraud, is not a condition precedent to his maintaining an action for deceit, since he is entitled to the benefit of his contract, plus the damage caused by the fraud." And the general principles sustaining plaintiff's right to recover are well stated in the cases of *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463. An effort is made to support the interpretation of the deed insisted on by defendant by construing the deed and option together, using the option in aid of the description contained in the deed. It is familiar learning, however, that user of the option for such purpose is not permissible. The deed now stands alone as embodying the contract between the parties. It makes no reference to the option for description, or for any other

purpose; and, while this last paper is competent evidence on the question of fraud, and to show whether or not the deed complies with the option, the authorities are clear that the paper is not relevant in aid of the description in the deed, and any attempt to use it for such purpose would therefore be improper. *Farthing v. Rochelle*, 181 N. C. 563, 43 S. E. 1. Again, it is contended that a great wrong has been done defendant in this trial, and a verdict has been rendered fixing it with a gross fraud, without any sufficient evidence to support it; but we find nothing either in the record or the testimony to justify this position. It appears that plaintiff gave an option at the price of \$60 to sell to the defendant company the pine, cypress, and poplar timber in the swamp and ravines as far as the muck and mire comes "on a tract of land consisting of about seven acres of the land known as the Harmon-Modlin tract, on the eastern side of the Washington & Jamesville road, and the southern side of Cooper swamp, and agreed that the company should have five years in which to cut and remove the same. By the representation of the defendant's agent, plaintiff was induced to sign and deliver a deed conveying to the defendant all the pine, oak, ash, cypress, and poplar timber upon the entire tract of land, known as the Harmon-Modlin tract, containing forty-two acres, more or less, all the pine, poplar, and cypress timber on such land on the southern side of Cooper swamp, and in said swamp and ravines, being the land conveyed to said Modlin as per record in Martin county by deed dated 18 February 1898"—giving 10 years in which to remove it. Speaking of the transaction by which this result was effected, the plaintiff testified as follows: "The highland part of the Harmon-Modlin tract is covered with pine, oak, and poplar timber. It is good timber. There is pine, ash, poplar, and cypress timber in the swamp. None of the timber has ever been cut. Mr. Arthur Hardison came to my house to buy my timber for the company. I gave him an option on the swamp timber as far up as the muck and mire goes. I did not sell him any of the highland timber. He was to cut timber down to 12 inches in diameter at the stump in the swamp and ravines. I signed the option, my wife and I. Hardison gave it to M. Jordan. I have seen it since. Mr. Jordan read it to me at his home in Beaufort county some weeks before the suit was brought. In 1905 was the last time I saw the option, just before I brought this suit. It was a 30-day option. M. Jordan came with a deed at the end of the 30 days. M. Jordan said the deed was exactly like the option; that it was written word for word like the option. I asked him to read the deed over to me. He said it is no use reading the deed. It is exactly like the option, and is all right. I cannot read, and M. Jordan knew that I could not read or write. I sold the timber for five years in the

option, and Mr. Jordan said the deed was exactly like the option in every respect. On this statement and relying on it, I signed the deed, my wife and I signed it, and Mr. Jordan took private examination and paid me \$59 in check on the company. One dollar had been paid by Hardison when the option was taken. It is admitted that the defendant paid \$60. M. Jordan acted for the defendant."

Thus it will be seen that plaintiff, as we interpret the deed, who had given an option at the price of \$60 to convey the pine, cypress, and poplar timber on seven acres of Judson Harmon land lying south of the Cooper swamp, and "as far as the muck and mire runs," has by the false representations of the defendant's agent been induced to convey all the pine, cypress, poplar, oak, and ash on the entire tract, except that part lying south of Cooper swamp, and all the pine, cypress, and poplar south of Cooper swamp, without limiting this amount by the restriction "as far as the muck and mire runs," the timber so conveyed amounting in value to \$350, being \$290, the amount of damage found by the verdict, plus \$60, amount paid under the contract. On the moral aspects of the question there is here, in our opinion, ample evidence to establish willful misrepresentation on the part of defendant's agent and to justify the verdict as rendered. If it be suggested that there is no evidence that the agent Jordan was aware of the contents of the option, the answer is that he positively asserted that he knew the contents and that the deed was in exact compliance with the same, and it is well established that one who intentionally and positively asserts a fact to be true of his own knowledge, when he does not know whether it be true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue.

It is further urged in objection to this recovery that no timber has yet been cut and may never be, but the law must deal with facts, and not with possibilities, which rest only in suggestion, and unfortunately for the defendant he has so dealt with this contract that his mental attitude toward it has ceased to be of importance. He has conveyed the timber bought by him to the Dennis-Simmons Lumber Company by deed containing a description exactly similar to his own. This last company is not a party to this record, and we are not informed of its purpose. Certain it is, however, that, if our interpretation of this deed be correct, it has a right to enter upon the plaintiff's land and cut and appropriate all the timber of the kind and dimensions specified on the entire Judson Harmon tract, to the value of \$350, when the plaintiff had only agreed to sell \$60 worth of timber on seven acres of the property. This being true, and the result indicated having been brought about by the fraudulent misrepresentations on the part of defendant's

agent, the plaintiff's right to recover on the main issue comes clearly within the principle so well stated in *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463: "Where the parties made a contract for the sale of certain timber, reserving a well-defined class of trees, and defendant undertook to reduce the contract to writing, in accordance with its terms, but knowingly included the reserved timber and falsely represented to plaintiff that said timber was reserved in the deed, and, by means of this false representation, procured the execution of the deed, the plaintiff has a cause of action for deceit, and this is not dependent upon the removal of the timber."

Defendant assigns for error, further, that on the issue as to the statute of limitations the judge below declined to charge, as requested, that the registration of defendant's deed was in itself such a notice of the alleged fraud as would put the statute in motion for the defendant's protection, and in bar of plaintiff's claim; but the point has been decided against the defendant. The statute applicable (Revisal 1905, § 395, subsec. 9) provides that actions of the present kind are barred in three years after the discovery by the aggrieved party of the facts constituting the fraud, and, construing this subsection, the court has decided that the statute commences to run when the aggrieved party first discovered the facts or could have discovered them by the exercise of proper effort and reasonable care, and that the registration of the deed or knowledge of its existence by which the fraud was accomplished was not of itself sufficient notice of such facts. *Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99; *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387.

There is no error, and the judgment of the lower court is affirmed.

Affirmed.

CONNOR, J. (dissenting). I am unable to concur in the conclusion reached by the court in this case. If nothing more was involved than a small sum of money, I would be content to note my dissent and say no more; but, as I interpret the record, a gross, moral fraud is by the verdict of the jury fixed upon the defendant, a corporation, it is true, but corporations commit frauds only by their agents and servants. It is impossible to disassociate them. I, of course, accept as true the allegation in the complaint and every statement made by plaintiff and his witness in regard to the terms of the option, and the contract upon which it is founded. I also accept, as true, his testimony in regard to the declarations and conduct of defendant's agent when he presented the deed for plaintiff's signature. I am, however, of the opinion that, instead of speaking a willful, deliberate falsehood in regard to the timber conveyed in the deed, he spoke the exact truth; that the deed, properly con-

strued in the light of the option, conveys no other and no more timber than is included in the option. I freely concede that if I am in error in this, and if the agent, who it seems did not take the option, or draw the deed, knew that it included more, and other, timber than the option called for, he was guilty of a gross fraud upon the plaintiff. It is so easy to charge men with fraud, and unfortunately we are so prone to take the accusation for the proof, that courts should be cautious to see that conduct, capable of more than one construction, should not be hastily, or, upon insufficient evidence, branded as fraudulent when it may be consistent with an honest mistake. The complaint sets out the terms of the option, and in that respect it is fully sustained by the testimony. The option was for "the pine, cypress and poplar timber in the swamp and ravines up as far as muck and mire comes, consisting of about seven acres, on the land known as the Harmon-Modlin land, on the eastern side of the Washington and Jamesville road and the south side of Cooper swamp." The charge is that defendant "willfully and wickedly contrived to defraud plaintiff," and "fraudulently and purposely" inserted in the deed other timber, to wit, "oak and ash," on the swamp and ravine, and "pine, oak, ash, cypress, and poplar" on the highland, etc.

Plaintiff introduces Mr. Hardison, who says: "I took an option on the swamp and ravine timber. \* \* \* The plaintiff had other timber than swamp and ravine. I did not buy the timber on the highland." Plaintiff testifies: "I gave him [Mr. Hardison] an option on the swamp timber as far up as the muck and mire goes. I did not sell him any highland timber. He was to cut timber down to 12 inches in diameter at the stump on the swamp and ravine." The deed contains the following description: "All the pine, oak, ash, cypress and poplar timber of and above the size of twelve inches in diameter on the stump when cut in and upon the following described tracts of land, situated in Jamesville township in the aforesaid county of Martin, adjoining the lands of S. L. Wallace, H. M. Modlin and others, and known as the Harmon-Modlin tract, containing forty-two acres more or less, all the pine, poplar, cypress timber on said land on the southern side of Cooper swamp, and in said swamp and ravines. Being the land conveyed to said Modlin as per record of Martin county by deed dated the 18th February, 1898." It bears date November 13, 1899, and is recorded December 19, 1899. No timber has been cut, and defendant has never claimed, but expressly disclaims, any other timber than that included in the option. Its contention is thus stated in the record: "The defendant contends that the deed to it did not convey any timber except that in the swamp and ravines." Thus the issue is sharply presented. Plaintiff charges that

defendant fraudulently included all of his timber in the deed, whereas, defendant disclaims ever taking, owning, or acquiring the timber on the highland. The controversy, so far as the quantity of timber is concerned, depends upon the construction of the deed. It will be noted, that although the plaintiff alleges that defendant fraudulently inserted in the deed "oak and ash" in "the swamp and ravine," the deed conveys only "pine, poplar and cypress," the exact language of the option. The controversy is therefore narrowed to the question whether, reading the deed in the light of the option, any other timber is conveyed than that on the "southern side of Cooper swamp and in said swamp and ravines." His honor construed the deed to convey all of the timber on the Harmon-Modlin land; thus giving no effect to the last restrictive words in the description. I take it as settled that courts in such cases will, for the purpose of ascertaining the intention of the parties, "endeavor to place themselves in the position of the parties at the time of the conveyance." *Cox v. McGowan*, 116 N. C. 131, 21 S. E. 108. We should read this deed as if the description referred to the option. The question which the court is to ask in such cases is thus clearly stated by Judge Walker in *Gudger v. White*, 141 N. C. 507, 54 S. E. 386: "After all, the simple question is: What does the whole description show was actually intended to be conveyed? When reading the deed and looking at the facts and circumstances, as they appear, what impression is left on the mind as to the purpose of the parties?" "When a general description is joined with a particular one, it is a rule of construction that the latter prevails over the former. A general description may be limited, restrained, or controlled by a particular description; but, as a rule, a particular description is not limited, restrained, or controlled by a general description. The real intent of the parties should, when possible, be gathered from the whole description." *Jones on Conv.* § 410. It is sometimes said that the first description will control a later one. This rule is, however, applied only when the question as to which conveys the intention is so exactly balanced that it is necessary to invoke it "to tip the nodding beam." "But whether a specific description comes before or after a general description, it must prevail, upon underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain." *Cox v. McGowan*, supra. In *Carter v. White*, 101 N. C. 30, 7 S. E. 473, the grant described the land as: "A tract containing sixty-seven and a half acres lying and being in the county of Currituck, known by the name of Walker's Island, beginning," etc. These words were followed by a specific description which did not include the whole of Walker's Island. *Smith, C. J.*,

said: "While the words recited, unconnected with others, will embrace a water-bound tract as an island, yet, upon every well-settled rule of interpretation, subsequent restrictive words, giving and defining its boundaries, must have the effect of qualifying the preceding general designation. The island determines, as does the mention of the county, the locality of the land granted; the particular description, what portion is intended, and thus the general and true intent is reached and an apparent repugnancy avoided, and the deed rendered self-consistent." The learned chief justice says that the proposition is so manifest that he refrains from citing authority for its support. In *Peebles v. Graham*, 128 N. C. 218, 39 S. E. 24, the testator, under whom both parties claimed, gave plaintiff "all the lands included under the name of the Arnold, the Geer and the Jones lands—all east of the Raleigh and Roxboro road." Furches, C. J., said: "If the description had closed with all the lands included, \* \* \* and the dispute had been whether the 64½ acres were a part of the Arnold land, it would have been proper for the court to submit that question to the jury. But the description did not stop here. It added, 'all east of the Raleigh and Roxboro road.' This qualification must mean something. It would not have been added if it did not. The description, without this qualifying clause, would undoubtedly have given the plaintiff all the Arnold tract. \* \* \* As [to] this language, according to all rules of interpretation, the only meaning it can have is to restrict the gift to the east side of the road." *Proctor v. Pool*, 15 N. C. 371. In these cases the court had no facts and circumstances allude the deed to aid it, whereas, we have the option pursuant to which the deed was drawn. The option includes "pine, cypress, and poplar timber." The specific description in the deed is confined to "pine, cypress, and poplar timber." The option calls for the timber "in the swamp and ravines"—the exact words of the deed. The option confines the timber sold to the "Harmon-Modlin land on the eastern side of the Washington and Jamesville road, on the south side of Cooper swamp." The deed confines the grant to the timber on the "south side of Cooper swamp."

No point is made of the omission to insert the road. But it is said that the words "up as far as the muck and mire comes" are omitted. No reference is made in the complaint of this omission. The only complaint made of the description as to the land on the "south side of Cooper swamp in the swamp and ravines" is that the deed includes "oak and ash," whereas, the option includes only "pine, cypress and poplar," and, when the deed is read, it appears that "oak and ash" are not in it. I fail, after careful inspection, to find any evidence suggesting that plaintiff was claiming any damage for fraud as to the swamp and ravine timber. His action is for the value of the timber on the high-

land. It is conceded that no timber has been cut. There is no suggestion that defendant, or its grantee, has ever claimed to own the highland timber. On the contrary, defendant expressly disclaims such ownership. I think that his honor was in error when he held, as a matter of law, that the deed conveyed all of the timber on the Modlin land. There is not the slightest evidence that Jordan, or any one else, ever made any such claim. While it is conceded that defendant did not request his honor to submit the question of the intention of the parties to the jury, it did except to his instruction that, as a matter of law, the language of the deed included all of the timber. If the question was for the jury, I think the exception extends to all errors in the charge in that respect. If the description was ambiguous and obscure, it would seem clear that the question as to what was included in the deed, in the light of the "facts and circumstances," should have been submitted to the jury. *Ward v. Gay*, 137 N. C. 397, 49 S. E. 864. It is said that defendant conveyed the timber to the Dennis-Simmons Lumber Company by deed containing the same description as is found in the deed from plaintiff. There is no suggestion that the lumber company has ever claimed that the highland timber passed, although eight years have elapsed since plaintiff's deed was made. I confess to some difficulty in comprehending how a person, either natural or corporate, can be fixed with actual, intentional fraud in respect to property which it does not claim to own, has never asserted any right to, and when, after eight years from the date of the alleged fraud, it is first notified that any such construction is put upon the deed, promptly disclaims title to the property. The defendant is made to buy property at plaintiff's price, which it does not want, has never purchased or claimed to own, and, for the purpose of compelling the purchase, is fixed with a gross, wicked fraud. It is made to pay interest for eight years. The deed was recorded immediately.

It will be further observed that although the defendant's grantee, by the judgment, is compelled to take the timber, it is given only two years within which to remove it. If it be not removed within that time, the plaintiff receives \$290, with interest for eight years, and retains his timber. *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24, and other cases in which we have held that at the expiration of the time fixed for removal, the estate of the purchaser reverts in the vendor. Assuming that ten years was inserted, instead of five, for removal, the difference in the price is fixed by the testimony. This amount, easy of calculation, plaintiff would recover. It may not be improper to say that, upon the argument, the attorney who wrote the deed, a man utterly incapable of committing a fraud, had the original deed showing that a portion of the description was printed, thus explaining how the ambiguity

occurred. The written words constitute the specific description.

I think that, in any aspect of the case, there should be a new trial, to the end that the rights of all parties may be adjudged and protected.

(145 N. C. 214)

ALLEN v. ATLANTIC COAST LINE R. CO.  
(Supreme Court of North Carolina. Oct. 18, 1907.)

1. MASTER AND SERVANT—ACTION BY SERVANT FOR INJURY—SUFFICIENCY OF EVIDENCE—“LAST CLEAR CHANCE.”

In an action by a servant, a brakeman, for personal injuries, evidence considered, and *held* not to warrant the submission of the issue of “last clear chance.”

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1131, 1132.]

2. SAME — METHOD OF WORK — “FLYING SWITCH” AS NEGLIGENCE PER SE.

Making a flying switch is not negligence per se as to the employé performing it. It is the attempt to make a running switch when the detached car has no brakeman on it, and is under no control, that is declared to be negligence, because highly dangerous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 756.]

3. SAME — CONTRIBUTORY NEGLIGENCE OF SERVANT.

In an action by a servant, a brakeman, against a railroad company for personal injuries, evidence as to contributory negligence considered, and *held* sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from Superior Court, Lenoir County; E. B. Jones, Judge.

Action by William Allen against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The court submitted the following issues:

“(1) Was the plaintiff, William Allen, injured by the negligence of the defendant? (2) Did the plaintiff, William Allen, contribute to his injury by his own negligence? (3) What amount, if any, has plaintiff been damaged?” The jury answered first issue, “Yes,” and second issue, “Yes.” From the judgment that the defendant go without day, the plaintiff appeals.

Loftin & Varner, G. V. Cowper, and M. H. Allen, for appellant. Rouse & Land, for appellee.

BROWN, J. Upon the trial the plaintiff tendered the issues submitted, and also another issue, as follows: “If the plaintiff contributed to his own injury, could the defendant have avoided the injury by due care?” The refusal of the court to submit this issue is strongly pressed by plaintiff as error. The contention of a plaintiff that, although he may be guilty of negligence, yet the defendant had the last opportunity to prevent injury, can be presented under the issue of contributory negligence, as negligence to bar

recovery must be shown to be the proximate cause. *Baker v. Railroad*, 118 N. C. 1021, 24 S. E. 415; *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448. We find nothing in this case which warrants the application of the so-called doctrine of the “last clear chance.” The only person who it is claimed could have intervened and saved the plaintiff from injury was the brakeman, Outlaw; and we see nothing in the evidence to sustain the contention that he could have done it. It appears by plaintiff’s own testimony that he had been employed on a freight train of defendant and was an experienced brakeman; that he was ordered by the conductor to go help Elias Outlaw place some shanty cars on the siding; that, instead of going to the side of the shanty cars where the ladders were, he let the shanties pass, and jumped on a coal car, which was the first car after the shanties passed. In respect to this contention, the plaintiff’s evidence is as follows: “As soon as I caught the coal car, which was the first car that reached me after the shanties passed, I got upon the platform of the coal car and at once started to step from it to a ladder on the shanty car, which I was going to place on the said track. Just as I was stepping to this ladder on the shanty car, the switchman cut off the cars, and dropped me from the center of the track down to the ground.” This testimony makes the acts of plaintiff and the switchman, Outlaw, practically simultaneous. Upon the plaintiff’s statement, then, there was no intervening time between his step and the act of Outlaw in disconnecting the cars to have enabled any agency to have been brought to bear upon the occurrence which could have averted the injury. Therefore there is no possible deduction in the testimony which would have permitted the submission of this issue. Again, there is no evidence in the record that Outlaw saw the plaintiff as he started to climb from the moving coal car onto the shanty, or that Outlaw had any reason to expect the plaintiff to take that way of going on top of the shanty, instead of the usual method of climbing from the ground by the ladders. There was no “last clear chance” left to Outlaw to avoid the injury, and no evidence that he neglected any duty he as a fellow servant owed the plaintiff. The evidence, therefore, does not support the issue tendered, and, for the same reason, we think his honor properly declined to give plaintiff’s prayer for instruction embodying such contention. *Ellerbe v. Railroad*, 118 N. C. 1026, 24 S. E. 808; *Taylor v. Railroad*, 109 N. C. 236, 13 S. E. 736. The only exception to the evidence and most of the prayers for instruction relate to the first issue, and, as the jury answered that issue in favor of the plaintiff, it is unnecessary to consider them.

2. The contention of plaintiff, as presented in prayers for instruction upon the second issue, that “kicking” cars is negligence per se,

and the proximate cause of the plaintiff's injury, seems to be founded upon a misapprehension of the decisions. The word "kicking" seems to be used in railroad parlance as synonymous with making a "flying switch." This court has never held such operations to be per se negligence in respect of the employees performing them. It is "the attempt to make a running switch when the detached car has no brakeman on it, and is under no control, that is declared to be negligence, because highly dangerous." *Wilson v. Railroad*, 142 N. C. 336, 55 S. E. 257, and cases there cited.

3. The plaintiff further requested the court to charge that there is no evidence of contributory negligence. We think his honor properly denied his prayer. There is ample evidence in the record to go to the jury upon that issue. In fact, his honor might well have instructed the jury that the plaintiff upon his own showing was guilty of contributory negligence, and by his careless conduct caused his injury. Plaintiff was ordered to assist the switchman, Elias Outlaw, in sidetracking the "shanties." Being a brakeman, he knew his place was on top of the shanties and at the brakes, so he could control the cars as they were "shunted" or "kicked" from the track onto the switch. He jumped from the ground to the moving coal car, next to the shanty, for the purpose of ascending the ladder. When he mounted the coal car, he saw the switchman at the crank, and knew he was in the act of "cutting loose" the shanties, as ordered. The plaintiff never called to Outlaw, but took his chances, and endeavored to leap onto the shanty car just as the switchman "cut it loose." The plaintiff probably believed that he could successfully make the leap, or doubtless he would not have attempted it. He made a mistake as other unfortunate men have done before, and fell to the ground between the moving cars, and was injured.

The majority of the court is of opinion that there is no error.

(145 N. C. 248)

#### BONEY v. ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina. Oct. 16, 1907.)

#### 1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK—STATUTORY PROVISION.

Under Revisal 1905, § 2646, denying the defense of assumption of risk when an employé is injured by any defect in machinery, a nonsuit in an action by a servant for injuries resulting from a defective handcar on which he was riding is properly refused.

#### 2. SAME—NOTICE TO MASTER.

Where a servant who was injured while riding on a defective hand car had repeatedly reported it to his superior as defective, and the superior had promised to furnish another, but had failed to do so, there was no assumption of risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-643.]

#### 3. SAME—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a servant for injuries received while riding on a defective hand car, evidence considered, and held to sustain a finding against contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 939-949.]

#### 4. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Contributory negligence to bar a recovery must be shown to be the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 795.]

#### 5. DAMAGES—PERSONAL INJURIES—QUESTIONS FOR JURY—AMOUNT OF DAMAGES.

In a personal injury action, the amount of damages is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 533.]

#### 6. NEW TRIAL—GROUNDS—EXCESSIVE DAMAGES.

If the verdict is for excessive damages, the court has power to set it aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 153-156.]

#### 7. APPEAL AND ERROR—REVIEW—DISCRETION OF LOWER COURT—EXCESSIVE VERDICT.

A refusal of the trial court to set aside a verdict as excessive is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3873.]

Walker, J., dissenting.

Appeal from Superior Court, Lenoir County; Long, Judge.

Action by H. F. Boney against the Atlantic & North Carolina Railroad Company. Judgment for plaintiff and defendant appeals affirmed.

Rouse & Land and L. I. Moore, for appellant. G. V. Cowper and Loftin & Varser, for appellee.

CLARK, C. J. The plaintiff was injured in consequence of using a defective hand car, whose defects he had repeatedly reported to his superior, who had promised to furnish another hand car, but had failed to do so. The nonsuit was properly refused, both because of the fellow servant law (Revisal 1905, § 2646), which denies the defense of assumption of risk when an employé is injured "by any defect in the machinery, ways and appliances of the company" (*Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817), and, even independently of that statute, because the plaintiff had reported the defective hand car to his superior, and had been promised another one (*Labatt, Master & Servant*, p. 86 [b], and section 423, p. 1193).

The defendant relied on the defense of contributory negligence, but that issue was found in favor of the plaintiff. The acts complained of were that the plaintiff, in charge of the hand car, was standing up, helping his men work the lever up and down running the car, and, looking back, saw the train six miles off, and about this time the hand car flew the track, solely from the defect, previously reported, in its running gear. The rules of the company required the hand car to be



taken off 20 minutes before the train passed. It is not clear whether the accident occurred 20 minutes before the train passed or not, but there was no causal connection between the passage of the train and the injury, and the jury so found. It may be that the court might well have instructed the jury that, if they believed the evidence, to find the issue of contributory negligence in the negative. Certainly the defendant has no cause of complaint, for the court gave the instructions asked by the defendant with the proper modification that, if the conduct of the plaintiff should be found as stated in the defendant's prayers and was the proximate cause of the injury to answer the issue of contributory negligence, "Yes," otherwise, "No." Negligence to bar a recovery must be shown to be the proximate cause of the injury. *Baker v. Railroad*, 118 N. C. 102, 24 S. E. 415; *Reemsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448, cited and affirmed *Allen v. Railroad* (at this term) 58 S. E. 1081. The charge as to quantum of damages follows that approved in *Wallace v. Railroad*, 104 N. C. 452, 10 S. E. 552, and recently in *Ruffin v. Railroad*, 142 N. C. 129, 55 S. E. 86.

The amount of damages was a matter of fact, of which the jury were the judges. If their finding was excessive, his honor, who heard the evidence, had the corrective power to set it aside. His refusal to do so is not reviewable by us. This is well settled by numerous decisions of this court. *Norton v. Railroad*, 122 N. C. 937, 29 S. E. 886, and cases there cited. There are states under the wording of whose Constitutions the appellate court can review the question of excessive damages, and it may not be improper to say that in those courts verdicts for damages for wrongful death and for personal injuries sustained by employes and others by reason of negligence in operating railroads, much greater in amount than those ordinarily returned by juries in cases coming up to this court, have been sustained as not excessive.

No error.

**WALKER, J. (dissenting).** I wish that I could fully concur with my associates in the decision of this case, because I regard the neglect of the defendant to repair the hand car, if the evidence is to be believed, as not only gross, but cruel. It is one of the first duties of the master to care for the safety of his employes, and in the discharge of that duty to use reasonable care in furnishing him with such tools and implements to perform his work as will not unnecessarily expose him to danger. *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125; *Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703. That duty was not performed in this case, as the jury evidently found; and if this were all, I would not hesitate to give my assent to the conclusion of

the court. But it is not by any manner of means. It appears here that the servant knowingly and deliberately violated the defendant's orders to remove the hand car from the track at least 20 minutes before the passage of a train—freight or passenger. The plaintiff actually saw a train approaching, and knew that it was on its schedule time. If he had complied with the rule and the instruction of his employer, the accident would not have occurred and the master's default, while gross and inexcusable, was not the proximate cause of his injury, as it must be to entitle him to a verdict, but his own neglect in disobeying orders. Besides, it is perfectly apparent, from the nature of the accident and the manner in which it occurred, that it was not the result of the particular defect in the hand car complained of, but was produced by the effort of the plaintiff to reach a point beyond that where he should have removed the hand car from the track. If he had complied with explicit orders, he would not have been hurt. This court has held repeatedly that, where an injury is caused by a departure from the employer's instructions to his servant, the latter is not entitled to recover because he is considered as the author of his own injury—"Volenti non fit injuria"—and it is not within the terms of the contract of employment that the master should protect him from such an injury. *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562. And, as being more directly in point, *Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703, where the principle is clearly and definitely stated by Justice Hoke for this court. We have also laid down the same doctrine at this term in *Patterson v. Lumber Co. (N. C.)* 53 S. E. 437. While the plaintiff has my sympathy in his misfortune, decisions of this court cannot be based upon sympathy, but must be founded upon the law, as we said in *Crenshaw v. Street Railway*, 144 N. C. 314, 56 S. E. 945.

There was just as much causal connection between the plaintiff's negligent act and the injury in this case as there was in any of those cases we have cited, wherein the servant was denied the right of recovery, and there are many more decisions which might be cited to the same effect.

(145 N. C. 188)

**WEBB et al. v. BORDEN et al.**

(Supreme Court of North Carolina. Oct. 10, 1907.)

**1. PLEADING — ISSUES — ALLEGATIONS — EVIDENCE — PAROL EVIDENCE — CONTRADICTION OF DEED.**

Where plaintiff claimed under a deed for which, after its destruction, a later deed was substituted, and plaintiff alleged that the second deed conveyed the land in the same way and manner as the first, and did not allege any mistake in the second deed, nor seek to have it corrected, parol evidence was inadmissible to show

that such deed did not convey the same estate as the first deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1237, 1250.]

## 2. REFORMATION OF INSTRUMENTS—JURISDICTION—PLEADING.

While plaintiff, in an action to recover land, may reform a deed in his chain of title, he must, in order to obtain such relief, make the essential averments in his complaint so that an issue may be framed to present the controversy, if any.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 141-146.]

## 3. TRUSTS—NATURES—COLLECTION OF RENTS AND PROFITS.

Where land was conveyed to certain grantees to pay over annually and deliver to W. the rents and profits thereof during W.'s natural life, and to permit him to occupy the premises as a home for himself and family for that period, the trust was an active; and not a passive, one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 178, 179.]

## 4. LIMITATION OF ACTIONS—OUSTER OF CESTUI QUE TRUST.

Where land was conveyed in trust to collect the rents and profits and pay the same to W. and permit him to occupy the premises as a home for life, the ouster of W. was the ouster of his trustees, and started limitations against both which barred their right to recover after seven years.

## 5. SAME—JOINT TENANCY—ESTATE OF TRUSTEES.

Under Revisal 1905, § 1580, providing that trustees shall hold as joint tenants in all respects as joint tenants held before 1874, where limitations had barred the entry of one trustee, the entry of his co-trustees was also barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 659.]

## 6. JUDICIAL SALES—FRAUD—VACATION—LACHES.

Where a commissioner's deed to land was not at most voidable for fraud practiced either by the commissioner alone or in conspiracy with others, and no action was taken by the parties in interest to vacate the deed until 28 years elapsed, and until after the clerk of the court in which the proceedings were had for the sale of the property had died, he being charged with participating in the fraud, complainant was barred by laches from impeaching the deed.

Walker, J., dissenting.

Appeal from Superior Court, Lenoir County; Webb, Judge.

Action by George B. Webb and others against P. B. Borden and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Civil action for the recovery of a lot in the city of Kinston.

The facts material to an understanding of the appeal, as shown by admissions in the pleadings and the uncontradicted evidence, are: The title to the land in controversy was prior to March 1, 1869, in James B. Webb, father of plaintiff, Geo. B. Webb, and those under whom the feme plaintiff, Emma P. Webb, claim. On the 1st day of March, 1869, the land was sold by the sheriff of Lenoir county under executions issued upon judgments against said James B. Webb, and conveyed to Mary M. Webb, his daughter, who

intermarried with Robert S. Hay. Plaintiffs allege that: Subsequently, in the year 1869, the said Mary H. Webb conveyed said lot of land by deed in fee simple, as tenant in common, to Benj. T. Webb, Geo. B. Webb, N. H. Webb, now the wife of H. G. West, J. W. Webb, Carrie J. Webb, now the wife of D. R. Midyette, Emma Webb, now the wife of T. W. Noland, and Martha J. Webb, subsequently the wife of one Lewis Meyer, and who has since died, leaving as her only heirs at law Lilly and Daisy Meyer surviving her. That in said deed mentioned in the fourth paragraph of this complaint the said James B. Webb was given and granted an estate in said lot of land for his own life, the grantees named in said fourth paragraph to have and to take their interest in the same after the death of the said James B. Webb. That the said deed was recorded in the register's office of Lenoir county and said state, in Book No. 42, p. 295, the records of which have been destroyed by the fire of 1878 or 1880, except the index thereto, and the said deed itself is lost or destroyed, and cannot be found after a thorough search therefor. That the said Mary M. Webb, who on the 28th day of June, 1881, was Mary M. Hay, wife of Robert S. Hay, did, together with her said husband, execute on said 28th day of June, 1881, another deed in place of said lost or destroyed deed, conveying said lot of land in the same way and manner as did the said lost or destroyed deed, except as to Martha J. Webb, who intermarried with one Lewis Meyer, and, she having died prior to said 28th day of June, 1881, her share in said lot of land is in the substituted deed conveyed to her only heirs at law, Lilly and Daisy Meyer, see said deed recorded in said county and state, in the register's office in Book No. 6, pp. 558, 559, 560, as part of this complaint. The deed of June 1, 1881, referred to, was put in evidence, and contained the following language: "That whereas on or about the first day of March, A. D. 1869, the said Mary M. Hay, then Mary M. Webb, for and in consideration of natural love and affection, did sell and convey to the said Benj. T. Webb, George B. Webb, N. H. Webb (now N. M. West), J. W. Webb, Carrie J. Webb, Emma Webb, and Martha J. Webb (mother of the said Lilly and Daisy Meyer), and their heirs, certain tracts or lots of land in the county of Lenoir in and near the corporate limits of the town of Kinston, \* \* \* adjoining the lots of John Ennls and John D. Long. And whereas the said lots of land was by the said Mary M. Hay, then Mary M. Webb, conveyed and assigned to the said B. T. Webb and others, and their heirs by a certain deed of absolute conveyance duly executed, but with the special trust and confidence that they, the said B. T. Webb and others, pay over and deliver to their father, Jas. B. Webb, the rents and profits of said lands during his natural life, and that the said J. B. Webb be allowed to occupy the said premises as a home for himself and

family during his natural life. And whereas the said deed of conveyance is now supposed to be lost: Now, therefore, this indenture witnesseth that for and in consideration of the foregoing premises, together with the further consideration of the love and affection to them the said B. T. Webb and others, borne by the said Mary M. Hay and husband, Robert S. Hay, have given, granted, released, confirmed, and quitted claim and by these presents do give, grant, release, confirm, and quitclaim unto the said B. T. Webb and others, their heirs and assigns, all their right, claim, interest, and property in and to the aforesaid parcels of land to have and to hold to them the said B. T. Webb and others, and their heirs in fee simple forever. But with this special trust that they pay over annually and deliver to Jas. B. Webb the rents and profits of said lands for and during his natural life, and they permit the said Jas. B. Webb to occupy and use said premises as a home for himself and family during the term of his natural life." On the 17th day of December, 1874, B. T. Webb, one of the sons of James B. Webb, executed a deed describing said lots to R. W. King, in which are set forth the following recitals: "Whereas Benjamin T. Webb, commissioner appointed by the court to sell a certain lot of land mentioned in the petition of B. T. Webb, Lewis Meyer, and wife, Martha Jane, George B. Webb, Nannie Webb, Caroline J. Webb, Emma Webb, and James B. Webb and wife, Margaret, and whereas, in pursuance to the order of said Court, I, Benjamin T. Webb, commissioner, as aforesaid, having advertised said lot of land agreeably to law, and agreeably to the order of said court, for more than thirty days, did expose the same at public sale at the court-house door in the town of Kinston, Lenoir county, on the 14th day of December, A. D. 1874, when and where Richard W. King became the purchaser, he being the last and highest bidder," etc. R. W. King conveyed the lot to one Anthony Blount, and, by a connected chain of conveyances, such title as King acquired vested in the defendants Peter R. Borden and E. W. Borden during the years 1885 and 1886, at which time they entered into possession, and have continued therein, claiming under said deed until the institution of this action April 1, 1902. The deeds from King and others in the claim of defendants' title, including those to themselves, are duly recorded. Plaintiffs allege that the deed of B. T. Webb, commissioner, to King, was void and conveyed no title, by reason of fraud, misrepresentation, etc., in respect to the alleged proceedings under which it purports to have been made, etc. It is unnecessary to set forth in detail plaintiffs' contentions in this respect. James B. Webb died August 3, 1901. Plaintiff Geo. B. Webb was of full age July 8, 1876. The youngest child, a daughter, was of full age February 17, 1888. All of the daughters married before reaching their full age. The

children of James B. Webb, except plaintiff Geo. B. Webb, executed deed for such interest as they had in the lot to plaintiff, Emma P. Webb, wife of Geo. B. Webb, after the death of their father.

Plaintiffs demand judgment for possession of the land and damages for withholding, etc. Defendants, conceding that James B. Webb owned the lot and that his title vested in his daughter Mary, allege that by virtue of the deed of B. T. Webb, commissioner, and the mesne conveyances, they are the owners thereof. They also rely upon the several statutes of limitation, etc. His honor was of the opinion (1) that the deed executed by Mary Hay January 28, 1881, referred to in paragraph 7 of the complaint, did not vest a life estate in James B. Webb; (2) that parol evidence was not admissible to contradict the averments in allegation 7 of the complaint. He expressed the opinion that plaintiffs were not entitled to recover, whereupon they excepted, submitted to judgment of nonsuit, and appealed.

Loffin & Varser and Wooten & Wooten, for appellants. Rouse & Land, Y. T. Ormond, and W. D. Pollock, for appellees.

CONNOR, J. (after stating the facts as above). Plaintiffs proposed to show, by B. T. Webb, that the deed of March 1, 1869, made by Mary M. Webb, who intermarried with Robt. S. Hay, conveyed the lot in controversy to Jas. B. Webb and his wife for their joint lives and the life of the survivor, remainder to their children. It was admitted that the courthouse "in which the deed was recorded was destroyed by fire during the year 1880, and that the original deed was lost. The court, upon defendants' objection, excluded the testimony and plaintiffs excepted. The purpose of the proposed testimony was to avoid the effect of the substituted deed of June 28, 1881, by showing that the recital therein and the habendum were incorrect. It will be observed that in the seventh paragraph of the complaint plaintiffs, referring to the deed of March 1, 1869, and its destruction, say that the said Mary Hay executed the deed of June 28, 1881, "conveying said lot in the same way and manner as the said lost or destroyed deed" (except that the name of the children of a deceased daughter was inserted). The substituted deed of June 28, 1881, is made a part of the complaint. It is true that in a preceding paragraph they say that the lost deed of March 1, 1869, conveyed to Jas. B. Webb a life estate. The deed of June 28, 1881, which "conveyed the land in the same way and manner," when made a part of the complaint and put in evidence, became the basis upon which the court must, by its construction, ascertain what estate is conveyed. The plaintiffs, having elected to claim under this deed, cannot show, in the absence of any allegation of mistake in the maker or draftsman, that the deed of March 1, 1869,

conveyed a different estate from that described in the deed. This would be not only to contradict their own allegation, but the deed under which they claim. While, under the Code system of procedure, it is settled by many decisions of this court that, in an action for the recovery of land, the plaintiff may, by proper averments, invoke the equitable power of the court to reform a deed in his chain of title, he must make the essential averments, so that the defendant may either admit or deny them, and an issue may be framed presenting the controversy in that respect. He cannot set up a deed as the foundation of his title, and, without amendment of his complaint, when he finds that it does not serve his purpose, attack it by parol evidence. The law is well stated by Mr. Justice Walker in *Buchanan v. Harrington*, 141 N. C. 39, 53 S. E. 478. Referring to an attempt to introduce testimony of this character, he says: "But the pleadings do not raise any issue to which it was pertinent. If the petitioners desired to have the deed reformed, relying upon their right to the equity of correction, this matter should have been set up by proper averment and a corresponding issue submitted to the jury. \* \* \* If a party demands equitable relief, he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction." The wisdom of the law, in this respect, is illustrated by this record. The parties went to trial upon the allegations in the verified complaint. The deed was made a part thereof and introduced in evidence. To permit the plaintiffs, without any notice to defendants, to introduce parol evidence of an interested witness, based upon his recollection of the contents of a deed, which it seems he never saw but once, and then more than 30 years ago, to contradict the solemn declarations, by way of recital in another deed, made in substitution of the first, more than 20 years ago, would be to place the security of defendants' title upon the slippery memory of the witness, without any opportunity to apply the usual tests or contradict him. It appears, from this record, that the deed of September 21, 1881, was drawn by an intelligent and careful attorney by whose testimony plaintiffs now propose to contradict it. This witness, plaintiffs charge, fraudulently executed another deed for this same property. His honor's ruling was manifestly correct. To have admitted the testimony would have violated all those rules of evidence which experience has shown to be essential to the security of titles.

We are thus brought to the consideration of the deed of June 23, 1881, for the purpose of ascertaining what estate was vested in Jas. B. Webb. Whatever he acquired by that deed he also had by the deed of March 1, 1869, because his daughter conveyed by the latter deed "in the same way and manner" as in the first. Plaintiffs insist that the

trust declared was passive, and that, by operation of the statute of uses, Jas. B. Webb took an estate for his life in the land. From this position, they conclude that the children had no title to, or estate in, the lots other than a vested remainder, until the death of Jas. B. Webb, August 3, 1901, and that, therefore, the statute of limitations began to run against them at that time. Defendants, on the contrary, insist that the trust impressed upon the legal title was active, imposing upon the grantees and trustees duties in respect to the property which made it necessary for them to hold the legal title; that Jas. B. Webb took no estate in the land; that the case comes within one of the well-recognized classes not affected by the statute of uses. From this position they conclude that the ouster, under the deed of B. T. Webb, December 17, 1874, put the statute of limitations into operation against the trustees, and that, being under color, it ripened into a perfect title at the end of seven years. The solution of this controversy depends upon the character of the trust created by the deed. The lot is conveyed to B. T. Webb and others in trust, "that they pay over annually and deliver to Jas. B. Webb the rents and profits of said lands for and during his natural life and they permit the said Jas. B. Webb to occupy and use said premises as a home for himself and family for and during his natural life." It is well settled that "the duty to collect or receive the rents, profits, and income of the estate, and pay over the same to the person entitled thereto, is generally inseparable from the personal control and supervision of the estate by the trustee, and requires the legal title to the corpus upon which the rents and profits accrue shall be in the trustee." 28 Am. & Eng. Enc. 926. We had occasion to consider the question in *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541, where we quoted, with approval, the language of Mr. Tiederman. "Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc., the trust is called active." Real Prop. § 494. Whereas, as said by Mr. Lewin: "If the trust be simply to permit A. to receive the rents, the legal estate is executed in A.; this being a mere passive trust." Trusts, § 18. In *Hicks v. Bullock*, 96 N. C. 164, 1 S. E. 629, it is held that "where, by a will, land is devised to a trustee to rent and pay the rents over to a person during his life, the cestui que trust takes no estate in the land, but only the right to have the rents paid to him." In *McKenzie v. Sumner*, 114 N. C. 435, 19 S. E. 375, Shepherd, C. J., emphasizes the fact that the trustee is charged with no specific duties in respect to the property. Here the holders of the legal title are required to "pay over annually and deliver the rents and profits" to Jas. B. Webb during his life. How can they pay over and deliver, unless they "rent and collect?" It

seems clear that to execute the trust, to discharge the duty imposed, they must of necessity hold the legal title, control and manage the property. They are further to permit him to occupy the premises "as a home for himself and family"; thus showing the intention of the maker of the deed that, as to the portion of the property suited for that purpose, the father is to "occupy" for the restricted purpose named, and, as to the other part, they are to rent it out and receive the rents and pay them over to him annually. We think it apparent, in view of the fact that the property had just preceding the execution of the deed been sold under executions against him, that it was the purpose of his children to take the title and impress upon it a charge, or trust, for the benefit of their father, to remove it beyond his control, or power to dispose of it; in other words, to create an active trust for his benefit. The deed is carefully drawn to effectuate that purpose, and apt language is used to that end. This being settled, it follows, upon the well-settled doctrine of this court, that the ouster of Jas. B. Webb was the ouster of his trustees, and put them to their action. This principle was clearly announced by Smith, C. J., in *Clayton v. Rose*, 87 N. C. 106, 110, and followed in a well-considered opinion by Shepherd, J., in *King v. Rhew*, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76; *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856; *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, 7 L. R. A. (N. S.) 407. The result of this rule is that, if the trustees are barred, the cestui que trust is likewise barred. If this is true when the trustee is a stranger to the remainderman, the same process of reasoning would seem to lead to the conclusion, with even greater force, that, when the trustees were entitled as remaindermen, they should be barred after permitting the statutory period to expire. It was the duty of the trustees to bring an action against the disseisor within seven years. They would have recovered the possession to enable them to execute the trust and protect the remainder. If their failure to do so, for the statutory period, barred their entry for one purpose, or in one right, it must do so for all purposes. It was not only the interest of Jas. B. Webb, which the disseisor acquired by seven years adverse possession under color of title, but the title as against all who had a right of entry, and therefore a cause of action. It would seem that, under our statute (Revised 1905, § 1580), trustees are seised as joint tenants and not as tenants in common, resulting in the conclusion that, if one is barred of his entry, his co-trustees are also barred. *Cameron v. Hicks*, supra. B. T. Webb was 24 years of age in 1874, and plaintiff Geo. B. Webb 19 years of age at that time. They are clearly barred, and by the decision of this court it is settled that their co-trustees are equally so. It is immaterial,

for this purpose, whether the ouster be fixed at the date of the deed of B. T. Webb, commissioner, to King—December 17, 1874—or at the date of defendants' deed 1885. From either date the same result follows. What we have said is upon the assumption that the deed of B. T. Webb, commissioner, is absolutely void and the entry under it wrongful.

There is, however, another view of the case equally decisive of plaintiffs' contention. The deed from B. T. Webb, commissioner, reciting that proceedings were had in the superior court upon the petition of himself and the other owners of the lot resulting in his appointment as commissioner, sale of the property, payment of the purchase money, etc., was recorded immediately after its execution, and, upon the destruction of the courthouse, recorded a second time in 1881. There is evidence in the record showing conclusively that the purchasers under that deed took possession and those claiming under them have continued therein; that the defendants have put valuable improvements upon the property; that plaintiff Geo. B. Webb has made conveyances of adjoining lots calling for the lines of the one in controversy as the property of the purchasers; that all of these facts have been known to him since 1874. It is also apparent that Jas. B. Webb and other persons having knowledge of these facts are dead. It also appears that B. T. Webb, the person who made the deed and received the purchase money in 1874, being \$118, has, since the death of his father, executed a deed to Geo. B. Webb conveying his undivided one-fifth interest for \$500 to the wife of Geo. B. Webb; that the other children have likewise conveyed to her for a recited consideration of \$500 for each share. The deed made by B. T. Webb, commissioner, is not, upon plaintiffs' averments, void, but, if they be true, may it be in equity set aside for fraud practiced by said B. T. Webb, either alone, or, as charged by plaintiffs, in conspiracy with others. In view of these facts, and the lapse of 28 years of unexplained silence, it would seem that a court of equity would refuse to interfere by setting aside the deed. In *Harrison v. Hargrove*, 109 N. C. 346, 13 S. E. 939, the time elapsing since the proceeding was only 17 years. There was an outstanding life estate, and the fact was found that no service was made of the summons on the petitioners. This court, by Shepherd, J., held that the petitioners were guilty of laches, and relief was refused. His language is peculiarly applicable to this record. "Indeed, if there is anything in the rule which requires long delay to be explained and knowledge of a decree to be negated, we can conceive of no stronger case than the present one." No one can read this record without being deeply impressed with the remarkable combination of facts and circumstances surrounding plaintiffs' alleged claim.

Although it was the imperative duty of the plaintiff Geo. B. Webb and the other children of Jas. B. Webb to protect the interest of their father and secure to him the annual reception of the rents and profits and a home for himself and family, they permit him to be ousted and remain so for 27 years by the alleged fraud of their brother. They took no steps to recover the property for his use, and after his death, and the death of the clerk of the court seek to have the deed declared fraudulent upon the testimony of their brother, who they charge with active participation in the fraud, and to whom they have paid, as shown by his deed, \$500 for his alleged interest in the property which he sold in 1874, and for which he received the purchase money. It is significant that the clerk who is charged with aiding him in perpetuating the fraud is dead. In any aspect of the case his honor correctly directed judgment of nonsuit.

Affirmed.

WALKER, J. (dissenting). I do not understand the facts of this case as do my associates. It seems to me that there was sufficient allegation in the complaint of an intention and agreement on the part of Mary H. Webb (afterwards Mrs. Robert S. Hay) to convey to James B. Webb an estate for life in the land, and whether legal or equitable can make no difference in the view I take of the law of the case. If, therefore, the substituted deed of June 28, 1881, did not convey such an estate as the parties intended should pass to James B. Webb, and as they distinctly allege did pass by the original deed, why were not the plaintiffs entitled to establish the mistake, if they could do so by the requisite proof? If the deed of June 28, 1881, while intended to take the place of the one of 1869, which gave James B. Webb a life estate, failed by reason of the mistake of the draftsman to convey a life estate to him, and there was a mutual mistake, as I think is sufficiently alleged in the complaint, though not very formally or with that precision so much to be desired in pleadings, it would seem that his honor erred in excluding the evidence offered for the purpose of proving the fact. Can the mere circumstance that the plaintiffs have placed a wrong construction upon the deed of 1881, as the majority think they have, preclude their right to have it conformed to what was really the purpose in making it? The substance of the allegation, when properly considered, is—and that is what the plaintiffs really meant—that the deed of 1881 did convey a life estate to James B. Webb, but, if it did not, then that it should be corrected so as to carry out the agreement of the parties in respect to that contemplated effect of the deed. Pleadings should not be construed too strictly, for narrow and technical interpretations often defeat justice. "In the construction of a pleading for the purpose of determining its

effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Revisal 1905, § 495. The plaintiffs also allege that all of the successive purchasers had full notice of their equity. The defendants plead that they have had 20 years' adverse possession of the land and 7 years' adverse possession under color of title, but there is no plea of the statute especially addressed to plaintiffs' equity for a correction of the deed, and, if there were, I doubt if, under the facts and circumstances of this case, as they now appear, it should be allowed to avail the defendants.

I gave my concurrence to the decisions in *Kirkman v. Holland*, 189 N. C. 185, 51 S. E. 856, and *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 729, 7 L. R. A. (N. S.) 407, most reluctantly and only in deference to the prior decisions in *King v. Rhew*, 108 N. C. 696, 18 S. E. 174, 23 Am. St. Rep. 76, and *Clayton v. Rose*, 87 N. C. 106, and the greater learning and wisdom of my Brethren, because I believe the principle underlying those decisions is essentially wrong and will work, if it has not already wrought, great injustice. I do not think that when a life tenant is ousted, even though he has only an equitable estate, the legal title being in a trustee for him, and the disseisin continues long enough to bar his trustee, that persons entitled in remainder should be prejudiced by the inaction of the trustee, and there is eminent authority for this position. The bar should operate only against the estate of the life tenant, just as an estoppel is not permitted to extend beyond the estate of the person bound by it. James B. Webb died in August, 1901, and the life estate then fell in. This action was commenced in April, 1902, by the remaindermen, in full time for the assertion of their rights by the plaintiffs.

I am also of the opinion that there was evidence tending to show that the proceedings for the sale of the land which are attached for fraud, irregularity, and upon other grounds were of such a character as not to obstruct the plaintiffs' right to equitable relief. But his honor ruled out important and material evidence that plaintiffs proposed to introduce, on the other branch of the case, and peremptorily decided that they could not recover. They were deprived in limine of the benefit of proof essential to their success, and finally denied the right to recover in any aspect of the case. This, in my judgment, was error. It would, perhaps, have been better to submit the case to the jury upon proper issues, so that the facts might have been found. The jury may have found against the plaintiffs, but they should, at least, have had an opportunity to prove their case or to develop it. No issues were framed, but the case was most manifestly tried upon the understanding that proper issues would be submitted when the evidence had all been introduced. It does not seem to me, upon a review of the entire record, that

the plaintiffs have had the full benefit of their legal rights, and, being of this opinion, I must dissent from the opinion of the majority, which I always do with extreme regret. My inclination always is to concur with them, not only because of their great learning and ability, but also because I well know with what anxious care and patient investigation they consider and decide cases coming before them. I would enter more fully into the discussion of the principle involved in *King v. Rhew*, *Kirkman v. Holland*, and *Cameron v. Hicks*, if it would not extend this opinion to an unreasonable length. I may undertake to express my views at length on that subject at some future and more opportune time. The principle herein applied goes beyond what was there decided, it seems to me.

I agree with my Brethren that this case bears no resemblance to *Joyner v. Futrill*, 136 N. C. 301, 48 S. E. 649, or *Perry v. Hackney*, 142 N. C. 368, 55 S. E. 289, and for that reason they were not cited. In the former of those two cases, the trust was a passive one, and was executed by the statute of uses plainly and unmistakably, and, besides, it was clearly confined to the life estate. The remainder was devised, freed, and discharged of the trust. In *Perry v. Hackney* the devise was made directly to *Nancy Richardson* of the "use, benefit, and profit" of the property in controversy. There was no intervention of a trustee upon whom duties were conferred that created an active trust. She got the whole estate, because the language was capable of no other construction; and the rule in *Shelley's Case* was held to apply as the limitation then was "to the lawful heirs of her body" after her death. The statute of uses had no application, nor did the question presented in this case arise.

(145 N. C. 242)

#### SMITH v. GODWIN et al.

(Supreme Court of North Carolina. Oct. 16, 1907.)

#### 1. MORTGAGES—ASSIGNMENT—RIGHTS PASSING AS INCIDENTS.

Y. held a note against H. secured by a mortgage on land. The note being past due, H., for the purpose of paying it and discharging the mortgage, executed an absolute deed of the land to Y., who gave him a receipt in full, but retained possession of the note and mortgage. Y. then deeded the land to V. The deed recited that the consideration was a certain sum, but that it was understood that only a certain part had been paid, and that the deed would only become operative as a fee-simple deed on the payment of the balance. February 2, 1902, Y. gave plaintiff his note for \$1,000, and on February 3, 1903, indorsed to him as security the H. note and transferred the mortgage as security and also certain shares of stock. Subsequent to February 3, 1903, the deeds from H. to Y. and Y. to V. and the cancellation of the mortgage from H. to Y. were recorded. In June, 1904, Y. was adjudged a bankrupt, and defendants G. and others appointed as trustees. Plaintiff seeks to recover of defendant V. the balance due on the purchase price of the land

described in the H. mortgage conveyed to him by Y. Held, that under the express provisions of Revisal 1906, §§ 2214, 2215, when Y. indorsed the note, although past due, to plaintiff, he warranted that it was genuine, that he had a good title to it, that he had no knowledge of any fact which would impair its validity or render it valueless, and that on presentment it would be paid; and hence plaintiff's right to demand all securities which Y. held, including any interest in the land, is clear, and he has an equitable lien on the debt of V. for the balance due on the purchase price of the land.

#### 2. BANKRUPTCY—LIENS—VALIDITY AGAINST TRUSTEE.

Under these circumstances, the trustees in bankruptcy for Y. did not take title to the V. debt free from the equitable lien of plaintiff, since trustees in bankruptcy take title to the property of the bankrupt subject to all the rights and equities existing in favor of third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 286-295.]

#### 3. MORTGAGES—ASSIGNMENT AS SECURITY.

No demand having been made on plaintiff to apply the stock transferred to him to the payment of his note, he may enforce his lien against the debt of V. without doing so, since he may realize on either of his securities in the order which he prefers.

#### 4. BANKRUPTCY—RIGHTS OF TRUSTEE AS AFFECTED BY LIEN.

Under these conditions, it being conceded that the amount recovered by plaintiff in this action is insufficient to discharge his note, the trustees of Y. are entitled to an accounting of the funds in plaintiff's hands, to the end that they may have the stock sold and the balance after paying plaintiff's note paid to them.

Appeal from Superior Court, Harnett County; Peebles, Judge.

Action by Edward Smith against R. L. Godwin and others to recover the balance due on the purchase price of land. From a judgment for plaintiff, defendants appeal. Affirmed.

The facts, as shown by the pleadings, admissions, and verdict are: E. F. Young held a note against one B. F. Hamilton, secured by a mortgage on land in Harnett county, for \$1,256, dated March 1, 1896, subject to certain indorsed credits. On January 7, 1902, the note being past due, Hamilton, for the purpose of paying the note and discharging the mortgage, executed an absolute deed, for the land, to Young, who gave him a receipt in full, but retained possession of the note and mortgage. On the same day, January 7, 1902, Young executed a deed for the land to defendant W. R. Vann. The consideration, recited in the deed, was \$3,100, followed by the following provision: "It is distinctly understood and agreed between the parties hereto that only the sum of \$1,692.05 of the consideration of \$3,100, above written, has been paid, and that this deed shall become operative as a fee-simple deed of conveyance only from and after the payment of said balance in full with interest." On March 1, 1904, Vann paid Young on account of the balance due \$1,014.24, leaving due, at the time of the trial, \$746.76. The deed from Hamilton to Young and from Young to Vann were recorded subsequent to

February 3, 1903, as was the cancellation of record of the mortgage from Hamilton to Young. On February 2, 1902, Young executed to plaintiff, for a valuable consideration, his promissory note for \$1,000, due November 1, 1902, no part whereof has been paid. On February 3, 1903, Young indorsed to plaintiff as collateral security for said note, the Hamilton note, and transferred the mortgage executed to secure the same. There was apparently due on said note at that time \$1,053.96. On June 4, 1904, Young was duly adjudged a bankrupt, and defendants Godwin and others appointed his trustees. Plaintiff has not proven his debt against Young. At the time of the transfer of the Hamilton note and mortgage, Young, for the same purpose, transferred to plaintiff certain shares of stock in incorporated companies. Plaintiff, in this action, seeks to recover of defendant Vann the balance due on the purchase price of the land described in the Hamilton mortgage, conveyed to him by Young. He avers that, by the transfer of the note, he acquired an equitable lien on the debt. Defendant Vann is ready to pay the amount as the court may adjudge. Defendants, trustees, insist: (1) That plaintiff took the note after maturity and subject to all infirmities and defenses attaching thereto in the hands of Young. (2) That they took the debt, as trustees, free from any liens or equities attaching to Young's title. (3) That, in any event, plaintiff cannot recover the debt until he accounts for the value, or the amount which he ought, by due diligence, to have realized from a sale of the stocks. His honor being of the opinion that there was no evidence that Young, or his trustees, had notified plaintiff to dispose of the stocks, could not compel him to account for their value before realizing on the Vann debt, that they could, at any time, demand the return of the stocks by paying the note, he therefore declined to submit an issue in regard to the sum which Young could have realized by a sale of the stocks. Defendants duly excepted to these rulings. From the judgment rendered, the trustees appealed.

Godwin & Townsend and R. L. Godwin, for appellants. J. C. Clifford and Rose & Rose, for appellees.

CONNOR, J. (after stating the facts as above). It is conceded, as contended by defendants, that, as against Hamilton, the plaintiff took the note by indorsement from Young, subject to defense accruing to him by reason of the execution of the deed of January 7, 1902, and the receipt by Young; he could not have maintained an action on the note against Hamilton. This question, however, is not involved here. When Young indorsed the note, although past due, to plaintiff, he warranted that it was genuine—that he had a good title to it—that he had no

knowledge of any fact which would impair its validity or render it valueless; and that, on presentment, it would be paid. Revisal 1905, §§ 2214, 2215. Hence his title to the note and his right to demand all securities which Young held is clear. While the record presents a peculiar state of facts, we can see no good reason why the same equitable principles which carries to the purchaser of a note all securities held by the assignor for its payment may not be invoked by plaintiff. Certainly, in good conscience and equity, Young should be treated as holding such security for the benefit of his assignee—the principal having passed, the incident goes with it. This is elementary. Hamilton was entitled to demand of Young the surrender of his note and cancellation of the mortgage. He permitted him, however, to retain the one and leave the other open upon the record. When Young sold to Vann, he expressly retained a lien upon the land to secure the unpaid balance of the purchase money. This represented in Young's hands, the note and mortgage which he held against Hamilton. A court of equity which always disregards mere form, so that substantial justice will be done, finds no difficulty in treating Young as a trustee for plaintiff in respect to the amount due by Vann. Defendants insist that, however this may be as against Young, they take under the bankrupt law, title to the debt free from such equity, or, to state their contention in the language of their well-considered brief: "When they were appointed trustees of Young's estate, and were, by operation of law, vested with the title to Young's property, they took that title which Young could, prior to his adjudication in bankruptcy, have transferred to an innocent purchaser for value." In considering this question, the fact that Hamilton's note was overdue and open to defense by him is immaterial. Plaintiff, as against Young, acquired a perfect title to the note. This being true, we are unable to see how his subsequent bankruptcy in any manner affected plaintiff's title, either to the note or any securities which Young held for its payment. We do not think plaintiff's right grows out of an estoppel; but equity, regarding that as done which ought to have been done, treats the Vann debt as having been transferred to plaintiff as incident to the transfer of the note, or, which amounts to the same thing, considers Young as trustee for the plaintiff. Whether if Young had, for value and without notice of such trust, transferred the Vann debt to a purchaser, plaintiff would have been without remedy, is not presented here.

While there is some apparent confusion in the decisions of the federal District and Circuit Courts, upon the question, we find that the Supreme Court of the United States has held that the trustees in bankruptcy take the assets of the bankrupt subject to rights, liens, and equities existing against them in



the hands of the bankrupt. In *Thompson v. Fairchild*, 196 U. S. 513, 25 Sup. Ct. 306, 49 L. Ed. 577, it is said: "Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it and subject to all equities impressed upon it in the hands of the bankrupt." *Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. The result of the decisions is thus stated in 5 Cyc. 341: "The trustee becomes vested with the same kind of a title as though he were a purchaser, but such title is subject to all the rights and equities existing in favor of third persons against the bankrupt." *Bank v. Iron Co. (C. C.)* 102 Fed. 753. The same principle has been recognized by this court in regard to assignees of property to secure the payment of existing debts. In *Potts v. Blackwell*, 56 N. C. 449, *Pearson, J.*, speaking of the title acquired by such assignees, says: "It would seem that they take subject to any equity that attached to the property in the hands of the debtor and cannot discharge themselves from it on the ground of being purchasers without notice." This cause was reheard, and, after most exhaustive argument by counsel of marked learning, affirmed. It has been uniformly followed in this court, and is sustained by reason. 57 N. C. 58. While there are some apparently conflicting rulings in the bankrupt courts, we think that they are more apparent than real, being controlled frequently by local statutes regarding registration of deeds and mortgages. No question of that kind is presented in this case. Plaintiff did not acquire any interest in the land sold to Vann, but became entitled to the debt for the purchase money. It will be observed that at the date of the assignment to plaintiff the mortgage from Hamilton had not been canceled, nor the deeds from Hamilton to Young or Young to Vann recorded. So far as plaintiff's knowledge or information extended, the Hamilton note and mortgage were intact. This fact shows the strength and justice of his equity against Young and equally so against his trustees.

The next exception made by defendants involves the right of plaintiff to recover in this action, before disposing of the stocks transferred to him. We can perceive no reason, in the absence of a demand upon him to do so, why he may not realize on either of his securities in the order which he prefers. It is conceded that the amount recovered by him in this action is insufficient to discharge his note. The trustees of Young are entitled, if so advised, to have an accounting of the fund in plaintiff's hands—to the end that they may either have the stocks sold and the balance, after paying plaintiff's note, paid to them—or, we presume, by an order of the bankrupt court they may redeem the stocks and dispose of them for the benefit of the estate. Discussing the

duty of a pledgee of stocks to secure debts, *Mr. Justice Blatchford*, in *Culver v. Wilkinson*, 145 U. S. 205, 12 Sup. Ct. 832, 36 L. Ed. 676, says: "A sale, in the absence of a request to sell, or the commencement of a suit, was not compulsory, but was at the discretion of the pledgee." We concur in the opinion of his honor. *Lake v. Little Rock Trust Co.*, 77 Ark. 53, 90 S. W. 847, 3 L. R. A. (N. S.) 1199, that: "Young had a right to pay plaintiff's note and take back his collaterals, or he could have instructed plaintiff to sell them." This right passed to his trustees. Neither he nor they did so.

There is no suggestion of any other breach of duty on the part of plaintiff in respect to the stock. Upon a careful examination of the record, with the aid of the well-prepared briefs and arguments of counsel, we find no error. It was in the sound discretion of his honor to set aside the verdict on the eleventh issue, and, as we have seen, in the absence of any notice to sell, the issue was unnecessary.

The judgment must be affirmed.

(145 N. C. 264)

#### OLDHAM v. RIEGER.

(Supreme Court of North Carolina. Oct. 16, 1907.)

#### 1. EXECUTORS AND ADMINISTRATORS—CLAIMS—ESTABLISHMENT—ENFORCING PAYMENT—PROCEEDINGS.

Where a debt was established by a judgment against one in his lifetime, it is not necessary to establish the debt after his death by a new adjudication on the judgment before taking proceedings to enforce payment.

#### 2. SAME.

Where, in an action to compel an administrator to account and to pay a judgment against his intestate, limitations were pleaded, the court should first determine that issue, and should not order an account and settlement, under *Revisal 1905, § 104 et seq.*, unless it found against the plea.

#### 3. SAME.

Under *Revisal 1905, § 129*, conferring on the superior court jurisdiction of actions against administrators, and section 614, providing that when any proceeding begun before the clerk of any superior court shall be sent to the superior court, the judge shall have jurisdiction, the superior court has jurisdiction of an action commenced before the clerk to compel an administrator to account and to pay a judgment, and transferred by the clerk to the court.

#### 4. LIMITATION OF ACTIONS—DEFENSES—AVAILABILITY.

Under *Revisal 1905, § 360*, declaring that the objection that an action was not commenced within the time limited can only be taken by answer, the bar of limitations cannot be raised by demurrer or motion to dismiss.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Limitation of Actions, § 670.*]

#### 5. SAME.

Where the complaint sets out a cause of action which is barred, and the facts are admitted by answer, and the statutory bar is pleaded, the court may decide the question as a matter of law, but where the complaint states a cause of action apparently barred, and the answer denies the facts and sets up the bar, the court cannot dismiss on a motion for nonsuit, since under *Revisal 1905, § 485*, a plea of the statute does

not require a reply, and since, under section 248, evidence that the action is not barred on the ground of infancy, etc., may be shown by evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 727.]

Appeal from Superior Court, Brunswick County; Webb, Judge.

Action by W. P. Oldham against Sarah M. Rieger. From a judgment of dismissal, plaintiff appeals. Reversed.

The plaintiff alleges, in his complaint, that he recovered judgment against A. W. Rieger on December 14, 1895, for \$126.31 in New Hanover county before a justice of the peace, and the judgment was duly docketed on the same day in the superior court under the statute; that the said Rieger died in Brunswick county, the place of his domicile, on December 3, 1903, and the defendants Sarah M. Rieger and M. B. Mintz qualified as administrators of his estate in said county of Brunswick on the 8th day of December, 1903; that the plaintiff duly demanded payment of the judgment from the defendants, as administrators, which was refused. They further allege that more than two years have elapsed since the defendants qualified as administrators, and that the judgment still remains unpaid. The defendants answer the complaint and admit the death of A. W. Rieger and administration on his estate, as alleged in the complaint, but they deny all the other allegations of the complaint, except the one that two years have elapsed since letters of administration were taken out by them. They then plead the statute of limitations, denying the material allegations of the plaintiff's complaint, except as hereinbefore stated, and averring that, even if they be true, the plaintiff's cause of action, upon the facts stated in the complaint and the additional facts averred in their plea of the statute, is barred. The full administration of the estate is alleged, with the usual allegations as to legal notice to creditors, and so forth. The plaintiff brought this action (or proceeding) before the clerk of the superior court of Brunswick county, where administration was granted, to have an accounting of the defendants, as administrators of the estate of A. W. Rieger, and to compel the payment of their judgment; the suit being in the nature of a creditors' bill, under the statute. The clerk ruled that the case was cognizable by him and issued the necessary notices. Upon the issues joined between the parties, he then transferred the case to the superior court at term for trial. The plaintiff moved to remand the case, and the judge was of the opinion, as we infer from the briefs, though not, necessarily, from the record, that it was the duty of the plaintiff to have prosecuted an independent action upon his judgment, before proceeding to call the defendants to an account of their administration of the estate of their intestate. He thereupon rendered judgment dismissing the action, but coupled

it with an order, made in open court, directing the clerk "to require the defendants to file accounts and make a proper settlement of the estate according to the law in such cases made and provided; the said account and settlements to be filed at once, after citation to the proper parties." The plaintiff duly excepted and appealed.

S. M. Emple, for appellant. E. K. Bryan, for appellee.

WALKER, J. (after stating the facts as above). It is stated in the plaintiff's brief, and the argument, which is so ably presented in the defendant's, seems to admit, that the learned judge, who presided at the trial of this case, ruled as he did, because he was of the opinion that the plaintiff should have sued upon the judgment independently and established his claim against the estate before bringing this proceeding. In this ruling, if it is correctly stated in the briefs, though it does not so clearly appear in the record, we do not concur. There was a special plea in bar, namely, the statute of limitations, and we think this plea should have been determined before ordering an account, or a reference to ascertain the exact condition of the estate. It was not necessary to establish the claim of the plaintiff by a new adjudication upon his judgment. *Bank v. Harris*, 84 N. C. 206; *McLendon v. Commissioners*, 71 N. C. 38; *Glenn v. Bank*, 72 N. C. 626. The debt had already been established by a judgment against A. W. Rieger in his lifetime. The court should have submitted to the jury, unless the parties could agree upon the facts, the issue raised by the pleadings, to wit, whether the plaintiff's claim was barred, and, if it was found that the statute was not in the way of the plaintiff's recovery, then the court should have proceeded to order an account and settlement. *Revisal 1905, § 104 et seq.* The superior court had full possession of the case by the transfer, and therefore jurisdiction, under the statute (*Revisal 1905, § 129*), and the decisions of this court, to finally determine all matters of controversy between the parties. This has been the law in cases of administrators, since Acts 1876-77, p. 446, c. 241 (*Code 1883, § 1511*), as construed in *Haywood v. Haywood*, 79 N. C. 42, and *Pegram v. Armstrong*, 82 N. C. 327; *Bratton v. Davidson*, 79 N. C. 423; *Clark's Code* (3d Ed.) pp. 263, 264; *Revisal 1905, § 614*; *Capps v. Capps*, 85 N. C. 408; *McMillan v. Reeves*, 102 N. C. 550, 9 S. E. 449; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518; *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123; *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188; *Fisher v. Trust Co.*, 138 N. C. 90, 50 S. E. 592. Indeed, Acts 1887, p. 518, c. 276 (*Code, § 255; Revisal 1905, § 614*), as above cited, provided that, whenever a cause which was originally brought before the clerk is constituted in the superior court at term by transfer, appeal, or

in any other way, that court shall proceed to hear and determine all matters in controversy, with power to remand in its sound discretion, if, by that method, justice can be more speedily and cheaply administered. In *re Anderson*, 132 N. C. 243, 43 S. E. 649.

Not having had the benefit of an oral argument from the learned counsel who represented the respective parties, which is always desirable, we were somewhat troubled to decide upon the reasons assigned in one of the briefs, whether the proceedings should not be dismissed in this court, because it appeared, *prima facie* at least, upon the complaint, that the cause of action is barred by the statute of limitations, which is pleaded in the answer. But slight consideration of that question and a cursory examination of the authorities convinced us that the point was entirely without merit. The bar of the statute of limitations could not be raised by demurrer or motion to dismiss. Under the former system, it could have been done in equity (*Robinson v. Lewis*, 45 N. C. 58; *Whitfield v. Hill*, 53 N. C. 316; *Smith v. Morehead*, 59 N. C. 360); but it cannot be under the new procedure, for the law provides that "an objection that the action was not commenced within the time limited can be taken only by answer." *Clark's Code* (3d Ed.) § 138, and notes (*Revisal 1905*, § 360). The change, under the reformed procedure, is noted and fully discussed by *Shepherd, J.*, in *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204, and *Randolph v. Randolph*, 107 N. C. 506, 12 S. E. 374. See, also, *Freeman v. Sprague*, 82 N. C. 366. When the complaint sets out a cause of action which is clearly barred, and the facts are admitted by the answer, and, in addition to the admission, the statute is pleaded or relied on, then the court may decide the question as a matter of law. This was the case, as will appear by reference to the statement of the facts in *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101, and *Cherry v. Canal Co.*, 140 N. C., at page 426, 53 S. E., at page 139 (111 Am. St. Rep. 850), in the last of which cases Justice Hoke says: "The facts are uncontroverted." But when the complaint states a cause of action apparently barred, and the answer properly denies the facts, or the cause of action, and then sets up the bar of the statute, the court cannot dismiss upon a demurrer or *tenuis*, or a motion to nonsuit, for when such a motion is made it must be decided upon the pleading of the plaintiff, or of the adversary of the party who makes the motion, and the court has no right to look at the pleading of the opposing party, except to see if the facts are admitted so as to present merely a question of law. No defendant can therefore, in the science of good pleading or practice, demur to the cause of action of the plaintiff and call in aid the averments of his own pleading, unless they amount to an admission of what is alleged in

the complaint. This would be in the nature of a "speaking demurrer," and would be no more permissible than if a defendant, after all the evidence had been introduced, should move to nonsuit the plaintiff or to dismiss his action, upon the evidence introduced by himself. There is excellent reason for this rule, in the case of pleadings, when the statute of limitations is set up as a bar, and it is this: When the plaintiff alleges the facts constituting his cause of action, and the defendant denies the material allegations, and then pleads the statute of limitations as a bar, the court evidently has no facts before it upon which it can declare the law, as to the statutory bar, because there are no facts admitted or found by a jury, and for one other reason at least, if not still for others just as sound and conclusive, namely, that the plaintiff has the right, without any special or written reply (*Clark's Code* [3d Ed.] § 248; *Revisal 1905*, § 485), to show in evidence that his cause of action is not barred, although apparently so, as, for instance, that he was an infant, or imprisoned, or insane, or, if a feme, that she was covert at the time the cause of action accrued, or any other good and sufficient disability which would exempt his or her cause of action from the operation of the statute. This being so, how could the judge dismiss, and thereby exclude the plaintiff from his right to repel the plea of the statute by proof? It must be remembered that the plea of the statute does not, like a counterclaim, require any special written reply; but a reply is always deemed to have been made as upon a direct denial or avoidance, as the nature of the case may require. *Clark's Code* (3d Ed.) § 248, and notes; *Revisal 1905*, § 485; *Askew v. Koonce*, 118 N. C. 526, 24 S. E. 218.

We have discussed this question somewhat fully, because it does not seem to be very clearly understood. The court erred in not first submitting to the jury the plea of the statute, instead of ordering an immediate accounting in limine. The plea in bar should have been disposed of, because, if found in favor of the defendant, no reference or accounting would have been necessary. *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746, and cases cited; *Smith v. Barringer*, 74 N. C. 665; *Clements v. Rogers*, 95 N. C. 248; *Kerr v. Hicks*, 129 N. C. 141, 39 S. E. 797; *Bank v. Fidelity Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; *Austin v. Stewart*, 126 N. C. 525, 36 S. E. 37; *Jones v. Wooten*, 137 N. C. 421, 49 S. E. 915. The court could hardly have proceeded under *Revisal 1905*, § 100, which requires the clerk of the superior court to compel the filing of accounts within 20 days by executors or administrators who have neglected to comply with their statutory duty.

There was error in the ruling of the court.  
Error.

(73 S. C. 324)

**THOMPSON v. SEABOARD AIR LINE RY.**  
(Supreme Court of South Carolina. Oct. 17, 1907.)

**1. RAILROADS—INJURIES TO ANIMALS AT CROSSING—NEGLIGENCE—QUESTION FOR JURY.**

In an action against a railroad company for killing a team stalled on the track at a crossing in consequence of the wheel of the wagon going into a ditch by the side of the railroad bridge at the crossing, the evidence showed that the road ran beside the track, that at the bridge it made a short turn to cross the track, making a long bridge necessary, and that the bridge had been reported to the county supervisor as unsafe. *Held* that the question whether the bridge was unsafe was for the jury, though it had been in like condition for some years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1627-1630.]

**2. SAME—PROXIMATE CAUSE—QUESTION FOR JURY.**

Where a team stalled on a railroad track at a crossing in consequence of a defect in the railroad bridge was killed by a train, the question whether the defect in the bridge was the proximate cause of the accident was for the jury. (Per Pope, C. J., and Jones, J.)

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1640.]

**3. APPEAL—QUESTIONS NOT RAISED IN TRIAL COURT—REVIEW.**

A question cannot be raised for the first time in the Supreme Court on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1018-1034.]

**4. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS EMBODIED IN THOSE GIVEN.**

It is not error to refuse a requested charge covered by the general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by J. M. Thompson against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

*Eldred & Dreher and Lyles & McMahan*, for appellant. *G. T. Graham and Nelson & Nelson*, for respondent.

**POPE, C. J.** The plaintiff, J. M. Thompson, a citizen of Lexington county, owned, in March, 1905, a pair of mules, wagon, and harness. On the 9th of March he hired them to his brother to do some hauling, who about 9 o'clock that night was traveling along the Two Notch road, a public highway in Richland county, at a point where the highway crosses the track of the defendant, about 9 miles from Columbia. In attempting to cross a bridge at the crossing the front wheel of the wagon missed the end of the bridge and went into the ditch, thus stopping the mules. The vestibule train of the defendant, known as the "Florida Limited," due about that time at Weddell, a small station a few hundred yards from the crossing, struck the mules and killed them and injured the harness and wagon considerably. The plaintiff brought suit alleging negligence on the part of the defendant in failing to keep the bridge in proper repair, and willfulness and wanton-

ness in running its train at an excessive rate of speed and in failing to stop in time to prevent injury to plaintiff's property. The answer of the defendant was a general denial. The case came on for hearing at the January, 1907, term of court for Lexington county, and resulted in a verdict of \$450 for the plaintiff. The defendant appeals.

The first exception alleges error on the part of the circuit judge in refusing to charge that there was no evidence tending to show that the plaintiff's property was injured by reason of the alleged improper construction of the bridge in question. That there was at least some evidence tending to show that the bridge was not properly constructed we think is quite clear. It was shown that the road ran right down beside the railroad track and that this bridge made a sharp turn to cross the railroad, thus making a long bridge necessary. Again, there was evidence that the bridge had been reported to the county supervisor as unsafe. True, the bridge had been in like condition for some years, but that fact would not raise a conclusive presumption that it was properly constructed. What is proper construction under all of the circumstances is a question which must be left to the jury.

There being some evidence of negligent construction of the bridge, the question then arises as to whether this negligent construction was the cause of the accident. The plaintiff alleges that the driver of the wagon exercised due care in attempting to cross. The evidence of the defendant certainly did not so clearly negative due care as to enable the court to say as a matter of law that there was a failure of such care. This question was likewise properly left to the jury. We are aware that this conclusion is adverse to the doctrine laid down in *Brown v. Railway*, 57 S. C. 434, 35 S. E. 731, but after mature consideration it seems that the holding in that case was wrong in principle and should be overruled. It is not our purpose, however, to consider the question at length, for it is ably set forth in the dissenting opinion of Mr. Justice Jones in the case above referred to. Suffice it to say here that the question of proximate cause is one peculiarly within the province of the jury. Therefore, where a plaintiff alleges negligent construction or repair of a bridge on a railroad's right of way, and injury resulting from such negligence, the trial judge is invading the province of the jury when he attempts to say that some other agency brought about the injury. The case of *Felder v. Railway*, 76 S. C. 554, 57 S. E. 524, has no application to the case in question, for the reason that there was evidence tending to show that the bridge at the crossing here extended clear across the track. Even if it did apply to the railroad's liability for the proper construction of the bridge, not having been contested below, that question cannot be raised for the first time in this court.

Again, error is alleged in refusing the fol-

lowing charge: "If you find from the evidence that the driver of the wagon in question was negligent in missing the end of the bridge with his wheel, if you find that he did so drive it, and that such negligence on his part was the proximate cause of the injury, then you must find for the defendant." Examination of the record fails to disclose the ground on which the refusal was made; but, be that as it may, language almost identical with the alleged rejected charge was used to the jury in the general charge. Thus the instruction was: "If it was the plaintiff's servant's negligence which was the proximate cause of the injury, the railroad is not responsible; if the driver—if you should find that there was a driver in charge of that team, and if that team was injured through the negligence of the driver as the proximate cause—why, then, the defendant would not be responsible if the negligence of the driver was the sole proximate cause of the injury." Where a request to charge is fully covered by the general charge, it is not error on the part of the circuit court to refuse such a request. The aim of permitting requests is to secure a full presentation to the jury of the law applicable to the case. When this result is secured independent of such requests, it is not error to refuse to reiterate the same law. We think the charge in this case was full and clear, covering thoroughly the law applicable. Therefore all objections are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., concurs. WOODS, J., concurs in the result.

GARY, A. J., I concur in the result, as I do not think the case of *Brown v. Railway*, 57 S. C. 433, 57 S. E. 731, should be overruled.

(78 S. C. 237)

OWENS v. HEYWARD, Governor, et al.  
DUNCAN v. SAME.

(Supreme Court of South Carolina. Sept. 24, 1907.)

Applications by W. R. Owens and W. H. Duncan for injunction against D. S. Heyward, Governor, and others, constituting the state board of education. From an order of Associate Justice Woods (54 S. E. 760), refusing a temporary injunction, petitioners appeal. Affirmed.

The petition, answer, and exceptions are as follows:

Petition:

"To the Honorable the Justices of the Supreme Court:

"Your petitioner would respectfully show unto the court:

"(1) That your petitioner is a citizen and resident taxpayer of the county of Barnwell, having children of lawful school age in attendance upon the free public schools of said county, in which schools only such books are permitted to be used as are prescribed by the state board of education, pursuant to the power vested in it by section 1184 of the Civil Code; and your petitioner is required to pay for said books such prices as said board may contract for with the publishers thereof.

"(2) That on the 20th day of January, 1906,

the Governor, as ex officio chairman of said state board of education, issued his proclamation, 'To Whom It may Concern,' calling for 'bids for contracts to furnish for use in the public schools in the state, for a period of five years, from July 15, 1906, \* \* \* a uniform series of text-books as described,' and accompanying said proclamation was a copy of certain resolutions of said board and a form of the required contract, all of which were designed and intended to inform the bidders of the requirements of said board, a copy of which proclamation, resolutions, and contract is hereto attached as a part of this petition.

"(3) That on the 22d day of June, instant, pursuant to said proclamation and resolutions, the bids which had been filed by competing publishers were opened and considered, and certain school books adopted thereunder, to be contracted for under the terms of the proposed contract, for use in the free public schools.

"(4) That in the third section of said proposed contract it is provided, 'The party of the second part (meaning the publishers) further agrees to and with the party of the first part (meaning said board, the state) that it will furnish the books named in this contract to its own agencies, to the county depositories, and to individuals in the state, through a central depository, to be located in the city of Columbia, in the county of Richland, said depository and its manager to be approved by the state board of education; and it is further agreed that if any books are furnished to the above-named agencies, depositories, and individuals in any other manner, said books shall be furnished at the same price and upon the same terms as those furnished through the state depository.' And your petitioner is informed and believes, and so alleges, that all of the bidders for contracts to furnish said books thereunder considered the extra expense which would be incurred in establishing and maintaining the required 'central depository,' and added the estimated amount thereof, to wit, 10 per cent., to the cost price of the books to the purchaser, over and above what said books would have been sold at, if the board had not required the maintenance of said newly created 'central depository,' and required all of said books furnished under said contract to be furnished through the same.

"(5) That by section 1184 of the Civil Code of 1902 (volume 1), 'the general powers of the board' are defined, inter alia, by the fifth subdivision as follows: 'To prescribe and to enforce, as far as practicable, the use of a uniform series of text-books in the free public schools of the state; to enter into an agreement with the publishers of the books prescribed, fixing the time of prescription and the price above which the books shall not be retailed during the period of prescription, and a rate of discount at not less than which the books shall be furnished to the retail dealers in this state; to require the publishers, in the discretion of the board, to establish in each county one or more depositories of their books within the state, at such place or places as the board may designate, and where such books may be obtained without delay; and to exact of the publishers a bond in the sum of not more than five thousand dollars conditional for the faithful performance of the agreement, and with a penalty of twenty-five dollars for each violation of the agreement, the form and execution of the bond to be approved by the Attorney General of the state, which agreement and bond shall be deposited with the State Treasurer, all recoveries thereon to go into the state treasury for school purposes.' And in section 1239 of said Code it is prescribed: 'The county boards of education of the several counties of this state are hereby authorized and required to set aside from the public school fund of their respective counties an amount not exceeding five hundred dollars, for the purpose of providing the pupils attending the free public schools of their counties with school text-

books at actual cost or exchange prices. The amount so set aside from the school funds shall be paid to the county superintendent of education by the county treasurer, out of the unappropriated general school funds in his hands, on the warrant of said county board of education, and shall be and remain a permanent fund in the hands of the county superintendent of education, to be used in purchasing and keeping on hand school text-books for sale to pupils attending the free public schools of his county, for cash, at actual cost or exchange prices, and to be used for no other purpose, and in no other manner; and the place where said school text-books are kept and sold shall be deemed depositories, under the control of the state, as provided in the seventh article, or provision, in the contract made in 1893 with the publishers of school text-books. That the county superintendent of education in every county in the state be, and he is hereby, required to keep his office open each day of the week prior to the time appointed for schools to open in his county, and for one week immediately after, and for at least one day in each week during the remainder of the school term, for the convenience of those wishing to purchase books. The 'seventh article or provision' referred to in the above section is as follows: '(7) That if the Legislature of the state, or the state board of examiners, should hereafter provide for a system of depositories under the control of the state, they agree to furnish their adopted books to the depositories at their best rate and terms of exchange, their best prices and terms of introduction, and their greatest rate of discount, set forth in their original and supplemental propositions to the state board of examiners, pay the transportation charges on all cash orders for such books when shipped by freight, and to so ship when so ordered, and to make no charge at any time for box, packing or drayage, and to conform to all reasonable orders of the state board touching the regulations of same.'

"(6) That your petitioner is informed and believes that the amount annually expended for the purchase of school books for the free public schools of the state for which said books are prescribed is at least \$100,000, and it is estimated that the entire amount of sales for the succeeding five years provided for in the proposed contract is between \$500,000 and \$600,000, of which amount, as above set forth, 10 per cent. over and above all other expenses incurred in distributing the school books is intended to go to the 'central depository' in payment of services rendered and expenses incurred by said central depository, exclusive of and in addition to the cost and expenses of maintaining the various county depositories, and is an additional expense which would not be incurred but for the illegal establishment of said 'central depository,' and the incurring of said expense is without the warrant of law, and is an indirect tax illegally levied upon the patrons of the public schools, and the same is practically a bonus contributed to private enterprise.

"(7) Your petitioner is informed and believes, and so alleges, that since the date of the acceptance of the bid and the adoption of said books for the next succeeding five years as above mentioned, to wit, on the — day of June, instant, the various publishers, or a majority thereof, whose bids had been accepted by the board, met and selected, as the manager of the 'central depository,' in the city of Columbia, a retail book concern of said city, and then and there agreed to give as compensation to said book concern, for acting as the said central depository, 10 per cent. of the gross price of all books to pass through the hands of said dealer or shipped to county depositories or individuals by its order, under its direction or through said 'central depository,' and said extra 10 per cent. being in addition to the net price of said books as furnished to the county depositories, and the 10 per cent. allowed said county depositories

for their immediate remuneration and expense.

"(8) And your petitioner contends and charges that the amount so allowed to the central depository is an additional amount over and above the actual cost of the books which the law contemplates shall be charged to the patrons of the schools, and, being charged solely for the maintenance of the central depository, is a violation of the law, in that it increases the number of middlemen acting between the publisher and the ultimate purchasers, to the cost and damage of the latter.

"(9) Your petitioner respectfully contends that by the statutes of this state the cost of the books to patrons of the school shall be the net price received by the publishers, plus the percentage allowed to the local county depositories, and that it is unlawful and beyond the power of the board to add, by any means whatsoever, and especially by newly created and additional agencies, any sum, however small, to the cost of these books which the purchaser is required to pay.

"(10) That the said third section of the proposed contract, in requiring that books furnished to 'individuals in any other manner' than 'through the state depository' shall be furnished at the same price and upon the same terms as those furnished through the state depository, compels the patrons of the school, when procuring the books directly from the publishers, without the intervention of county depositories of the state depository, to pay 10 per cent. beyond the price for which the books would otherwise be provided to them, and that said 10 per cent. is either a bonus given by the board to the state depository for services not rendered, or is allowed to the publishers in addition to the cost, and is a penalty imposed upon the individual for failing to procure said books through the county depositories or the state depository, and is in violation of the legal rights of your petitioner and the other patrons of the schools, and without warrant of law.

"(11) That the first section of said contract is as follows: 'That the party of the second part hereby covenants and agrees to and with the party of the first part to establish and maintain from and after the 1st day of September, 1906, up to the 31st day of August, 1911, not fewer than three depositories or agencies in each and every county of the state, said depositories to be approved by the state board of education, where there shall be constantly on hand for sale to the children attending the public schools a sufficient number of the books hereinafter named, and at the prices hereinafter named in this contract to supply the demands, the same to be established at such places as will afford proper facilities for the purchase of such books: provided, however, that nothing herein contained shall prevent the said party of the second part from establishing such additional agencies or depositories as it may deem necessary and proper, it being understood that the failure of the party of the second part to supply a sufficient number of depositories or agencies as may be determined by the state board of education of South Carolina shall operate a forfeiture of this contract.'

"(12) That the said proposed contract contains many provisions not warranted by law, as a mere inspection of the same will show; and therein it is required that the bond provided for shall contain conditions not in accordance with law, and the said proposed contract attempts to change the procedure which has prevailed in the courts of this state for a century for the collection of official or statutory bonds.

"(13) That your petitioner respectfully contends that the county depositories provided by the statutes of this state are amply sufficient, together with the services of the county superintendents of education, as means for the efficient distribution of all the school text-books to be used in the free public schools of this state, and that the additional agencies cannot legally

be created at the expense of the people by the said board of education, and that an attempt to do is utterly ultra vires.

"(14) That your petitioner is informed and believes that it is the intention of the said board of education, pursuant to the proclamation, resolutions and 'adoption' before mentioned, to enter, with the publishers successfully bidding thereunder for the furnishing of the school books of the state, into a contract identical with, or similar to, the proposed contract before mentioned, embodying all of the essential provisions thereof, and that unless this honorable court shall enjoin said board from attempting to execute said contract with the same will be entered into between said publishers and the state board, and that your petitioner and the other patrons of the public schools of the state will have no remedy or relief against the enforcement of its unjust and unlawful terms.

"(15) That your petitioner has no adequate remedy at law, other than as this honorable court may grant in its proceedings.

"(16) That, the conditions upon which the bids were made having required the establishment of the illegal and 'state depository,' it is respectfully contended that the bidding and 'adoption' before mentioned were not such as is contemplated by law, and, in that the bids were not for the cost of the books, such as is estimated by law, that the action of the board in the premises was null and void.

"(17) That on account of the matters hereinbefore alleged the petitioner charges that not a single legal and lawful bid was made by any book-publishing house, and on that account no legal adoption or award could be made by the said board to any of said publishing houses so bidding; that said bids were caused directly and immediately by the action of the said board in requiring said bidding publishing houses to bid with reference to said central depository and the additional cost and expense of school books necessitated thereby.

"Wherefore your petitioner prays that the said state board of education be enjoined from entering into the proposed contract, or doing or performing any other act pursuant to said illegal bidding and awarding of the contract, and for such other and further relief as may be just and equitable."

**Answer:**

"The defendants above named, answering the petition herein, allege:

"(1) As to the first paragraph thereof, that they are informed and believe, and allege, that the said W. H. Duncan is at present a taxpayer and patron in the Barnwell graded school district, which school district was created by an act of the General Assembly approved December 23, 1886. See Vol. 19, Statutes of South Carolina, pp. 552, 553. That section 5 of article 11 of the Constitution, by special provision, retains and maintains the integrity and powers of such special school district. That said act (1886) provides that the board of trustees of the Barnwell graded school district shall have the following powers and duties: (1) To discharge the duties of school trustees, and have all the powers, privileges, rights, and liabilities now possessed by and pertaining to school trustees. (2) To determine the studies and class books to be used in the schools of said district. That they are informed and believe that the said trustees adopt their own books and fix their own prices, independent of the adoption of the state board of education, and that the said W. H. Duncan, as a citizen of said school district, is exempt from the adoption and prices fixed by the state board of education, and that he has relief through such trustees without petitioning to the courts, if the state board of education should provide unsatisfactory books and unsatisfactory prices. And these defendants allege that they have no knowledge or information

sufficient to form a belief as to the truth of the allegations contained in the first paragraph of the petition, except as the same may have been hereinbefore admitted.

"(2) As to the second paragraph of the petition, they admit the allegations thereof.

"(3) As to the third paragraph of the petition, they admit the allegations thereof.

"(4) As to the fourth paragraph of the petition, they admit that in the third section of the said contract it is provided as therein alleged, but they deny each and every other allegation in said fourth paragraph of the petition contained.

"(5) As to the fifth paragraph of the petition, they admit the allegations of the same, except that, in quoting section 1239 of the Civil Code of 1902, the date of the contract therein referred to is incorrectly given as '1903,' whereas said date as given in said section 1239 is '1893,' and they allege that the said 'contract made in 1893 with the publishers of school text-books' has long since expired by its own limitation, and that the said 'seventh article or provision' thereof has no longer any force or effect.

"(6) As to the sixth paragraph of the petition, they admit so much thereof as alleges the amount of the annual expenditure for school books in this state, and the estimated amount for the next five years, but deny each and every other allegation thereof except as hereinafter admitted. And they allege that the 10 per cent. on the retail price of the books which is to go to the manager of the central depository is in lieu of and supersedes the greater expense that would otherwise be incurred by the publishers at their offices in Richmond, New York, Boston, Chicago, and elsewhere, for storage, insurance, taxes, extra clerk hire, extra bookkeepers, the additional expense of collecting small amounts scattered over a large area of territory, and the excess of freight and express charges that would be involved in shipping the books in small lots to the local depositories in the several counties, as compared with shipping same in large or car load lots to the central depository at Columbia; all the freight and express charges of distributing books from the central depository at Columbia to the local depositories in the several counties being included in and covered by the said 10 per cent. going to the manager of said central depository.

"(7) As to the seventh paragraph of the petition, they admit the selection of a manager of the central depository at Columbia, as therein alleged, and that such manager is to receive 10 per cent. on the retail prices of the books handled through such central depository, but deny each and every other allegation of said paragraph except as the same may be admitted in the next preceding paragraph of this answer.

"(8) As to the allegations of the eighth paragraph of the petition, they deny the same.

"(9) As to the ninth paragraph of the petition, they deny the allegations thereof.

"(10) As to the tenth paragraph of the petition, they deny the allegations thereof.

"(11) As to the eleventh paragraph of the petition, they admit the allegations thereof.

"(12) As to the twelfth paragraph of the petition, they deny the allegations thereof.

"(13) As to the thirteenth paragraph of the petition, they deny the allegations thereof.

"(14) As to the fourteenth paragraph of the petition, they admit the allegations thereof, except that they allege that the contract with some of said publishers has already been executed, and except that they deny that the terms thereof are either unjust or unlawful, and further deny that petitioner has no remedy or relief other than the injunction sought by him in this action.

"(15) As to the fifteenth paragraph of the petition, they deny the allegations thereof.

"(16) As to the sixteenth paragraph of the petition, they deny the allegations thereof.



"(17) As to the seventeenth paragraph of the petition, they deny the allegations thereof.

"(18) They deny each and every allegation of the petition not hereinbefore admitted.

"(19) And, further answering the petition herein, these defendants allege that pursuant to the statutes in such case made and provided, and pursuant to the proclamation of Gov. D. C. Heyward, chairman of the state board of education, and pursuant to the resolutions of the board, they met as the state board of education of South Carolina on the 22d and 23d days of June, 1906, and adopted a series of text-books for the five years next ensuing from and after September 1, 1906, after the bids of the competing publishers had been duly filed and examined, and that some of the successful bidders had signed their contracts and executed and filed their bonds in the office of the state board of education before the commencement of this action, and, as defendants are informed and believe, have already begun the manufacture of the special South Carolina edition of said text-books, with the indorsements required by this board printed on the back thereof; that the form of contract between the state and the publishers adopted by the board is in strict accordance with the statutes of this state, and a copy of said contract is hereto appended as a part of this answer, which said contract was duly approved by the Attorney General of this state, and reference thereto is hereby craved, especially to the last sentence of the third paragraph thereof, added thereto by way of amendment by the advice of the Attorney General; that the method of supplying text-books to the patrons of the free public schools of this state as outlined in said contract was determined upon by said board after careful consideration as not only in accordance with law, but as the best possible method from the standpoint of convenience and economy to the patrons of said schools; that under said method, the patrons of said schools will be able to procure said books with greater convenience and at as low or lower prices than under the next previous contract of 1900, although in many respects the books to be furnished under the present contract are much superior in quality to those furnished under the former contract of 1900; that under the former contract the said text-books were often sold by the retail dealers to the patrons of the schools at 25, 40, 50, 60, and even 75 per cent. above the contract price, whereas, under the present contract, it will be impossible to sell said books to the patrons of said schools at anything above the contract retail price stamped on the back of each book; that under the present arrangement many thousands of dollars will be saved to the patrons of said schools; that all heretofore existing contracts for school books have expired by their own limitations, and that the state of South Carolina has now no contracts for text-books for its schools, except those contracts now made and being made which plaintiff seeks to enjoin; that the public schools of the state will begin to open about the middle of the month of August next, and they will be seriously disorganized and embarrassed by even a temporary injunction, pending this action, restraining these defendants from executing the said contracts agreed on by them with the publishers.

"Wherefore these defendants pray that the interlocutory injunction herein may be vacated, and that the petition herein may be dismissed."

**Exceptions:**

"(1) His honor erred in dissolving the temporary restraining order; the actions being brought solely for an injunction, and a prima facie case being made for the same by the verified petitions.

"(2) His honor erred in not granting an interlocutory order, restraining the respondents from entering into the contract mentioned in the petitions until the cases could be heard by the court upon their merits; the actions being brought

solely for an injunction, and the verified petitions making on their face a prima facie showing for same.

"(3) His honor erred in dissolving the temporary restraining order, and in refusing to grant an interlocutory order restraining the defendants from executing the contract mentioned in the petitions, because as the proceedings were brought solely for an injunction, and, as the verified petitions made a prima facie showing therefor, he could not determine the questions raised by the petitions upon the showing before him adversely to the petitioners, without denying to them a hearing upon the merits in the mode prescribed by law.

"(4) His honor erred in holding that the state board of education had authority to authorize and to establish a central depository, and to provide for and insert in the contracts with the publishers whose books were adopted a provision creating this central depository, because, under and by the terms of the contract set out in the petition, and which the state board of education was about and intended to enter into, the price of school books was made 10 per cent. higher than the same should have been, and would have been, had the said board not established said central depository, and required all bids to be made with reference thereto, and the additional expense thereby occasioned.

"(5) His honor erred in not holding that the state board of education was without authority to create or establish said central depository; the law providing how, when and where depositories should be established, and the compensation to be allowed to those keeping the same.

"(6) His honor erred in not holding that as the state board of education was the creature of the statute, and as it had no authority other than therein given to it, and as such statute gave it no authority to establish a central depository, but only to establish county depositories, it was without power to create and establish this central depository, or to require the publishers to bid with reference thereto, and the additional expense and cost in text-books occasioned thereby.

"(7) His honor erred in not holding that the only depositories authorized by law are county depositories, and that consequently the state board of education had no authority to establish a central depository for the entire state—really a state depository—and thus add to the cost of the text-books in the free public schools.

"(8) His honor erred in holding that the petitioners could not bring and maintain these proceedings, but that they could only be brought by or on behalf of the state, as the alleged injuries did not differ in kind from that suffered by the people at large.

"(9) His honor erred in holding that the personal interest of the petitioner was exceedingly small, and that on that account the wrong complained of should not have the same standing in court it would have had had his interest been exceedingly large, because, while the individual cost to the plaintiff of paying the additional expense occasioned by the central depository may be small, yet thousands and thousands of school patrons are similarly affected.

"(10) His honor erred in holding that the petitioner had waited without excuse to bring these proceedings until the board had expended much time and labor in the adoption of text-books, because, as it was impossible for the plaintiff to have known of the purpose or intention of the state board of education with regard to a central depository, a sooner action would have been impertinent and discourteous to the state board, and would have been based upon an assumption that they would exceed their authority under the law, when every citizen has a right to assume that public officers will act within the scope of their authority and will obey the law.

"(11) His honor erred in holding that the



establishment of the central depository by the state board of education did not increase the cost price to the school children of text-books over and above what the same would have cost, had there been no central depository created by the board.

"(12) His honor erred in not granting an interlocutory order in each case restraining the state board of education from entering into the contract mentioned in the petitions herein, until these proceedings could be heard upon their merits and the facts ascertained and determined in the manner and mode prescribed by law.

"It is agreed that the above two cases shall be consolidated and heard together, and that when the case, with exceptions, is printed, it shall constitute the return required by the rules of court, and may be filed with the clerk of the Supreme Court as and for such return."

Bellinger & Welch, for appellant. Le Roy F. Youmans, Atty. Gen., D. C. Ray, Asst. Atty. Gen., and J. S. Muller, for respondents.

JONES, J. The petition in each of these cases is addressed to the justices of this court, and seeks to enjoin the state board of education from entering into certain contracts with certain publishers to furnish school books for the free public schools of the state. Applications were made before Hon. C. A. Woods, Associate Justice, at chambers, for temporary injunctions, and he, on July 19, 1906, in an opinion published in 74 S. C. 560, 54 S. E. 760, rendered judgment refusing the temporary injunction sought. The petitioners appeal to this court from said order on a number of exceptions, which, with the complaint and answer and order appealed from, will be set out in the report of this case. After careful consideration, the exceptions are overruled, and the order of Associate Justice Woods is affirmed, for the reasons therein stated.

(78 S. C. 388)

**COBB & SEAL SHOE STORE v. AETNA INS. CO.**

(Supreme Court of South Carolina. Oct. 18, 1907.)

Appeal from Common Pleas Circuit Court of Abbeville County; R. O. Purdy, Judge.

Action by the Cobb & Seal Shoe Store against the Aetna Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed by an equally divided court.

King, Spalding & Little and M. P. De Bruhl, for appellant. W. P. Greene, for respondent.

WOODS, J. The plaintiff recovered judgment on defendant's policy of fire insurance covering a stock of shoes in a store at Edgefield, S. C. Motions made by the defendant for direction of a verdict and for a new trial were refused, and the main points involved in the appeal relate to the grounds on which these motions were based.

The plaintiff was duly incorporated under the name of Cobb & Seal Shoe Store, but did business under the name of Cobb & Seal, and the policy was issued in the name of Cobb & Seals, instead of the proper corporate name. The defendant asked the court to hold, as a matter of law, the corporation Cobb & Seal Shoe Store could not recover on a policy of insurance issued in the name of Cobb & Seals. O. H. Cobb testified to informing Norris, the insurance agent, of the incorporation, and of the true corporate name, when he was negotiating for the insurance, and before the policy was issued. If the real meaning of the contract was to insure the corporate property for the benefit of the corporation, designating the corporation as Cobb & Seals, instead of using its true corporate name, cannot have any effect to relieve the

insurer from liability. A contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits. *Neely v. Yorkville*, 10 S. C. 147; 1 *Thompson on Corporations*, § 294. Evidence that there was no such legal entity as Cobb & Seals, and that the defendant's agent, before issuing the policy, knew the property was owned by the corporation, Cobb & Seal Shoe Store, tended strongly to show the failure to use the true corporate name in the policy was a mere inadvertence, and that "Cobb & Seals," in the contract, meant the corporation. It follows there was no such failure to show a contract with the plaintiff corporation as to require the court to direct a verdict for the defendant or order a new trial.

The policy requires: "(1) The insured will take a complete itemized inventory of the stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned." The plaintiff, having just opened the Edgefield store, had not taken stock, and had no inventory when the contract of insurance was made, unless the invoices of the goods purchased are to be so regarded. The invoices and all the books relating to the Edgefield business were burned in the store; but there was evidence that the plaintiff kept in a safe in its Abbeville store duplicate invoices of all goods sent to the Edgefield store. As an inventory at the time the business opened, which was less than 12 months before the date of the policy, the plaintiff offered a set of these invoices, showing all goods which had been received at the opening. A merchant's invoices are written itemized accounts, sent to him by the seller, of the goods purchased and the prices charged. His inventory of goods is his stock taking written out in detail. It consists of a detailed descriptive list of all the articles in the store, with a bona fide estimate of the market value of each article. Obviously it is not true as a general proposition that a collection of all the invoices less the aggregate sales is the equivalent of an inventory. After goods have reached the storehouse, they may be stolen, or prove to be worth less than the invoice price, because unsalable or shopworn. The difference between the invoice price and the inventorial value increases with the duration of the business. Therefore, when applied to a mercantile business which has continued long enough for the difference between the sum of the invoices, less the sales, and the inventory to be material, we give full assent to the following cases holding the inventory required by this provision of a policy cannot be supplied by the invoices: *So. Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Fire Ass'n v. Masterton*, 25 Tex. Civ. App. 518, 61 S. W. 962; *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 South. 932. This business had continued for about five months, a period long enough for material loss and depreciation when the fire occurred, and therefore we think the plaintiff's position that the sum of all the invoices, less the sales, was equivalent to an inventory made at the time of the fire, is untenable.

But at the beginning of the business a formal inventory or taking of stock would show practically the same articles in the storehouse as the invoices preserved by the merchant as a record of the goods in his store at the opening. As the valuations in the inventory rest on the merchant's own estimate, the inventory taken at the beginning would show stock of estimated value greater than the sum of the invoices; for it is fair to assume the business would not be

undertaken unless the merchant supposed the goods to be worth more in his storehouse than the invoice prices. Therefore, with perfect fairness to the insurer, at the opening of the business invoices of the goods received might be regarded the same as a formal inventory; that is, the merchant's descriptive list of all articles in the store, with his estimate of the value of each. In this case the policy was issued about 20 days after the business opened, and O. H. Cobb, the head of the plaintiff corporation, produced a separate set of invoices, which he testified was a complete list of the goods on hand when the business was opened, and which he had kept in the store at Abbeville. These invoices may fairly be taken as an inventory made within 12 months prior to the date of the policy. Such an inventory, like any other, is, of course, subject to attack for lack of verity. We are of the opinion the circuit judge was right in refusing to direct a verdict against the plaintiff for failing to comply with the requirement of the policy as to the inventory. The plaintiff at the least was entitled to have the jury decide whether the invoices of the goods on hand at the time the store was opened was in substance an inventory. *Madden v. Insurance Co.*, 70 S. C. 302, 49 S. E. 855. This conclusion was in accord with the decision of the court of West Virginia in *Reffner v. Insurance Co.*, 59 W. Va. 432, 58 S. E. 944. In *Carp v. Nat. Assurance Ass'n* (Mo. App.) 99 S. W. 523, plaintiff's file of invoices was held equivalent to a book showing all goods purchased.

The iron-safe clause further provides: "(2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy. (3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such a set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." Having held that under the evidence the jury might consider the invoices kept in the store at Abbeville, a place not exposed to the fire, to be in substance an inventory, it follows there was no error in refusing to direct a verdict for defendant for failure to keep the inventory in an iron safe in the storehouse mentioned in the policy, or in some place not exposed to a fire which would destroy that building. But, as shown by plaintiff's own evidence, the books presenting a record of the business were not kept in an iron safe in the store, nor in a place free from exposure to the fire, as required by the policy, but, on the contrary, were habitually kept in the store without protection from fire, and were burned with the store and goods. The plaintiff, being unable to produce such books for the inspection of the insurance company, failed to comply with the policy. The defendant insists for such failure the policy was rendered void. This result must follow, unless prevented by estoppel or waiver.

Was there evidence of waiver or estoppel to support a verdict for the plaintiff? Norris, the agent who issued the policy, admitted knowledge that the plaintiff had no iron safe in the store. He does not say with definiteness when he acquired the knowledge; but, taking his testimony as a whole in connection with the evidence on behalf of plaintiff, there was room to infer he knew this fact at the time he de-

livered the insurance policy. Knowledge by the agent at the inception of the contract that the books could not be kept in an iron safe on the premises estop the insurance company from claiming a forfeiture on that ground. The cases in this state announcing the principle are cited in *Pearlstone v. Insurance Co.*, 74 S. C. 250, 54 S. E. 372, *Doyle v. Hill*, 75 S. C. 261, 55 S. E. 446, and *Fludd v. Insurance Co.*, 75 S. C. 315, 55 S. E. 762. But the contract itself provides the precautions to be taken when the insured for any cause fails to keep the books in an iron safe. In that case the agreement is to keep them in some place not exposed to a fire which would destroy the storehouse. We do not think any evidence was adduced of waiver or estoppel before the fire as to this agreement. Assuming that Norris, the agent, knew at the time the policy was issued, the plaintiff's books were kept in the store, this would be no notice that the plaintiff would continue to keep them there after making a most important contract depending for its validity on keeping them elsewhere. But it is insisted the agent had an office near by, was frequently in and about plaintiff's place of business, and had abundant opportunity to observe that the books were not carried from the store at night. There is no pretense of actual knowledge brought home to Norris, either as defendant's agent or as an individual, of the plaintiff's habit of leaving the books in the store, unprotected from fire. The claim is that it was his duty on behalf of the insurance company to think of the books when he saw the plaintiff's employes leave the store, and protest against the failure to take them out. Slight circumstances have been allowed by the courts to support verdicts as some evidence of waiver or estoppel, but to sustain this contention would be going beyond reason. Whether Norris was an agent whose power embraced the authority to waive any or all of the conditions of the policy it is not necessary to decide; for, even if he had such authority, neither the company nor its agent was under any obligation to the plaintiff to watch its officers and employes for violations of the policy, and warn them against continuing such violations. The plaintiff's duty was to have the conditions of the contract in mind and observe them, and he cannot shift the duty to the shoulders of the defendant's agent. Night after night, for five months, the plaintiff left its books in the store unprotected, because its officers either did not bear in mind the conditions of the policy, or, having them in mind, chose not to comply with them. It cannot escape the consequences by saying the defendant's agent should have had the matter on his mind and seen to the removal of the books. Further, when Norris had the opportunity to observe the failure to take the books out of the store, there is no evidence that he was engaged in or about defendant's business with the plaintiff or any one else. At the most, he merely saw some of those in charge of plaintiff's store, from time to time, enter and leave the store, as any other citizen of the town might have seen them. There is no evidence that he ever thought of the insurance contract in connection with their coming and going; on the contrary, he testifies he never thought of the subject at all. This statement of the law, as taken from 19 Cyc. 810, is in accord with the cases in this state on the general powers of an agent, and is supported by numerous authorities cited in the text: "Any knowledge of the agent, to be considered in law that of the insurer, must have been acquired in the course of his business; and the company is not chargeable with information acquired by an agent in transactions without the agency, unless it appears that such information was remembered and in the mind of the agent during the time of the transaction upon which the insured claims a waiver." *Knoblock v.*

Bank, 50 S. C. 290, 27 S. E. 962. There was no evidence whatever of waiver or estoppel before the fire, and therefore it was error to submit to the jury the question whether the company had waived, before the fire, the requirement of the policy that the books should be kept in an iron safe and produced after the fire.

The actions of the defendant and its agents after the fire are to be considered in the light of a nonwaiver agreement. According to the testimony of E. E. Cobb, the general manager of the store, Norris in the presence of the adjuster wrote a paper to the effect that plaintiff had goods in the store of value far in excess of the insurance, and asked Cobb to go with him to get the best men in Edgefield to sign it. The same witness also testified Norris told him, while procuring signatures to this paper, he would have no trouble whatever in getting the insurance. Norris testified he expressed only the hope that the policy would be paid. The mere expression of hope or confidence by the agent, after the fire, that the insurance would be paid, is no evidence of waiver. *Young v. Insurance Co.*, 68 S. C. 391, 47 S. E. 681; *Joye v. Insurance Co.*, 54 S. C. 374, 32 S. E. 446. But trouble taken by Cobb, plaintiff's manager, at the instance of Mr. Norris, defendant's local agent, with the acquiescence of its adjuster, in procuring signatures to the statement of the value of the stock, with reasonable belief that the defendant regarded the policy as valid, under the cases of *Kingman v. Insurance Co.*, 54 S. C. 599, 32 S. E. 762, and *Montgomery v. Insurance Co.*, 55 S. C. 6, 32 S. E. 723, would ordinarily be some evidence of waiver. So, also, as a general rule, waiver could be inferred from the testimony that the adjuster demanded proof of loss, and the production of the invoices heretofore mentioned. *Curnow v. Insurance Co.*, 46 S. C. 79, 24 S. E. 74; *Norris v. Insurance Co.*, 57 S. C. 358, 35 S. E. 572. But the plaintiff, after the fire, made a non-waiver agreement in these words: "It is hereby mutually understood and agreed by and between Cobb & Seal, of the first part, and the Aetna Insurance Company, Hartford, Conn., and other companies signing this agreement, parties of the second part, that any action taken by said parties of the second part in investigating the cause of fire, or investigating and ascertaining the amount of loss and damage to the property of the parties of the first part, alleged to have occurred on Thursday night, June 7, 1906, shall not waive or invalidate any of the conditions of the policy of the parties of the second part, held by the parties of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement. The intent of the agreement is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of loss or damage, in order that the party of the first part may not be delayed unnecessarily in \* \* \* business, and in order that the amount of \* \* \* loss and damage may be ascertained and determined without regard to the liability of the parties of the second part." This language is too plain to require a restatement of its meaning. The plaintiff's contention that a request or demand made by defendant of plaintiff is not an act of the defendant within the meaning of the agreement is an attempt at refinement wholly inadmissible. The request for the estimate of other persons of the value of the insured property, demand for proof of loss, and the examination of the invoices were all acts looking to the ascertainment of the amount of the loss, and therefore of the nature expressly covered by the agreement.

The nonwaiver agreement should be given full effect as the contract of the parties. *Joye v. Insurance Co.*, 54 S. C. 375, 32 S. E. 446; *Hayes v. Insurance Co.*, 132 N. C. 702, 44

S. E. 404; *Shawnee Fire Ins. Co. v. Kneer*, 72 Kan. 385, 83 Pac. 611; *Sun Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539; *Keet-Rountree Co. v. Mercantile Ins. Co.*, 100 Mo. App. 504, 74 S. W. 469. But is it to be strictly construed against the insurer, and should not be extended by implication. The agreement here introduced does not in terms embrace any acts indicating waiver done by the insurer prior to its execution, and the court will not extend it by construction to such acts; for that would be holding the forfeiture to be revived by implication. Forfeitures are not favored, and, when once waived, the waiver is irrevocable, except by consent of the party against whom it is claimed; and his consent will not be implied from an agreement against waiver which does not distinctly refer to past transactions, but appears on its face to contemplate future action. There was evidence of some acts done after the fire and before execution of the nonwaiver agreement from which the jury might infer waiver. There was, therefore, no error in refusing to direct a verdict or order a new trial on the ground that there was no evidence of waiver of the forfeiture.

There should be a new trial, however, for error in the charge heretofore pointed out.

JONES, J. I dissent. There was some evidence tending to show waiver. See *McMillan v. Insurance Co.* (filed Oct. 11, 1907) 58 S. E. 1020.

GARY, A. J. I dissent.

(107 Va. 292)

## DOUGLAS LAND CO. v. T. W. THAYER CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1907.)

### 1. BOUNDARIES — EVIDENCE — DOCUMENTARY EVIDENCE.

Where, in partition, several tracts were allotted to the parties, and the deeds to them called for the lines of designated patents, the patents were relevant evidence on the issue of the boundary line between the tracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 160.]

### 2. SAME—ACTS OF PARTIES — EVIDENCE — ADMISSIBILITY.

Where, in a suit involving the boundary line between plaintiff's and defendant's lands, it appeared that an agent of defendant, while endeavoring to determine the true line, adopted a corner and marked timber to identify it, proof that a third person, who owned land adjoining the land of defendant, pointed out to the agent the corner, was admissible in support of plaintiff's claim that the line from the corner was the correct line.

### 3. SAME.

In a suit involving the location of a boundary line, the admission in evidence that a witness received from plaintiff's counsel, in the presence of the counsel and general manager of defendant, instructions with respect to the running of a line from designated points, was not erroneous, where the counsel and manager of defendant likewise directed the running of the line.

### 4. SAME—DOCUMENTARY EVIDENCE.

In a suit involving the location of a boundary line, a deed of a part of the land allotted to plaintiff's predecessor in title, in a suit for partition, and which called for the dividing line between that allotment and defendant's land, was relevant to show that the vendors in the deed claimed the line as called for in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 160.]

**5. SAME—ACTS OF PARTIES.**

In a suit involving the location of a boundary line, the testimony of a witness that he had heard an agent of defendant say that it had twice run the boundary line was relevant to show the acts done by defendant in its efforts to locate its boundary lines.

**6. WRIT OF ERROR—ERRONEOUS ADMISSION OF EVIDENCE—RIGHT TO COMPLAIN.**

A party eliciting evidence to establish a fact cannot avail himself of an objection to evidence of the adverse party establishing the same fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3597.]

**7. BOUNDARIES—EVIDENCE—ADMISSIBILITY.**

Where, in a suit involving the location of a boundary line, there was evidence to prove that the lines and corners of an entry were identical with the calls of a patent, the entry was admissible, especially where some of the marked trees in the entry were called for in the deeds under which the parties claimed.

**8. WRIT OF ERROR—EXCLUSION OF EVIDENCE—REVIEW.**

Where the record is silent as to what answers were expected to be elicited from questions propounded, the sustaining of objections to the questions was not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Appeal and Error, §§ 2905-2909.]

**9. WITNESSES — COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.**

One having no interest in a suit involving the location of a boundary line, and connected with it only as surveyor and witness, may testify with reference to the direction given him by the general manager of defendant as to how a line should be run, though the general manager is dead.

**10. BOUNDARIES — EVIDENCE — CONDUCT OF PARTIES—ADMISSIBILITY.**

In a suit involving the location of a boundary line, the testimony of a surveyor with reference to the direction given him by the general manager of one of the parties as to the running of a line is admissible as against the objection that the manager had no authority to make parol disclaimer of the title of his employer.

**11. SAME—GENERAL REPUTATION — ADMISSIBILITY.**

Parol evidence of the general reputation and tradition with respect to the corner of an ancient patent and the old line between Virginia and Tennessee is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 155.]

**12. WRIT OF ERROR—ADMISSION OF EVIDENCE—EXCEPTIONS—REVIEW.**

Where, in a suit involving the location of a boundary line, evidence of the location of a corner of an ancient patent had been admitted without objection, an exception to evidence of the general reputation and tradition with respect to the corner was not available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

**13. EVIDENCE—OPINION EVIDENCE—ADMISSIBILITY.**

The opinion of a witness that a corner of an ancient patent was on the old state line is incompetent.

**14. WRIT OF ERROR—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

Where, in a suit involving the location of a boundary line, evidence that third persons had made statements to the agent of defendant which had been acted on by him in attempting to locate the boundaries was admitted, evidence

that the third persons had made similar statements to others was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

**15. EVIDENCE—SELF-SERVING DECLARATIONS.**

In a suit involving the location of a boundary line, the testimony of a witness that a particular line was plainly marked is admissible as against the objection that the evidence is self-serving, on the ground that the line had been recently marked.

**16. BOUNDARIES—EVIDENCE—ADMISSIBILITY.**

Where the call in a deed is for a line over "Cat Face" to a tree, evidence of the location of the natural monument referred to by the designation "Cat Face," together with the traditional derivation of the name, was admissible to identify and locate the call.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 155, 178.]

**17. WRIT OF ERROR—ADMISSION OF EVIDENCE—EXCEPTIONS—REVIEW.**

Where the exception to the refusal of the court to strike out evidence does not point out the specific evidence objected to, the exception cannot be regarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1620.]

**18. TRIAL — INSTRUCTIONS — IGNORING EVIDENCE.**

Where, in a suit involving the location of the boundary line between tracts as partitioned among the heirs of a decedent, the controlling inquiry was as to the location of the line fixed by the commissioners and confirmed by the court, an instruction ignoring the theory that the parties had acquiesced in the line for which one of the parties contended, and yielding precedence to the supposed intention of the commissioners, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 613.]

**19. SAME—UNDUE PROMINENCE TO PARTICULAR MATTERS.**

An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 577.]

Error to Circuit Court, Washington County.

Action by the T. W. Thayer Company against the Douglas Land Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Daniel Trigg, Fulkerson, Page & Hurt, and J. C. Padgett, for plaintiff in error. White & Penn, for defendant in error.

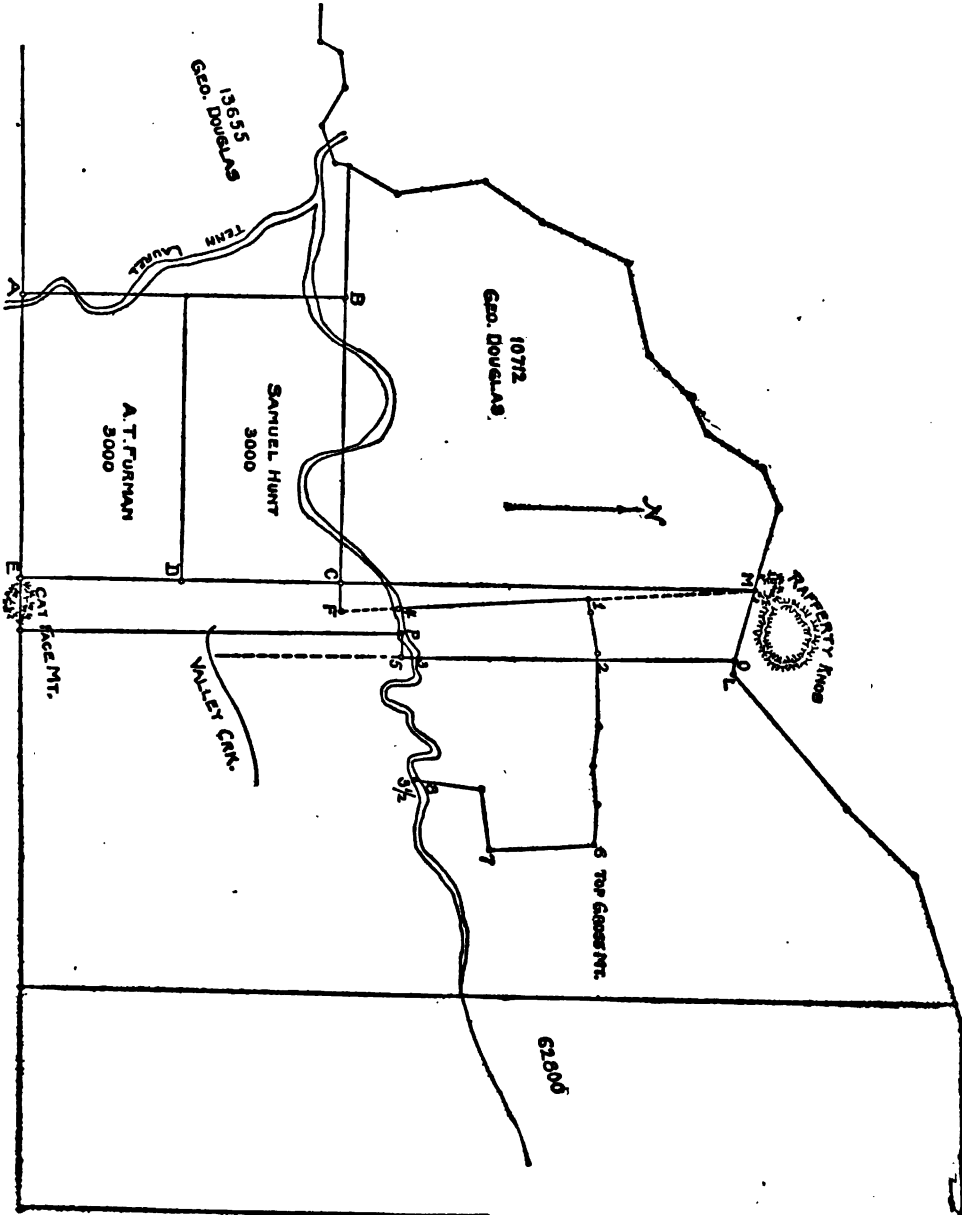
**WHITTLE, J.** This case involves the location of the true dividing line between the lands of Mrs. Monroe and George Douglas, Jr. (predecessors in title respectively of the defendant in error, the T. W. Thayer Company, plaintiff in the lower court, and the defendant, the Douglas Land Company, the plaintiff in error), both of whom derived title from a common source, their father, George Douglas, as established by the commissioners and confirmed by the circuit court of Washington county in the suit to partition the lands of George Douglas, deceased, amongst his heirs.

The plaintiff brought an action of trespass

on the case against the defendant and its lessee, the Laurel River Lumber Company, to recover damages for the alleged cutting and removing of timber from its premises, and to an adverse judgment against the defendants this writ of error was allowed.

The lands which were the subject of partition consisted of three tracts—one containing 62,800 acres, another 10,712 acres, and the third 13,655 acres. The first two tracts, which embrace the land in controversy, were patented to James Heron December 14, 1795. The three tracts were divided into four parcels. The eastern portion of the largest tract was allotted to William Douglas, the central portion to Mrs. Cruger, and the western to Mrs. Monroe, while the two smaller tracts

were allotted to George Douglas, Jr. The partition was confirmed in 1846, and carried into deeds in severalty by a special commissioner appointed by the court for that purpose. The deed to Mrs. Monroe calls for the northwest and southwest corners of the 62,800-acre tract, and also for the eastern lines of two older patents, Hunt's and Furman's. The calls in the deed to George Douglas, Jr., are for the northeast corner of the Hunt patent and Mrs. Monroe's western division line. The disputed lines are from "M" to "C" (contended for by the plaintiff), and from "O" to "S," and thence to the end of the dotted line (claimed by the defendants), as shown on the "Buchanan Map," a copy of which is filed with this opinion.



The action of the court in admitting in evidence the Hunt and Furman patents constitutes the first ground of exception.

As remarked, the lines of these patents are called for in the partition deeds, and they are, therefore, relevant evidence to sustain the theory of the plaintiff as to the true line between the claimants. The land included in the Furman patent adjoins the Hunt patent on the south, and the eastern boundary lines of the two patents are coincident, and according to the claim of the plaintiff constitute in part the western line of the 62,800-acre patent. The patents and deeds in the line of the Douglas title refer to the Hunt land and Furman land interchangeably as the Hunt and Furman land, and evidence was admissible to prove that both tracts were sometimes called the "Hunt land."

The next exception is to the admission of the testimony of the surveyor, Buchanan, that the Debusks, who owned part of the Hunt land adjoining the Douglas land, pointed out to Gen. Greever the northeast corner of the Hunt patent at "C."

Greever was the agent of the defendant, the Douglas Land Company, and was endeavoring to determine the true line between Mrs. Monroe and Douglas, and there was evidence tending to show that he adopted the corner at "C" and marked timber to identify it. This evidence was admissible as conducing to establish the plaintiff's claim that the line from "M" to "C" was the correct line.

In *Harriman v. Brown*, 8 Leigh (Va.) 706, Judge Tucker observes: "It is not the mere declaration of Milburn that the witness gives in evidence; but it is an act, to wit, the showing of certain corner trees, which the general reputation of the neighborhood fixed upon as the corners to Harriman's land. \* \* \* Even if Milburn's showing certain trees as the corners of the land was not evidence to establish them as corners, the fact that he pointed out trees, which by other evidence are established as true corners, could not be rejected.

The objection to the testimony of the same witness, that he had received direction from plaintiff's counsel to run the line from "M" to "F," is also without merit. The instruction was given in the presence of counsel for the defendants and their general manager, and the latter likewise directed the running of the line. But it was also proper, by way of inducement, to show why the witness ran the line.

There was, moreover, an exception to the admission of what is known as the "Clement deed." That deed embraced 2,574 acres of the western portion of the land allotted to Mrs. Monroe, and called for the dividing line between that allotment and the defendant's land as its western boundary, and was relevant as tending to show that Clement's vendors, who were vendees in the line of

Mrs. Monroe's title, claimed the line "M" to "F" as their western boundary line.

The next objection was to the admission of the statement of the witness Buchanan that he had heard Gen. Greever say that the Douglas Land Company had twice run the northern line of the 62,800-acre patent.

We think this was relevant evidence to show acts done by the defendant in its efforts to locate its lines. But, if the testimony were objectionable, the same fact was elicited by the defendant, and consequently cannot be availed of. *Thornton v. Garr*, 87 Va. 315, 12 S. E. 753; *Va. & S. W. Ry. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33.

Exception 9 was to the introduction of the Fulton entry of April 8, 1837.

There was evidence going to prove that the lines and corners of that entry were identical with the calls of Hunt's patent, and it was offered to explain the presence of newly marked timber in the lines of that patent; and, besides, the evidence is admissible, because some of the marked trees in the entry are called for in the partition deeds.

In *Clement v. Packer*, 125 U. S. 332, 8 Sup. Ct. 907, 31 L. Ed. 721, it was held that, when the lines and corners of a senior patent had become uncertain, evidence showing the lines of a junior patent, which called for those of the senior patent, was admissible, not as controlling, but to aid in identifying the older lines.

Exceptions 10, 11, and 12 are to the action of the court in refusing to permit the witness Buchanan to answer certain hypothetical questions.

It is sufficient to say, with respect to those exceptions, that the questions propounded were not within the scope of expert testimony, and, if they had been, the record is silent as to what answers were expected to be elicited. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 658.

Exception 13 involves the action of the court in overruling the motion of the defendant to exclude the testimony of the same witness with reference to the direction given him by Watson, general manager of the Douglas Land Company, to run the line from "M" to "F," on the ground that Watson was dead, and, furthermore, that he had no authority to make a parol disclaimer of the title of his principal.

The ruling was right in both particulars. Buchanan's connection with the case was merely as surveyor and witness, and he had no interest whatever in the litigation. In no sense was he a party to the controversy, and hence the rule of exclusion invoked was not applicable. Nor was the direction alleged to have been given by Watson a disclaimer of title in his principal. It was only an acquiescence on his part to running a line which might throw light on the question at issue.

Exceptions 14 and 14½ involve the admissibility of parol evidence to prove by general reputation and tradition the southwest corner of Furman's patent, which issued in 1788, and the old line between Virginia and Tennessee. It is well settled that such evidence is admissible. *Harriman v. Brown*, supra; *Clements v. Kyle*, 13 Grat. 468, 477. But in this instance, also, similar evidence of the location of the corner had been introduced without objection, and therefore, under the authorities cited, the exception cannot avail. We think, however, that the opinion of the witness Mock that the corner was on the old state line was not competent evidence and ought to have been excluded.

Exceptions 15, 16, and 18 challenge the admissibility of Mock's and Lewis' testimony of what the Debusks had told them concerning the location of the eastern line of the Hunt patent.

In view of the fact that evidence had already been introduced tending to prove that these parties had made similar statements to Gen. Greever, agent of the Douglas Land Company, which had been acted on by him, it is not perceived that the admission of this evidence could have been prejudicial.

Exception 17 is to the admission of the testimony of Lewis that the line between Douglas and Clements was plainly marked.

This objection is founded on the fact that the line had been comparatively recently marked, and that the evidence was self-serving. That question is settled adversely to the exceptor by the case of *Clement v. Pack-er*, supra.

Exception 19 is to the action of the court in overruling the objection to a question propounded to the witness Lewis with respect to the location of the cliff and traditional origin of the name "Cat Face," a projection of rocks on the western slope of Pound Mountain.

The call in the partition deed to Monroe and wife, after leaving the Hunt and Furman line, is for a line east 400 poles over "Cat Face" to a beech and sugar tree on the dividing ridge. Several witnesses testified to the location of that natural monument and the traditional derivation of its name—that the caverns on its face afforded dens to wild cats. We think the evidence was admissible to identify the cliff and locate the call in the partition deed.

Exception 20 questions the admissibility of the Fulton entry, and is controlled by what was said in regard to exception 9.

We are of opinion that the leases referred to in exceptions 21 and 22 were rightly excluded. It was not shown that either of them covered the land in controversy, nor did their relevancy otherwise appear.

There is no avowal of what answers were expected to the questions whose exclusion is made the ground of exceptions 23 and 24, and, if material, as before observed, the objection could not be considered.

The answer of the witness to the question, the exclusion of which constitutes exception 27, "that he did not know whether there was any controversy over the land referred to," shows that the exception was immaterial.

Exception 28 is to the refusal of the court to strike out the cross-examination of the witness Mock, "wherein he speaks of what Mr. White told him of the controversy having been settled." The exception is amenable to the objection that the exceptor has omitted to point out the specific answers objected to, and for that reason it cannot be regarded. *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Hughes v. Kelly*, 30 S. E. 387, 2 Va. Dec. 588.

We are of opinion that the question and answer which were admitted by the court over the objection of the defendant (exception 29) were merely intended to explain the attitude of counsel in the matter involved and could not have prejudiced the defendant.

The remaining exceptions (save only the last, which is to the refusal of the court to set aside the verdict as contrary to the law and evidence) are to the giving and refusal of instructions.

It is unnecessary to prolong this opinion by specific consideration of these assignments of error. We shall content ourselves with calling attention to one of the instructions which the court gave, the unqualified language of which would naturally have induced the jury to give predominance to what they may have believed the commissioners intended, without regard to what they may have done in establishing the line in controversy. The controlling inquiry in the case at last is the ascertainment of the line fixed by the commissioners and confirmed by the court; and that fact, if proved and acquiesced in by the parties, would take precedence over any presumed intention of the commissioners. On the other hand, the intention of the commissioners, to be gathered from the partition proceedings, in connection with the facts and surrounding circumstances, constitutes an important factor in aiding the jury to determine the correct location of the line.

In *Smith v. Davis*, 4 Grat. (Va.) 50, the commissioners intended the dividing line to be a straight line between known corners, and directed the surveyor so to run it; but the land was in forest, and the surveyor, without intending it, ran and marked a curved line. The court approved an instruction which told the jury that, if they believed from the evidence that the commissioners intended to run the division line as a straight line between ascertained corners, then a straight line was the true division line, unless they should believe from the evidence that the parties had agreed to and acquiesced in the crooked line. The court also held an instruction erroneous which charged the jury that if the division line was actually run and marked at the time the division was made,

and that the line thus made was the crooked line laid down on the plat returned by the surveyor, the crooked line should prevail, although the call of the plat and report of the commissioners was for a straight division line. It will thus be observed that the instruction which the court approved modified the effect which the jury were to allow the intention of the commissioners by acquiescence of the parties in the curved line run and chopped through mistake by the surveyor.

So, in this case, an instruction which ignores the theory of the defendants that the parties had acquiesced in the line for which they contend, and without qualification yields precedence to the supposed intention of the commissioners, is erroneous. See cases cited in note to *Smith v. Davis*, 4 Grat. (Va. Rep. Ann.) 36, and *Elliott v. Horton*, 28 Grat. (Va.) 766, 772.

The prayer in question also contravenes the doctrine of that line of decisions which hold that "an instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue." *Seaboard, etc., Ry. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593; *Montgomery's Case*, 98 Va. 852, 37 S. E. 1; *Boush v. Fidelity, etc., Co.*, 100 Va. 735, 42 S. E. 877.

We are of opinion that, in so far as the ruling of the circuit court in giving and refusing instructions at the previous trial is in conflict with the views expressed in this opinion, it is erroneous. For this reason, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

(2 Ga. App. 636)

#### WALLER v. STATE (No. 718.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

#### 1. CRIMINAL LAW—FORMAL ARRAIGNMENT—WAIVER.

The right of formal arraignment and plea will be conclusively considered as waived where the defendant goes to trial before the jury on the merits, and fails until after verdict to bring to the attention of the court that he has not been formally called upon to enter a plea to the indictment. *Pol. Code 1895, § 10*; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66; *Bryans v. State*, 34 Ga. 323.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2118.]

#### 2. SAME—NEW TRIAL—GROUND—SEPARATION OF JURY—PREJUDICE.

The unauthorized separation of the jury will not of itself require a new trial. Prejudice must have resulted from such separation, and, where it is affirmatively shown that the jurors who temporarily separated themselves from the jury had no communication with any one upon the subject of the trial, either directly by conversation, or individually by hearing the observations of others, the presumption of injury arising from such irregularity would be sufficiently rebutted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2257-2262.]

#### 3. SAME—WAIVER.

Where pending the trial of a misdemeanor case two of the jurors temporarily separated from the jury, and this fact was at the time known to the defendant or his counsel, and the attention of the court was not called to the irregularity until after verdict, a new trial will not be granted therefor, but an implied assent thereto by the defendant will be presumed. *Kirk v. State*, 73 Ga. 620; *Carter v. State*, 56 Ga. 467 (4); *Eberhart v. State*, 47 Ga. 598 (5).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2126.]

#### 4. SAME—MISCONDUCT OF OFFICER.

The fact that the officer in charge of the jury in a criminal case, after they had retired to consider of their verdict, permitted them to sit in a body in a veranda and eat watermelons sufficiently near to the sidewalk to hear a discussion of the case by persons thereon, will not require a new trial, where it affirmatively appears that the jury while on said veranda were in charge of the officer, and neither discussed the case themselves nor heard any one else discuss or refer to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2275.]

#### 5. SAME.

The paramount duty of courts is to insure fair and impartial trials. Mere irregularities which do not affect or prevent the full and complete accomplishment of this duty should not require new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2128-2145.]

#### 6. SAME—WRIT OF ERROR—NEW TRIAL—DENIAL—REVIEW.

The evidence was weak and conflicting, but considered by the jury sufficient to convict. The discretion of the trial court in refusing a new trial will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3067, 3068.]

(Syllabus by the Court.)

Error from City Court of Cairo; J. R. Singletary, Judge.

C. C. Waller was convicted of an offense, and he brings error. Affirmed.

R. C. Bell and J. O. Smith, for plaintiff in error. S. P. Cain, Sol., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 631)

#### LEDBETTER v. STATE (No. 683.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

#### 1. CLERKS OF COURTS—DEPUTIES—DE FACTO OFFICER—POWERS.

The office of deputy clerk of the superior court exists. Therefore one may de facto hold that office who is not entitled to hold it de jure, because of a failure to take the oath. The acts of such de facto officer are as effective in matters, both civil and criminal, as if he were regularly qualified. *Civ. Code 1895, § 4359*; *Pol. Code 1895, § 242*; *Ballard v. Orr*, 105 Ga. 195, 31 S. E. 554; *Gunn v. Tackett*, 67 Ga. 725; *Herrington v. State*, 103 Ga. 318, 29 S. E. 931, 68 Am. St. Rep. 95; *Brooks v. Rooney*, 11 Ga. 423; *Allen v. State*, 21 Ga. 219, 68 Am. Dec. 457; *Tietjen v. Merchants' Bank*, 117 Ga. 503, 43 S. E. 730.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Clerks of Courts, §§ 10, 11.]

#### 2. CRIMINAL LAW—APPEAL—CONCLUSIVENESS OF FINDINGS—PLEA IN ABATEMENT.

The evidence not being such as to preclude a finding that the indictment had been returned



into court and delivered to the clerk or to his de facto deputy, a finding by the trial judge, acting by consent as trior, against a plea in abatement alleging to the contrary, will not be disturbed.

(Syllabus by the Court.)

Error from City Court of Sylvania; H. A. Boykin, Judge.

Son Ledbetter was convicted of misdemeanor, and he brings error. Affirmed.

The defendant, Son Ledbetter, was indicted by the grand jury of Screven county for a misdemeanor. The indictment was transferred from the superior court of Screven county to the city court of Sylvania, in which court the defendant filed a plea in abatement, alleging, in substance, that the indictment was delivered into court from the grand jury by one Gilbert, who was not the bailiff of the grand jury, and who was not a sworn officer of the court, and was without authority of law to hand said indictment into said court, and that the delivery of the indictment into court by Gilbert was not in the presence of the grand jury, but was handed in by him privately after the grand jury had taken a recess for the day. The state filed a traverse to this plea, and the issue thus raised was by consent tried by the judge without a jury. The evidence introduced by the defendant in support of the allegations of his plea was substantially as follows: Two witnesses testified that they were in the office of the clerk of the superior court on the day the indictment was found; that one Gilbert, an assistant to the Solicitor General, came into the office from the direction of the grand jury room, and handed the clerk a batch of indictments, including the one in question; that at this time the grand jury was not in session. There is no direct evidence in the record as to the source from which Gilbert got the indictment. The evidence on the part of the state showed that the clerk of the superior court had a deputy by the name of Potter, who habitually performed the functions of clerk, frequently receiving the indictments returned into court by the grand jury, and doing other routine work under the supervision of the clerk. He had never taken an oath of office. He testified that after indictments had been delivered into court by the grand jury he often turned them over to the Assistant Solicitor General for the purpose of having bench warrants issued on them. The regular bailiff of the grand jury testified that he never delivered any indictments to Gilbert, but always turned them over to the clerk or his deputy. The theory of the state under this testimony was that the indictment against the defendant had been returned into court by the regular bailiff of the grand jury and delivered by him to the clerk or his de facto deputy, and had then come into the possession of the Assistant Solicitor. The evidence does not preclude a finding to this effect. After hearing the evidence, the trial judge

overruled the plea, and his decision is assigned by the defendant as error.

E. K. Overstreet, for plaintiff in error. T. J. Evans, Sol., for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 649)

ROSENBLATT v. STATE. (No. 679.)

(Court of Appeals of Georgia. Oct. 15, 1907.)

CRIMINAL LAW—PLEA IN ABATEMENT.

There was no error in deciding adversely to the plea in abatement.

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

J. Rosenblatt was convicted of the illegal sale of intoxicating liquor, and, from a decision of the superior court adverse to him on a writ of certiorari, he brings error. Affirmed.

The defendant was indicted by the grand jury of Ben Hill county for illegally selling liquor. The case was transferred for trial to the city court of Fitzgerald. The defendant filed a plea in abatement, which alleged, among other things, that the indictment against him was void because (1) the jury commissioners, appointed to select the grand jury which found the indictment against him, did not before entering upon their duties subscribe the oath required by section 814 of the Penal Code of 1895; and (2) under the act creating the Cordele circuit only the judge of the superior court of Ben Hill county was authorized to draw the grand jurors for the spring term, 1907, of said court. The evidence disclosed the fact that the ordinary administered the prescribed oath to the jury commissioners before they entered upon their duties, but the oath was not subscribed by them until two or three days later. As to whether or not the subscription of the oath took place before or after the final selection of the grand jury there was some conflict; but there was evidence from which the court could find against the defendant as to that point, for two of the jury commissioners testified that "none of the names of the persons who were finally selected as grand jurors and whose names were put in the grand jury box, had been selected prior to the time that the oath of jury commissioners was subscribed to by the jury commissioners, the work done prior to that time being the work of going over the tax digest for the purpose of getting the names of all the poll taxpayers of the county, from which the names of the grand jury were to be selected." After hearing the evidence, the judge directed a verdict against the plea in abatement; but the assignment of error is sufficient only to raise the same question as if the jury had found the verdict without the direction. See *Dickenson v. Stuts*, 120 Ga. 632, 48 S. E. 173 (1). The case went to trial on the merits, and the defendant was convicted. He carried the

case to the superior court by certiorari; and, the decision of the judge on the return of the writ being adverse to him, he assigns this decision as error.

E. W. Ryman and E. Wall, for plaintiff in error. E. D. Graham, Sol. Gen., Alex. J. McDonald, Sol., and W. F. George, Sol. Gen., for the State.

**POWELL, J.** (after stating the facts as above). The judgment of the trial court overruling the certiorari will be affirmed for several reasons. First There having been an issue of fact as to whether the jury commissioners drew the list before or after they subscribed the oath, the finding of the trial court as to that is final. Further, if they were not *de jure* officers, their acts as *de facto* officers were not invalid. *Ledbetter v. State* (No. 685) 53 S. E. 1106. Also, "the official acts of an officer are none the less valid for his omission to take and file the oath, unless in cases when so specifically declared." *Pol. Code 1895, § 242*. And, they having actually taken the oath, their subscription of it related back. *McLain v. State*, 71 Ga. 279; *Roby v. State*, 74 Ga. 812.

While under the act creating the Cordele circuit (Laws Ga. 1906, p. 52) the judge of the superior court had the power to draw the grand jury, this in no wise interfered with the power of the jury commissioners under the general law.

Judgment affirmed.

(2 Ga. App. 659)

**SUTTON v. STATE** (No. 681.)

(Court of Appeals of Georgia. Oct. 16, 1907.)

**1. ASSAULT AND BATTERY—DEFENSES—ABUSIVE LANGUAGE.**

Abusive language, without more, is not a valid defense to a battery with a large pistol sufficient in severity to knock down and cause unconsciousness.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 4, *Assault and Battery*, § 95.]

**2. SAME.**

The aggressor in the use of opprobrious words cannot set up as a defense to a violent battery with a pistol the use of similar words provoked by his own language.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 4, *Assault and Battery*, § 95.]

**3. SAME—VERDICT—EVIDENCE.**

The verdict rendered was the verdict required by the undisputed evidence and the defendant's statement considered separately or together.

**4. SAME—NEW TRIAL.**

The grounds in the motion for a new trial are utterly without merit.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

R. L. Sutton was convicted of assault and battery, and he brings error. Affirmed.

Polhill & Foy, for plaintiff in error. J. H. Tipton, for the State.

**HILL, C. J.** Judgment affirmed.

(2 Ga. App. 660)

**PAULK v. STATE** (No. 744.)

(Court of Appeals of Georgia. Oct. 16, 1907.)

**1. COURTS—CITY COURTS—JUDGES—PRESIDING IN OTHER COURTS.**

The city court of Baxley is a constitutional city court, and the judge of said court is authorized under the Constitution of 1877 to preside in the superior court of Appling county in any case where the judge of the latter court is disqualified, and, when presiding in said court in the trial of such disqualified case, "becomes the impersonation of the superior court for that case."

**2. LARCENY—INSTRUCTIONS—REQUESTS.**

On the trial of an indictment for the offense of hog stealing, where the issue of fact was as to the intention of the defendant, it being contended by the defendant that his intent was not to steal the hog in question, but to wound and kill it, it was error in the presiding judge to refuse a written request timely made and pertinent to this issue.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 82, *Larceny*, §§ 191, 192.]

(Syllabus by the Court.)

Error from Superior Court, Appling County; J. H. Thomas, Judge.

George Paulk was convicted of larceny, and he brings error. Reversed.

W. W. Bennett, for plaintiff in error. John W. Bennett, Sol. Gen., and W. W. Lambdin, for the State.

**HILL, C. J.** Plaintiff in error was convicted of the offense of simple larceny in the superior court of Appling county. The judge of the superior court of said county was disqualified to try the case, and the judge of the city court of Baxley presided on the trial. The defendant moved for a new trial, which was overruled, and he excepted.

1. The first question made is whether the judge of the city court of Baxley had the right, under the Constitution of 1877, to preside in said case. It was admitted that the judge of the superior court of that county was disqualified. The Constitution of 1877 (article 6, § 5) provides as follows: "In any county in which there is or hereafter may be a city court, the judge of said court and of the superior court, may preside in the courts of each other, in cases where the judge of either is disqualified." This provision of the Constitution has been decided by the Supreme Court to apply only to constitutional city courts. The fact that the city court has only jurisdiction to try misdemeanor cases does not affect the constitutional right of a judge of a constitutional city court from presiding in the superior court in a felony case where the judge of the latter court is disqualified. As to the disqualified case in the superior court, the judge of the city court is invested with all the power and authority of the judge of the superior court. In the language of Mr. Justice Jackson in the *Northwestern Mutual Life Ins. Co. v. Wilcoxon*, 64 Ga. 566: "He becomes the impersonation of the superior court for that case during the term." The city court of Baxley has been

decided by the Supreme Court to be a constitutional city court. *Sellers et al. v. Mann*, 113 Ga. 643 (1), 39 S. E. 11; *Heard v. State*, 113 Ga. 444, 39 S. E. 118; *Ivy v. State*, 112 Ga. 180, 37 S. E. 398; *Acts 1897*, p. 420.

2. The next ground of error insisted upon is that the court erred in refusing to give the following written instruction to the jury: "Gentlemen of the jury, if you find from the evidence in this case that this defendant, in company with the other defendant, with a gun shot and wounded the hog in question without any intention of stealing it, and then with a club beat the hog to death and threw it into the water of a river swamp, without any intention of stealing it, and without converting it to their own use, but simply killed it and left it there to rot, that then, and in that event, he would not be guilty of the offense of simple larceny, as charged in this indictment." Under the evidence, there was no question that the defendant and his codefendant did kill and drag the hog of the prosecutor described in the indictment from the place where they killed it and hid it behind a log in the shallow water of the lake swamp. The material question was as to their intention. Did they intend to steal the hog, or did they intend wantonly and maliciously to maim and kill the hog? The learned judge charged the jury the general elements constituting the offense of simple larceny as applicable to the facts of the case, and as contended for by the state. He failed to charge the contention of the defendant that the jury would not be authorized to convict if the intention of the defendant was not to commit the crime of larceny, but some other offense not set out in the indictment. We think this was error, and that the above request was pertinent to the issue and contentions as made by the evidence, and should have been submitted to the jury. For this reason alone, we are constrained to grant a new trial.

Judgment reversed.

(2 Ga. App. 662)

**PAULK v. STATE. (No. 743.)**

(Court of Appeals of Georgia. Oct. 16, 1907.)

**1. COURTS—CITY COURTS—JUDGES—TRIAL OF CASES IN OTHER COURTS.**

The judge of the city court of Baxley was qualified under the Constitution of 1877 to preside in the superior court and try this case; the judge of the latter court being disqualified. *Const. 1877*, art. 6, § 5; *Paulk v. State* (No. 744, Court of Appeals of Georgia) 58 S. E. 1108.

**2. JURY—DISQUALIFICATION—SERVICE ON PRISON JURY.**

It is no cause of challenge to the array that 12 of the 48 jurors constituting the array had just served as a jury on the trial of another person jointly indicted with the defendant in which a verdict of guilty was rendered, and that the witnesses and evidence in the present case would be the same as in the former. Such cause

of challenge was not good against the panel, but would have been available only by challenges to the polls. *Schnell v. State*, 92 Ga. 459, 17 S. E. 968.

**3. CRIMINAL LAW—INSTRUCTIONS—REQUESTS.**

The written requests to charge on the issue made by the facts proved as to whether the specific intent of the defendant was to commit the offense of larceny, or some other offense, was fully covered by the charge of the court on that subject.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 14, *Criminal Law*, § 2011.]

**4. SAME—VERDICT.**

No error of law was committed, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Appling County; J. H. Thomas, Judge.

Will Paulk was convicted of larceny, and he brings error. Affirmed.

W. W. Bennett, for plaintiff in error.  
John W. Bennett, Sol. Gen., and W. W. Lambdin, for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 658)

**SHELL v. STATE. (No. 762.)**

(Court of Appeals of Georgia. Oct. 15, 1907.)

**CRIMINAL LAW.**

Owing to the nature of the charge against the defendant, and of the testimony in the record, we shall make no report of the facts. We have, however, made a careful study of the assignments of error, but find nothing requiring the grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Jim Shell was convicted of an offense, and he brings error. Affirmed.

Beall & Adamson and Griffith, Weatherby & Mathews, for plaintiff in error. C. E. Roop and S. Holderness, for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 657)

**GATES v. STATE. (No. 717.)**

(Court of Appeals of Georgia. Oct. 15, 1907.)

**CRIMINAL LAW—EVIDENCE—NEW TRIAL—NEWLY DISCOVERED TESTIMONY.**

The evidence authorized the conviction. The trial judge did not abuse his discretion in overruling the motion for a new trial on the ground of newly discovered testimony.

(Syllabus by the Court.)

Error from City Court of LaGrange; Frank Harwell, Judge.

Limus Gates was convicted of an offense, and he brings error. Affirmed.

E. T. Moon, for plaintiff in error. Henry Reeves, for the State.

POWELL, J. Judgment affirmed.

(2 Ga. App. 656)

**McALLISTER v. STATE. (No. 710.)**

(Court of Appeals of Georgia. Oct. 15, 1907.)

**INDICTMENT—TRUE BILL—SIGNING.**

That the foreman of a grand jury did not sign the entry of true bill on an indictment is no ground for a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 129.]

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

John McAllister was convicted of a misdemeanor, and he brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

**RUSSELL, J.** After his conviction for the offense of a misdemeanor, the defendant made a motion in arrest of judgment. His motion was overruled, and he excepts to this judgment.

The motion in arrest of judgment is predicated upon the fact that the indictment was not signed by the foreman of the grand jury. In *Barlow v. State*, 127 Ga. 62, 56 S. E. 181, Judge Lumpkin remarks that the proper practice is for the foreman of the grand jury to sign a finding of true bill on the back of the indictment, and this is the universally recognized practice. But there is no positive law requiring that the foreman of the grand jury shall sign the finding at all. It was not required at common law. If it be indispensable that the foreman shall sign it, the defect arising from failure to sign is at least not ground for a motion in arrest of judgment. That has been definitely decided in *McGuffie v. State*, 17 Ga. 510. In *Hughes v. State*, 76 Ga. 40, the same question was before the court, and it was held that: "All exceptions which go merely to the form of the indictment shall be made before trial, and no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. If a plea in abatement had been filed, it might be that the state would have shown from the minutes of the court the finding of the grand jury." The court therefore committed no error in refusing to arrest the judgment.

Judgment affirmed.

(2 Ga. App. 654)

**McALLISTER v. STATE. (No. 709.)**

(Court of Appeals of Georgia. Oct. 15, 1907.)

**CRIMINAL LAW—CONFESSIONS—WEIGHT.**

The confession not being plenary, and not being connected with the specific act which was the basis of the criminal offense charged, the conviction of the defendant was not authorized by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1227-1229; vol. 1, Adultery, §§ 21-23.]

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

John McAllister was convicted of adultery, and he brings error. Reversed.

Jas. B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

**RUSSELL, J.** The defendant, John McAllister, was indicted and convicted for the offense of adultery and fornication and excepts to the overruling of his motion for a new trial. The only question presented by the record is whether the verdict is contrary to law, in that the evidence is insufficient to support it.

This court is especially reluctant to interfere with the verdict of a jury, and for that reason we have carefully scrutinized the record to ascertain if in any view of the case the verdict of the jury can be supported by law. The evidence for the state, in brief, was that one witness saw the defendant running after the married woman with whom the intercourse is alleg-

ed to have taken place and slapping her on the rump. Another witness at another time saw the defendant kiss the female in question. The state then produced the following statement made by the defendant to another witness: "The defendant told me that he did it to [the woman in question] whenever he wanted to do it." Another witness detailing this same conversation said that the defendant said that he did it to her one time. This was all the evidence in behalf of the state. The defendant stated that he had never had intercourse with the female in question, and she testified to the same effect. A confession corroborated will authorize conviction of a criminal offense; the amount of corroboration being solely for the jury. The error of the trial judge in this case grew out of his failure to recognize the distinction between a confession incomplete and a plenary confession. We think that the circumstance that a gentleman boarder was seen familiarly slapping the rump of his landlady, who was a married woman, and the further circumstance that he was seen holding her by the chin and kissing her, would afford strong corroborative testimony of a plenary and specific confession of sexual intercourse. But the witnesses for the state as to the confession did not detail a statement by the defendant which would authorize a conviction, even if the law permitted convictions by confessions uncorroborated. From this statement, denominated a confession, it does not appear that the intercourse took place in Bartow county, nor that it was within two years prior to the finding of the indictment, nor is there any circumstance to connect it with the facts upon which the state relied for corroboration.

Clark, in his work on Criminal Procedure (page 532), lays the rule down thus: "An extrajudicial confession, in order to warrant a conviction, must be corroborated by other evidence tending to prove the corpus delicti." Wharton, after stating the conditions upon which voluntary confessions are admissible, says: "While voluntary confessions of specific charges or of inculpatory facts are always admissible under conditions above stated, they cannot sustain a conviction unless there be corroborative proof of the corpus delicti." Whart. Cr. Ev. 632. In 1 Greenleaf on Evidence, § 217, in discussing the question whether extrajudicial confessions, uncorroborated by any other proof of the corpus delicti, are sufficient to support a conviction, the learned author says: "In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborative circumstance. In the United States the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the Criminal Code, and with the great degree of caution applied in receiving and weighing evidence of confessions in other cases, and it seems countenanced by approved writers upon this branch of the law." In *People v. Badgley*, 18 Wend. (N. Y.) 53, it was held: "Evidence of confession alone, unsupported by corroborating facts and circumstances, is not sufficient to convict. There must be proof alunde of the corpus delicti, although such proof need not be conclusive." In *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247, it was held: "In capital felonies, the extrajudicial confessions of the prisoner, where the corpus delicti is not proven by independent testimony, are insufficient to warrant a conviction of the accused." In *Johnson v. State*, 59 Ala. 37, following *Matthews v. State*, 55 Ala. 187, it was held: "An extrajudicial confession, not corroborated by independent evidence of the corpus delicti, will support a conviction of a felony." In Kentucky, as in Georgia, this principle is embodied in the statutory law of the state. *Cunningham v. Com.*, 9 Bush, 149. This seems to be true in Iowa. *State v. Feltes*, 51 Iowa, 601, 1 N. W. 755. In *U. S. v. Mayfield* (C. C.) 59 Fed. 118, *Boorman, J.*, said: "Before a conviction is justified, the

government should be required to establish the corpus delicti by some degree of circumstantial or other evidence independent of the defendant's extrajudicial confessions." In *Priest v. State*, 10 Neb. 394, 6 N. W. 468, the rule was laid down this way: "A confession is not sufficient evidence of the corpus delicti. There must be other evidence that a crime has actually been committed, the confession being used to connect the accused with the crime."

We think, therefore, that the verdict, for lack of evidence, is contrary to law, and that a new trial ought to have been granted.

Judgment reversed.

(2 Ga. App. 639)

**TOMPKINS v. STATE. (No. 761.)**

(Court of Appeals of Georgia. Oct. 14, 1907.)

**INTOXICATING LIQUORS—WRONGFUL SALE—PRESUMPTIONS.**

In the absence of evidence to the contrary, it may be inferred that a liquor called for and delivered and paid for as whisky is whisky, and therefore an intoxicating liquor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 275; vol. 14, Criminal Law, § 718.]

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Lee Tompkins was convicted of the illegal sale of intoxicating liquors, and he brings error. Affirmed.

Robert Orr, for plaintiff in error. W. L. Stallings, for the State.

**RUSSELL, J.** The plaintiff in error was indicted for the offense of selling whisky and convicted. The specific words of the charge were, "did unlawfully sell and barter for valuable consideration alcoholic, spirituous, malt and intoxicating liquors and intoxicating bitters and beer and wine."

No complaint is made of any error in the admission or rejection of evidence or in the charge of the court. Only one question is raised by the record: Is the evidence sufficient to support the verdict? There can be but one answer to the question. The evidence was ample, the one witness testified in the case. This witness testified that he bought 25 cents worth of rye whisky from the defendant, Tompkins, for each in Coweta county and within two years immediately preceding the return of the indictment (December 31, 1906). It is immaterial that the sole witness for the state testified that he told defendant that he wanted whisky, and that the defendant stated that he could get it for him, because it is undisputed that the witness saw defendant himself and not another, pour the liquid out of a quart bottle into a beer bottle, which was delivered to the purchaser. It is immaterial that the witness testified that he did not drink any of the whisky. The fact that the witness swore that it smelled like rye whisky might be corroborative of the already existent testimony that the fluid was whisky, but under the indictment it was not material for the state to show that the intoxicating liquor sold was rye whisky. It was enough if it was made to

appear beyond a reasonable doubt that the defendant sold whisky. The court would take knowledge of the fact that all whisky is intoxicating, and proof of sale of whisky would conform with the allegation that alcoholic, spirituous, and intoxicating liquors were sold by the defendant. The jury may infer that a liquor is intoxicating from its effect when drunk. Much more can they infer that a liquid, though not imbibed, is whisky where the purchaser plainly asks for whisky, and the seller furnishes it in compliance with his request.

The writ of error is entirely without merit. Judgment affirmed.

(2 Ga. App. 613)

**HARWELL v. STATE. (No. 631.)**

(Court of Appeals of Georgia. Oct. 14, 1907.)

**1. MASTER AND SERVANT—FRAUDULENT BREACH OF CONTRACT—FRAUDULENT INTENT—REBUTTAL.**

The presumption of fraudulent intent arising under the labor contract law of 1903 (Acts 1903, p. 90) is not rebutted as to one who obtains advances on the faith of his contract for services to be performed at a future time, and who does not enter upon such service, by repayment of the advance, unless such payment be made on or before the date fixed by the contract for the commencement of such labor or service.

**2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—INAPPLICABILITY TO EVIDENCE.**

A charge not applicable to the evidence, or without evidence to support it, is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1924, 1980, 1981.]

**3. MASTER AND SERVANT—FRAUDULENT BREACH OF CONTRACT—CRIMINAL PROSECUTIONS—DEFENSES—INSTRUCTIONS.**

Under the decision of the Supreme Court in *Howard v. State*, 128 Ga. 538, 55 S. E. 239, the court should have charged the jury that if it appeared from the evidence that the accused was a minor, and that the failure on his part to perform the services required under the contract was due to parental interference and control, that the presumption of fraudulent intent, arising from the fact that the money was procured on the faith of the contract, and the service not rendered, or the money returned, would be rebutted, and the defendant could not be convicted. The failure to so instruct the jury requires the grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Monticello; A. S. Thurman, Judge.

Earnest Harwell, alias Isaac, was convicted of swindling, and he brings error. Reversed.

A. Y. Clement, for plaintiff in error. Doyle Campbell, for the State.

**RUSSELL, J.** The defendant was indicted for the offense of misdemeanor, cheating and swindling by procuring \$20 from one M. Benton, by means of a contract with said Benton to work as a farm laborer; this sum, as alleged, having been fraudulently procured after the contract. Before trial the defendant demurred to the indictment, both generally and specially. The court overruled the demurrer, and exceptions were taken pendente lite. The grounds of the demurrer were as follows: "(1) Because said indict-

ment in the matters therein contained is insufficient in law, and he ought not to be required to answer same. (2) Because the allegations in said indictment are too vague, indefinite, and uncertain. (3) Because said indictment in the averments therein contained does not charge any offense under the law. (4) Demurring specially, defendant says it appears from the face of said indictment that the time has not expired in which said service was to be performed, and that under the statute he has the right and privilege of returning the money with interest thereon at any time before the expiration of the year 1907, and that it cannot be legally presumed that he will not return the money with interest thereon before the expiration of said period, and for this reason said indictment is premature and invalid. (5) Specially, because said indictment does not allege that said contract was in writing, nor does it allege that defendant was contracted with as an 'overseer,' but negatives that implication that he was 'to work as a farm laborer for one year beginning January 1, 1907,' said indictment shows upon its face that the alleged contract was void, illegal, contrary to public policy and the statute of frauds, and was not binding, for the reason that it appears that said contract was 'not to be performed within one year from the making thereof,' and that said contract was made December 28, 1906, and that the term of service was for 'one year beginning January 1, 1907.' Defendant says that the said indictment shows that the alleged contract was 'not to be performed within one year from the making thereof.' It is essential to the validity of said indictment that the alleged contract was in writing, or that the alleged contract was made with defendant as overseer, and in the absence of both of these essential averments it is apparent that the alleged contract was void and illegal, and therefore said indictment is invalid and sets forth no offense against defendant. (6) Specially, because said indictment is fatally defective, in that it fails to allege when said service is to be performed, or within what particular period it was to be performed. It should allege not only when said service was to 'begin,' but when it was to end."

Upon the trial the defendant was convicted. He made a motion for new trial, and now excepts to the order overruling his motion. In the motion for new trial, in addition to the general grounds, it is insisted: (4) That the court erred in admitting the alleged written contract between the defendant and prosecutor, which contract was as follows: "Monticello, Ga., 12, 27, 1906. I, Earnest Harwell, of Jasper county, Ga., formerly of Morgan county, Ga., in consideration of \$20.00 advanced to me by M. Benton of Jasper county, Ga., do contract and agree to work for the said M. Benton for the year 1907, do any and all kinds of farm work that may be required of me by the said Benton or his agent. M. Benton agrees to pay the said

Earnest Harwell \$10.00 per month and one-half of every Saturday. Earnest Harwell agrees to work Saturday evening when called on and is to receive 25 cts. extra for said extra work. Isaah Byrd signs the above contract for security for the \$200.00 advanced.

his  
[Signed] Earnest Harwell. Isaah X Byrd.  
mark.

his  
M. Benton. Witness to contract: Isaah X  
mark.

Byrd." In the fifth ground it is insisted that the court erred in permitting the solicitor to ask the witness Allie Isaac, over defendant's objection that the questions and answers were irrelevant, immaterial, and inadmissible: "How old are you? How old were you when you were married? How long had you been married when the defendant was born?" In the sixth ground of the motion, it is alleged that the judge erred in charging the jury as follows: "If you believe from the evidence that defendant had a good and sufficient reason for not performing the services or returning the money advanced under said contract, if you find there was a contract, then you would be authorized to acquit him; but if you believe from the evidence or the statement of the accused that he entered into said contract with the intent of procuring the money and not performing the service, and that he did not have a good and bona fide reason for nonperformance, and that the reason he offers is a mere excuse for the purpose of escaping punishment, then you would be authorized to convict." The seventh and eighth grounds complain of refusals of the judge to charge certain requests submitted by defendant's counsel. The ninth ground insists that the court eliminated from the jury as an element of good faith on the part of the defendant, and as a defense, the evidence that the defendant gave a security on the contract by an additional charge delivered to the jury after they had started to the jury room to consider their verdict, and it is insisted that the additional charge at the time and under the circumstances and in the manner given was hurtful to defendant. The tenth ground of the motion insisted that the judge erred in charging the jury that: "If the defendant had made a false representation as to his age, and this fact might be looked to by the jury in ascertaining the intention of the defendant at the time." The eleventh ground of the motion assigns error in that the judge failed to instruct the jury upon the subject of circumstantial evidence.

It is unnecessary to rehearse the evidence. The evidence in behalf of the state was sufficient to authorize the verdict of guilty, and there was no error in overruling the motion for new trial, unless the rules and instructions complained of were, for the reasons assigned, erroneous.

1. We think the court properly overruled the demurrer. It is necessary for the period of time within which the money may be returned to have expired in order that the

legal presumption may arise that the defendant intended to defraud, or that he does not intend to return the money advanced with interest thereon. The contract referred to in the act of 1903 is not one for the repayment of money, but to perform service. Nor was the indictment demurrable, in that it appeared that the contract was made December 28, 1906, and the term of service was for one year beginning January 1, 1907, because contrary to the statute of frauds. It was unnecessary to state in the indictment that the contract was in writing. It would be presumed to be in writing unless the contrary appears. And by the language used in the indictment, "did contract with one, M. Benton," and "after having so contracted procured," etc., applying the language of the act, it could only be understood that the contract was in writing. Nor was the indictment demurrable upon the ground that it failed to allege when the service was to be performed. It is undoubtedly true that indictments brought under this act must allege when the service is to be performed or within what particular period it was to be performed, but there was nothing vague or doubtful in the statement of the indictment that the service was for the period of "one year, beginning January 1, 1907." This would necessarily mean from January 1, 1907, to December 31, 1907, inclusive.

2. Our ruling on the fifth ground of the demurrer disposes of the fourth ground of the motion for new trial. If the language of the act requires that the word "contract" be considered as referring to a writing, then not only was there no error in admitting the writing to which objection was made in the fourth ground, but the state's case would have failed unless the contents of the contract had been proved, and the writing itself is the best proof of what it contains. The fact that Isaah Byrd was security on the contract, and that the contract showed credit indorsed thereon, would not affect the admissibility of the evidence as showing a contract to have been made between the defendant and the prosecutor. It might affect the result of the trial.

3. We find no error in the charge complained of in the sixth ground. The objection made to it was that it intimated an opinion; that the reason offered by the defendant for nonperformance was not a good and bona fide reason, and tended to discredit the defense set up by the defendant. It is plain that all that the judge said as to the defense being a mere excuse for the purpose of escaping punishment, or that it was not a good and bona fide reason for not performing the contract, is qualified, limited, and controlled by the words "If you believe from the evidence."

4. The charge requested in the seventh ground is a correct presentation of principles applicable to the cause on trial, and should have been presented to the jury. But the judge is not required to present the charge

in the verbiage or connection of the request. His instruction to the jury upon each of the subjects contained in the request being clear, full, and explicit, there was no error in not presenting the request in its exact language.

5. The judge properly refused to charge that: "If the jury believe from the evidence that M. Benton took Isaah Byrd as security on said contract, and that he looked to Isaah Byrd for the payment of the money in the event the defendant failed and refused to do so, you could not legally convict the defendant." As remarked before, the purpose of the contract was to perform service. It would be immaterial whether the money were paid back or not, if the service were performed. If the service was not performed, it would still be immaterial, if it were apparent that the defendant intended at the time of procuring the money not to perform the service, unless in fact the money was returned before prosecution. Certainly it does not follow that, because the prosecutor took security for money advanced to the defendant on the faith and representation of the defendant to do certain work, for this reason the defendant could not have had the intention to cheat and swindle the prosecutor by not working, as he contracted to do, it is possible that he might have both intended to cause the security to lose the money and the prosecutor the labor.

6. The fact that Isaah Byrd was security for the payment of the advancement is immaterial, as we have just remarked, if the defendant did not intend to perform the service he had contracted to perform. Isaah Byrd was security only for the repayment of the advancement. For this reason, there was no error in the charge complained of in the ninth ground of the motion for a new trial. And the charge excepted to is not for any reason erroneous. The fact that the judge recalled the jury after they had started to retire to the jury room is not a circumstance of prejudice to the defendant. The judge had not instructed them one way or the other in the previous charge as to the fact of Isaah Byrd's being security. It was proper that they should be instructed as to this contention, and they were properly instructed after they were recalled.

7. In the tenth ground of the motion, it is insisted that the judge erred in charging the jury that: "If they believe the defendant stated to M. Benton, the prosecutor, at the time said contract was made, that he was 21 years of age, and that he was not 21 in fact, that said false representation as to his age might be looked to by the jury in ascertaining the intent of the defendant at the time." Upon the examination of the record, we find that this instruction was unauthorized by the evidence. Both Benton and Byrd testified that defendant said that he was not 21 at the time the contract was made. The charge contains no intimation of opinion on the part of the judge as to any portion of the evidence, but, because it presents a theory not authorized by the evidence, it is reversible error.

8. As held by this court in the case of *Riley v. State*,<sup>1</sup> where a conviction depends solely upon circumstantial evidence, the jury could be instructed that the proof offered must not only be consistent with the guilt of the accused, but must exclude every other reasonable hypothesis. In this case, the guilt of the defendant was dependent entirely upon the intent to defraud existent at the time he obtained the advancement. This intent or lack of intent could only be determined by circumstances. So in its essence, the case depended entirely upon circumstantial evidence. The rule of law above stated was absolutely pertinent, and the jury should have been instructed with reference thereto, even in the absence of a request.

Our judgment is controlled by the decision of *Howard v. State*, 126 Ga. 538, 55 S. E. 239. The trial judge in this case entertained the correct view of the law embodied in Acts 1903, p. 90, as to all of the matters with regard to which complaint is made; but, under the decision above cited, he should have presented to the jury the defendant's defense that he was prevented from performing his contract of labor on account of his minority and the parental control of his mother, and should have instructed the jury that, if they believed that the accused was a minor, and that his failure to perform his contract was due to the mandate of his mother, the presumption of fraudulent intent would be rebutted, and they would be authorized to acquit the defendant.

Judgment reversed.

(2 Ga. App. 663)

**BAKER v. STATE (No. 750.)**

(Court of Appeals of Georgia. Oct. 16, 1907.)

**COURTS—FORMER DECISIONS AS CONTROLLING.**

This case is controlled by the decisions of this court in *Mosely v. State*, 58 S. E. 298, and *Harwell, alias Isaac, v. State* (No. 631, decided October 14, 1907) 58 S. E. 1111, and in the case of *Millinder v. State*, 124 Ga. 452, 52 S. E. 760.

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Alex Baker was convicted of an offense, and he brings error. Affirmed.

Jas. R. Thomas and Jos. A. Morris, for plaintiff in error. V. E. Padgett, for the State.

**HILL, C. J. Judgment affirmed.**

(2 Ga. App. 623)

**BUTLER v. STATE. PETTUS v. SAME. BENSON v. SAME. SIMPSON v. SAME. MARLOW v. SAME. GIBSON v. SAME.** (Nos. 660, 661, 662, 663, 664, and 665.)

(Court of Appeals of Georgia. Oct. 14, 1907.)

**GAMING—OFFENSES—EVIDENCE.**

The verdict was fully authorized by the evidence, and no error of law was committed.

(Syllabus by the Court.)

<sup>1</sup> 1 Ga. App. 661, 57 S. E. 1081.

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Charlie Butler and five others were separately convicted of gaming, and they bring error on separate bills of exceptions. Affirmed.

F. H. Colley and Wm. Wynne, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

**HILL, C. J.** Six men were jointly indicted in the superior court of Wilkes county for the offense of gaming. They were tried together, and were all convicted, and their motions for new trial were overruled. The grounds of the motion in each case were similar, and were the statutory grounds and one special ground, the refusal of the court to charge the following written request: "The mere fact that a piece of money was on the table when a game of cards was being played, without some evidence to show that it was being bet or staked on the game, will not authorize a conviction."

1. According to the testimony of an officer of the law, he saw all six of these defendants in the back end of Abe Williams' place of business. These defendants were sitting "around a box, or something like a trunk," and each was playing with cards, and money was on top of the box or trunk partly covered up with a piece of paper. The players were so busily engaged in the game that they did not see the witness until he put his hand on one of the players. This player immediately arose and grappled with the officer, and all the others ran out of the room, in their hasty exit throwing the box, the cards, and the money on the floor. The money was silver money, but the witness could not tell how much there was, but there were several stacks or piles. We think the verdict of the jury was authorized by the foregoing evidence. *Hicks v. State*, 1 Ga. App. 722, 57 S. E. 958; *Pacetti v. State*, 82 Ga. 297, 7 S. E. 867. The strong inference of guilt arising therefrom was not weakened by the testimony of each one of the defendants in behalf of the others that they were playing, but were not betting for money or other thing of value. Such denial is not unusual in criminal cases, but is very frequently the protest of guilt, even when caught in the act. Nor do we think the fact that certain reputable citizens bore testimony to the good character of the defendants was sufficient to generate any doubt as against the positive facts clearly indicating guilt. There are a great many excellent people who probably would not permit their good opinion of a man to be affected by the fact that he played cards for money or other thing of value. Many good men classify gaming as *malum prohibitum* with no element of *malum in se*.

2. The request to charge stated a truism so manifest and simple that it might reasonably and safely have been left to the ordinary intelligence of the jury without any in-



structions; but the request itself was fully covered by the general charge, and especially that part in the following language: "I charge you, as requested by defendants' counsel, there is no law in this state which forbids the playing of cards. It is necessary for it to be a crime for money or other thing of value to be staked on the game. Before you can convict the defendants, it must appear that they played for some thing of value." Judgment affirmed.

(2 Ga. App. 634)

**JENKINS v. STATE (No. 687.)**

(Court of Appeals of Georgia. Oct. 22, 1907.)

**1. BURGLARY—VERDICT—EVIDENCE.**

The evidence fully authorized the verdict, which was approved by the trial judge, and no reason appears why a new trial should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, §§ 104-107.]

**2. SAME—STOLEN GOODS—RECENT POSSESSION—CIRCUMSTANTIAL EVIDENCE.**

Under the evidence disclosed in the record, the jury were authorized to infer that the goods which had been recently stolen, and which were found in the possession of the defendant's wife, had been delivered to her by the defendant, and that the possession of the wife was constructively the possession of the husband, regardless of the marital relation existing between them. The evidence for the state, though entirely circumstantial, excluded every other reasonable hypothesis, save that of the defendant's guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 94.]

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Ed Jenkins was convicted of burglary, and he brings error. Affirmed.

At the November term, 1906, of Terrell superior court, Ed Jenkins was indicted by the grand jury of said court for the offense of burglary, by breaking and entering house and carrying therefrom two pairs of pants of the personal goods of one Ike Barney. The jury returned a verdict of guilty. The defendant made a motion for new trial, and the same was overruled.

The plaintiff in error in his motion for new trial relied upon the general grounds, first, of the verdict being against the weight of the evidence; and, second, because it is contrary to law and the principles of equity. An examination of the evidence in the records shows that Ike Barney's dwelling house was broken open and entered last year while he was at court on Monday, at the fall term of court, and that his house was located in Terrell county, and that, when he left home, he closed his door by a leather latch and nailed it, securely fastening the same; that he was the owner of two pairs of pants, of the value of \$8. He testified positively that he saw the pants before leaving home in the morning, and that they were gone when he got back in the afternoon, and that the next place

he saw the pants was at Ed Jenkins' wife's home, and that Ed Jenkins was there present at the time the officers went with him there to secure the pants; that he found the pants in Terrell county. The evidence further shows that Jenkins had made an effort to buy the pants from the witness Joe McLendon, but that Ike Barney purchased them before he did. There is further evidence to show that there were tracks about the window corresponding to the track of the shoe about the size which Jenkins wore. The witness McLendon swore that the pants the bailiff found at Jenkins' wife's house were those sold to Ike Barney. The testimony of Lottie Dixon shows that Ed Jenkins was on Monday, the day the pants were stolen, working in the field near the home of Ike Barney, and that he knew Ike Barney had gone to town to attend court. The evidence further shows that Ed Jenkins left the field on that day, and those with whom he was working did not know where he had gone. No theory is suggested by the evidence by which the pants could have reached Ed Jenkins' wife's house as reasonable as that the defendant carried them there, and the recent possession thus shown in him was not explained.

H. A. Wilkinson, for plaintiff in error.  
J. A. Laing, Sol. Gen., R. B. Arnold, and J. B. Ridley, for the State.

**RUSSELL, J.** Judgment affirmed.

(2 Ga. App. 673)

**GOODWILL v. PEEPLES. (No. 486.)**

(Court of Appeals of Georgia. Oct. 22, 1907.)

**REPLEVIN—TRESPASSING LIVE STOCK—IMPOUNDING—NOTICE.**

Possessory warrant will lie against one who in a stock-law county impounds trespassing live stock and fails within due time to give the statutory notice.

(Syllabus by the Court.)

Error from Superior Court, Marion County; Wm. A. Little, Judge.

Action by Jerry Peebles against Eugene Goodwill. From a judgment for plaintiff, defendant brings error. Affirmed.

Geo. P. Munro, for plaintiff in error. W. D. Crawford, for defendant in error.

**POWELL, J.** The hogs of the defendant in error, who was the plaintiff in the court below, strayed into the growing crops of the plaintiff in error in a stock-law county. The latter impounded them, but failed to stray them as required by Pol. Code 1895, § 1775. On the fifth day a brother of the plaintiff, who himself had wrongfully obtained possession of the hogs prior to the time they escaped into the defendant's crop, made an arrangement with the defendant whereby the latter was to retain the hogs till he should pay him the damages. The plaintiff, finding the hogs thus in the possession of the defend-

ant, brought possessory warrant and secured a favorable judgment. The defendant took certiorari, which on hearing in the superior court was overruled, and he now brings error.

The possession of the defendant was originally lawfully acquired, and for three days was lawfully retained. After the third day it became unlawful and criminal. Pol. Code 1895, § 1776. This raises the question whether possessory warrant lies where the defendant's possession is originally lawful, but subsequently becomes unlawful. Such a case does not appear to be within the words of the statute. Civ. Code 1895, § 4799. However, in the case of *Meredith v. Knott*, 34 Ga. 222, the property came into the defendant's possession peacefully and lawfully, but afterwards "the possession was changed, and that of Meredith was wrongful, tortious, and fraudulent," and, says the court, "in all such cases we hold that a possessory warrant is the proper remedy." In the case of *Sheriff v. Thompson*, 116 Ga. 436, 42 S. E. 738, the precise question again came before the Supreme Court, which, after citing the case of *Meredith v. Knott*, and after reviewing all intermediate cases apparently in conflict to that ruling, adhered to the former decision. In that case Justice Little, who in his subsequent capacity of judge of the superior court tried the present certiorari in the court below, dissented. We are inclined to agree with the view then entertained by him, at least to the extent of thinking that such cases are not within the letter of our statute on possessory warrants; and we unhesitatingly agree with him in his present ruling that that decision of the Supreme Court is binding precedent and controlling in this case.

Judgment affirmed.

(2 Ga. App. 641)

**AMERICAN SURETY CO. v. WOOD.** (No. 237.)

(Court of Appeals of Georgia. Oct. 15, 1907.  
Rehearing Denied Oct. 23, 1907.)

**1. ADMINISTRATORS — BONDS — ACTION — PARTIES.**

A suit can be maintained against the surety on an administrator's bond alone, where it appears that the principal, the administrator, is dead, and his estate is unrepresented. The case is not altered if the administrator dies pending the suit. The plaintiff, at his option, may either proceed against the representative of the deceased administrator's estate and the surety jointly, or he may proceed against the surety alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2541.]

**2. SAME—PARTNERSHIP ASSETS—ADMINISTRATION.**

In a case where a surviving partner and an administrator are in fact one and the same person, the law presumes that any property rightfully belonging to the administrator has been placed in his hands by such surviving partner. While it is the duty of the surviving partner to first pay all partnership indebtedness, still, whenever all partnership liabilities have been

satisfied, if there is a surplus remaining in the hands of such surviving partner and administrator, it becomes subject-matter of administration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 295.]

**3. SAME—SUPPORT OF WIDOW.**

If, after payment of the partnership liabilities, a surplus remains in the hands of the administrator, it is liable for the year's support regularly allowed the widow of the intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 661.]

**4. EVIDENCE—BEST EVIDENCE—ADMISSIONS.**

No sufficient reason appears from the assignments of error as to the admission of evidence or the charge of the court that a new trial should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 536, 1135.]

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by W. A. Wood against the American Surety Company. From a judgment for plaintiff, defendant brings error. Affirmed.

T. L. Griner and Jackson & Orme, for plaintiff in error. Jas. B. Sanders, W. C. Davis, and K. J. Hawkins, for defendant in error.

**RUSSELL, J.** This case has already been to the Supreme Court, and is reported in 121 Ga. 471, 49 S. E. 295. The present defendant in error was then plaintiff in error, and the judgment of the lower court in awarding a nonsuit was reversed upon the express ground that the evidence for the plaintiff was sufficient to take the case to the jury. *Wood v. Brown*, 121 Ga. 471 (3), 474, 49 S. E. 295. Upon the subsequent trial which is now the subject of review not only was every fact, which appears in the former record, proved, but the plaintiff introduced additional testimony. The defendant surety company also introduced witnesses. In so far as there is a conflict in the evidence the jury have concluded the issue by their verdict, and the only question, therefore, so far as the exception that the verdict is contrary to the evidence is concerned, is: Was the evidence in behalf of the plaintiff sufficient to authorize the verdict? If it was, and if the judge of the city court did not err in permitting the plaintiff to strike the principal and proceed alone against the surety on the bond, the American Surety Company, then the judgment overruling the motion for new trial was right. If it be true either that the court erred in allowing the case to proceed against the surety alone, or that the evidence was insufficient to establish a breach of the bond, then his judgment should be reversed. This summary leaves out of immediate consideration the exceptions taken to the charge of the court which we reserve to a later portion of our decision. Of course, so far as any of the points now involved were determined by the decision of the Supreme Court, they are conclusive, and hence we might perhaps omit any considera-

tion of the sufficiency of the evidence. Upon the same facts as appear in the record now before us, the Supreme Court held, when the case was before them, that the evidence was sufficient to go to the jury, from which it follows that, if such evidence was not rebutted and disproved to the satisfaction of the jury, the plaintiff would be entitled to recover, and for that reason a new trial could not have been granted upon that ground.

1. Counsel for plaintiff in error insists that his motion to dismiss the petition should have been sustained because the action could not proceed against the American Surety Company, the security on the administrator's bond, alone. Since the former trial of this case, as appears from the record, the administrator, R. E. Brown, having died, his death was only suggested of record. So far as appears there was no administration upon his estate, and at the trial the plaintiff announced that he elected to proceed against the surety alone, without making the estate of said R. E. Brown a party to the litigation. The surety company objected thereto and moved to dismiss the suit. The court overruled the motion to dismiss and proceeded with the trial, and the court certified and defendant filed his exceptions pendente lite thereto, as follows, after stating the case: "The death of R. E. Brown, one of the defendants in the above-stated case, the administrator of the estate of A. H. Brown and the principal in the bond signed by the American Surety Company of New York on which this suit is based, having been suggested of record, and the estate of R. E. Brown, deceased, not having been made a party to this action, defendant moved to dismiss the petition of the plaintiff upon the ground that the suit could not proceed against the American Surety Company, surety, which motion the court overruled, to which ruling the defendant, the American Surety Company of New York, hereby excepts, and assigns the same as error, and prays that these, its exceptions, be certified by the court and entered on the minutes."

We find no error in the ruling of the court. Unquestionably, if the administrator had died before the plaintiff had begun his suit, the plaintiff could have instituted his action on the bond against the surety alone, and the right to proceed against the surety alone arises whenever, by the death of the principal on the bond, or the fact that the principal's estate is unrepresented, gives rise to such difficulties, delay, or inconvenience as section 3398 and section 3501, Civ. Code 1895, were expressly intended to prevent. Electing to proceed against the surety alone is the same (certainly in its effect upon such surety in relation to his rights as against the principal) as if the principal had not been joined in the suit in the first instance. This being true, we are of opinion that the exception filed pendente lite is wholly without merit.

The exceptions stated in sections 3398 and 3501, under which the surety may be sued alone, such as the removal of the administrator from the state, his death, or the fact that his estate is without representation, as pointed out by Judge Bleckley in *Giles v. Brown*, 60 Ga. 658, are recognized and provided for the benefit of the uses or beneficiaries of the administrator's bond, and when the necessity arises the remedy may be applied. Sections 3398 and 5041, Civ. Code 1895. Learned counsel for the plaintiff in error insists that surety on an administrator's bond cannot, in the first instance, be sued alone for its breach; that the principal or his representative must be a joined party defendant. Counsel construed section 3399 as limiting section 3398, and as affording a protection to the surety. To quote from counsel's brief: "Though he may be sued with his principal in the first place in the action, he is entitled still to have his principal's property first exhausted in such an action before his can be levied upon." We hold that section 3398 and section 3399 have no connection with each other, and that each is applicable to a different state of facts. The first section is as follows: "The administrator and his sureties shall be held and deemed joint and several obligors, and may be sued as such in the same action, and if the administrator is beyond the jurisdiction of this state, or is dead, and his estate unrepresented, or is in such position that an attachment may be issued against him, the sureties, or any one or more of them, may be sued. No prior judgment, establishing the liability of the administrator for a devastavit by him, shall be necessary before suit against the sureties on the bond." The purpose of this section is merely to deal with the relation of the principals and surety on the bond as it affects those entitled to its protection. It puts principal and surety in the same class (as joint obligors), and then under certain circumstances virtually applies the rule of section 5041. Section 3399 is as follows: "In all cases of judgments recovered against the administrator and his sureties, the execution issued shall be first levied on the property of the principal, and no levy shall be made on the property of the sureties until there is a return of nulla bona as to the principal, unless the plaintiff in *fi. fa.* shall file with the levying officer an affidavit that the surety is actually removing or secreting his property so as to avoid the payment of such judgment." Manifestly it applies only to those cases where (the principal not having died, or his estate being represented, or not having subjected himself to attachment or not having left the state) the plaintiff was compelled to sue the principal and surety together and has obtained judgment against both. In such a case it provides that the effects of the principal shall be exhausted before the surety can be attacked. Section 3399 is for the benefit of the surety, as against his principal. It

has no reference to the plaintiff. Section 3398 is for the benefit of the plaintiff in the action on the bond. It is not concerned with lightening the burden the surety has assumed.

2. The court properly refused to direct a verdict for the defendant. Indeed, to have done so would have been manifestly erroneous. The evidence for the plaintiff, in any view of the case, showed the receipt by the administrator of assets in excess of his disbursements.

3. Exception is taken in the second ground of the motion to the admission of testimony of Judge Wood, to the effect that R. E. Brown had made returns as administrator, and that these returns were filed, but were withdrawn; the objection being that the entries thereon were the best evidence as to whether or not returns were made to the court and then withdrawn. The facts that the returns were filed and withdrawn, if true, were substantive facts, even if it had not appeared from the evidence without contradiction that the returns were withdrawn by counsel of record for plaintiff in error and were presumably in his possession.

4. The objection to the testimony to the effect that a witness had bought a horse from the principal on the bond, but that said principal, R. E. Brown, had told him that the horse was the property of A. H. Brown, and that he paid \$40 of the purchase price to R. E. Brown after the death of A. H. Brown, was properly overruled. The objection urged is that the statement of R. E. Brown, the principal on the bond, made prior to the death of his intestate and before giving the bond of the American Surety Company, is not admissible to charge the security. In our opinion it was certainly competent for the plaintiff to prove by the admissions of R. E. Brown that the debt due on the horse at the time of A. H. Brown's death was a part of the property of the intestate unaccounted for in the hand of the administrator, whose bond was secured by the obligation of the American Surety Company. Declarations of a person since deceased against his interest, and not made with a view to pending litigation, are admissible in any case. *Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92. This ruling also disposes of several other exceptions in the record.

5. In the fourth ground of the motion objection is made to testimony offered for the purpose of showing the state of the partnership said to exist between R. E. Brown, the administrator, and A. H. Brown, his intestate, the value of the property owned by the partnership, and that said partnership only owed a very small amount of partnership debts. The evidence was objected to on the ground that it was inadmissible because irrelevant and cannot be used to bind the surety; the argument being that the bond was given to cover the liability of R. E. Brown

as administrator, and not as surviving partner. We think the court did right in overruling the objection and in admitting the testimony. While it is unquestionably true that the administration of partnership property falls upon the surviving partner, and that it is his duty to first pay all partnership indebtedness, still, whenever the point has been reached that the partnership owes no debts when all liabilities have been satisfied, then the surviving partner should turn over to the administrator the interest of the deceased in the partnership property. In this case, the surviving partner and the administrator being one and the same person, it would be presumed that as soon as the debts were paid the interest of the surviving partner, whatever it might be, would immediately pass to the administrator, be in his hands, and be subject to the year's support of his intestate's widow.

6. The objection to the testimony of W. R. Hudson was properly overruled for the reasons just stated above. This witness testified to an admission of the administrator that the notes and accounts of R. E. and A. H. Brown amounted to between \$2,200, and \$2,300, and they were worth \$1,700, or \$1,800. The testimony that the notes amounted to \$2,200, in view of the rulings in *Adkins v. Hutchings*, 79 Ga. 261, 4 S. E. 897 (5), would not have charged the administrator; but the admission of the administrator that these choses in action were worth \$1,800 was competent to do so.

7. The sixth ground of the motion for new trial complains of the refusal of the court to give in charge to the jury certain requests submitted by counsel for plaintiff in error. Upon examination of the charge as delivered by the court, we find that these requests, so far as applicable, were submitted to the jury. The latter portion of the first request to charge, in so much as the court was requested to instruct the jury that, "if the administrator came into possession of property, but disposed of it prior to the filing of proceedings for the year's support and the entering of the judgment, no breach of the bond has appeared, and you must find for the defendant," was not a statement of the law. If the administrator in the legal disposition of the property legally and properly disposed of it, then, and only then, could it be said that there was no breach of the bond.

The court did not charge the principle requested by the plaintiff in error that the inventory of the administrator is not sufficient evidence to charge him, and the request to thus charge the jury was properly refused. When this case was before the Supreme Court it was expressly held that "his inventory of assets as belonging to his intestate puts the burden on him to show its incorrectness." This is a distinct holding so far as this case is concerned, but no further,

that the inventory is sufficient to make a prima facie case of such assets in his hands as may be shown by the inventory.

8. We find no error in the extract from the charge complained of which would authorize the grant of a new trial. In the brief of learned counsel of plaintiff in error our special attention is directed to the following sentence of the charge: "If you should find that this was partnership property that went into his hands, then he had the right to apply a sufficient amount of the property to the payment of the debts of the firm." Counsel complain that this charge "leaves the jury as judge as to whether or not partnership property shall be used in the payment of partnership debts when it is a matter not in their discretion." We do not think the exception as stated is well taken. The judge should have told the jury that it was the duty of the administrator to apply a sufficient amount, etc., instead of instructing them that "he had the right to apply," etc. The charge seems to leave it discretionary with the surviving partner (who was also administrator) as to whether he paid the partnership debts first and would be subject to that objection. But a minor error in the charge would not require the grant of a new trial in a case where the verdict rendered is demanded by the evidence. The judge very inaptly told the jury in effect that the surplus, after paying A. H. Brown's one-half interest due on the debts, might be subject to the year's support. But we think it was clear to the jury, as it is to us, that as the property was jointly owned by R. E. and A. H. Brown, and as the inventory was a return of A. H. Brown's half interest in the partnership property, the jury were not misled by this expression. Indeed, when it is considered, in connection with the other portions of the charge the jury could not fail to understand that what the judge really meant was that deducting from A. H. Brown's half interest in the partnership assets whatever might be one-half of the total indebtedness of the firm, after all the debts were paid, would enable them to ascertain as to whether there was really any surplus of A. H. Brown's undivided one-half interest remaining in the hands of the administrator. The legal calculation would be to take the assets of the partnership as a whole, deduct all of the indebtedness as a whole, divide the remainder, if any, by two, and the result would be the surplus, subject to the widow's year's support. Yet, as a matter of mathematics, the result reached in dollars and cents would be exactly the same.

We have carefully reviewed the entire evidence, and have no hesitation in saying that the jury would have been authorized (under the admissions of the administrator, the evidence submitted as to the value of his intestate's property, deducting every credit proved by the defendant surety to find a greater surplus in the hands of the administrator, placed there after the payment of every partnership debt which the evidence disclosed) to have found the surety liable for a larger amount than the verdict rendered.

Judgment affirmed.

(3 Ga. App. 684)

WOLFE v. STATE. (No. 658.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

HOMICIDE—SHOOTING AT ANOTHER—EVIDENCE.

The trial was fair, the charge unexceptionable, and the verdict supported by the evidence. (Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Tom Wolfe was convicted of shooting at another, and he brings error. Affirmed.

Payton & Hay, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

POWELL, J. The defendant was indicted for assault with intent to murder, and convicted of the offense of shooting at another. We have carefully examined the entire charge of the court, to which many exceptions were taken in the motion for a new trial, and we are struck with its clearness and its fairness. Of all the charges which it has been our pleasure and duty to review since we have been in this service, we have not noted any which excels this one in these cardinal particulars. Indeed, in light of the evidence, as shown in the record, the verdict as rendered is a testimonial to the skill of counsel for plaintiff in error as trial advocates; for the evidence of the defendant's guilt of the higher crime of assault with intent to murder is almost overwhelming. In fact, the state of the evidence is almost, though not quite, such as to make the verdict of shooting at another unjustifiable under the principles of the Kendrick Case, 113 Ga. 759, 39 S. E. 286. We have examined all the exceptions made in the record. Since they present no new questions of law, it will be profitless to set them out at length.

No good ground for disturbing the verdict is shown, and the judgment refusing a new trial is affirmed.

(2 Ga. App. 678)

**HIXON v. CALLAWAY**, Sheriff. (No. 501.)  
(Court of Appeals of Georgia. Oct. 22, 1907.)**1. SHERIFFS—RULES—ANSWER—TIME.**

Rules against officers of court for breaches of duty are not within the purview of statutes regulating defaults under ordinary procedure by petition and process. The court, in its discretion, may allow the officer to make answer at any time before the rule is made absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sheriffs and Constables, § 288.]

**2. SAME—FAILURE TO LEVY—INJURY—PRESUMPTION—DEFENSES.**

Whenever an execution is placed in the hands of a levying officer with direction to levy the same (the defendant being in possession of property), and he fails to make the money within the time prescribed by law, the law presumes injury to the plaintiff in *fi. fa.* The officer may successfully defend against a rule brought by showing that despite the defendant's possession of the property there was outstanding in a third person a title thereto superior to the plaintiff's judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sheriffs and Constables, §§ 267-271, 290.]

**3. CHATTEL MORTGAGES—JUDGMENT—LIEN—PRIORITY—GROWING CROPS.**

The lien of a judgment duly recorded on the general execution docket is, after the maturity of a growing crop of the defendant in *fi. fa.*, superior to the title thereto obtained through a bill of sale, to secure a debt executed by the defendant in *fi. fa.* to a third person after the judgment is recorded, but before the crop is mature.

(a) The act of December 21, 1899 (Laws 1899, p. 78), providing that mortgages given to secure supplies necessary to make a crop shall be superior to older judgments, does not include within its purview bills of sale given to secure such supplies.

(b) It appearing in this case that the defendant in *fi. fa.* was in possession of a mature crop sufficient in amount to pay off the judgment of the plaintiff in *fi. fa.*, and that this *fi. fa.* was placed in the hands of the sheriff with directions to levy, and, the excuse of the sheriff for not levying being the existence of a bill of sale to secure a debt executed by the defendant to a third person subsequently to the recording of the plaintiff's *fi. fa.* on the general execution docket, the court erred in not making the rule against the sheriff absolute.

(Syllabus by the Court.)

Error from City Court of Washington; S. H. Hardeman, Judge.

Rule by J. W. Hixon against J. W. Callaway, as sheriff, to compel the latter to show cause why he did not levy a *fi. fa.* on certain property pointed out to him by plaintiff as the property of the execution debtor. From a judgment discharging the rule, plaintiff brings error. Reversed.

W. A. Slaton and J. W. Hixon, for plaintiff in error. F. H. Colley and Wm. Wynne, for defendant in error.

**POWELL, J.** The plaintiff in error, Hixon, had a judgment against Henry Tunnell dated April 15, 1906, on which execution was issued April 19, 1906, and recorded on general execution docket May 7, 1906. In the fall of 1906 he placed the execution in the hands of

the defendant in error. Callaway, then sheriff of Wilkes county for levy. He pointed out certain mules and a crop in the possession of the defendant in *fi. fa.* to be levied on. The sheriff failed to levy, and at the January term, 1907, Hixon brought petition for rule against him. The judge issued the rule requiring the sheriff to answer instant; and this was served upon the sheriff. The sheriff did not answer until April term of the court; but no rule absolute was taken. At the April term of the court the sheriff answered substantially that he had not levied because the defendant in *fi. fa.* had no property subject to levy. The plaintiff moved to strike the answer because it was not filed at the first term. The court overruled the motion, and this ruling is the basis of an exception in the record. The plaintiff traversed the answer and evidence was introduced. There was undisputed evidence that the mules were not subject, and the plaintiff abandoned any claim as to these. As to the crop, it appeared that the defendant in *fi. fa.*, as a tenant of one Carlton, made crops in the year 1906 of greater value than the plaintiff's *fi. fa.* On May 19, 1906, to secure the necessary supplies in the sum of \$250, he executed to the Tyrone Mercantile Company a bill of sale to the growing crop. This bill of sale was recorded May 30, 1906. On account of this bill of sale the sheriff declined to levy. The court upon the hearing discharged the rule, and the plaintiff in *fi. fa.* brings error.

1. As to the exception that the court erred in not striking the answer of the sheriff because it was not filed at the first term, we hold that the court did not abuse its discretion. Rules against officers are *sui generis*, and are governed more largely by the discretion of the court in each particular case than by the technical rules of ordinary procedure. In an ordinary action begun by petition and process the judge would not have had the power to allow the belated answer filed. *Beacham v. Kea*, 118 Ga. 406, 45 S. E. 398; *Dodson Printers' Supply Co. v. Harris*, 114 Ga. 966, 41 S. E. 54. But rules against officers are not within the purview of these statutes regulating defaults. *Holcombe v. Dupree*, 50 Ga. 336; *Wakefield v. Moore*, 65 Ga. 268. While the court might have made the rule absolute at the first term for failure of an answer, yet, not having done so, he had the right to allow the answer to be filed subsequently. See *Brantley Co. v. Southerland*, 1 Ga. App. 806, 57 S. E. 960.

2. "Whenever an execution is placed in the hands of an officer for collection, and he fails or neglects to collect it in the time prescribed by law, the law presumes that the plaintiff was injured; and, upon a rule against the officer to show cause why he should not be attached for contempt, the burden is upon him to show that the plaintiff was not injured." *Reeves v. Parish*, 80 Ga. 222, 4 S. E. 768. The plaintiff makes a *prima facie* case for the full amount of his judgment by show-

ing that a valid execution was placed in the hands of the sheriff for levy, and that the defendant in *fi. fa.* was in possession of sufficient property to satisfy it. The sheriff may successfully defend by showing that, despite the defendant's possession of the property, there was a title thereto paramount to the plaintiff's judgment outstanding in a third person. *Brannon v. Barnes*, 111 Ga. 850, 36 S. E. 689; *Wilkin v. American Freehold Land Mortg. Co.*, 106 Ga. 182, 32 S. E. 135. The measure of liability is the actual injury sustained by the plaintiff in *fi. fa.*

3. This brings us to the question whether the bill of sale of the Tyrone Mercantile Company was superior to the plaintiff's judgment. In point of time both of actual creation and of record the judgment was superior. Ordinarily this would make a case where the outstanding title would not be paramount to the plaintiff's judgment, and would therefore not afford a defense to the sheriff upon the rule. However, two reasons are set up why this rule does not apply. The first is based upon the act of December 21, 1899 (Laws Ga. 1899, p. 78), which provides that "the lien of mortgages on crops, which mortgages are given to secure the payment of debts for money, supplies and other articles of necessity, including live stock, to aid in making and gathering such crops, shall be superior to judgments of older date than such mortgages." Since the Tyrone Mercantile Company did not take a mortgage, which is a mere lien, but a bill of sale, which passes title, the statute is not applicable. As Justice Lamar, in the case of *Franklin v. Callaway, Sheriff*, 120 Ga. 383, 47 S. E. 970, says: "this act is limited in its application. \* \* \* The solitary provision is that such mortgages for supplies shall take priority over older judgments." In many respects bills of sale to secure debts are similar in effect to mortgages; but in other cardinal features they are totally different. The existence of such a bill of sale when superior to the judgment prevents levy of the *fi. fa.* until the amount of the debt due on the bill of sale is paid or tendered. *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10 (5, 6, 9); *Civ. Code* 1895, § 5433. The existence of a mortgage, although superior to the judgment, as to rank of the respective liens, does not prevent the levy of the *fi. fa.*; and indeed (to follow the analogy of *Prince v. Walker*, 1 Ga. App. 282, 58 S. E. 61), would not be a sufficient answer by the officer when ruled for failure to levy; although after the levy and sale the mortgagee might take the money on a rule to distribute.

The other contention is based upon *Civ. Code* 1895, § 5425, which provides: "No sheriff or other officer shall levy on any growing crop of corn, wheat, oats, rye, rice, cotton, potatoes, or any other crop usually raised or cultivated by the planters or farmers of this state, nor sell the same, until such crop shall be matured and fit to be gathered: provided this provision shall not

prevent any levying officer from levying and selling crops as heretofore practiced in cases where the debtor absconds or removes from the county or state, or from selling growing crops with the land." It is contended that, since the crop was not mature at the date of the execution of the bill of sale, it was not subject to levy; and that, therefore, the lien of the judgment did not attach. Application of general legal principles to cases respecting growing crops has given courts and law commentators no little trouble. Indeed we are prepared to indorse heartily the frank confession of Chief Justice Simmons in the case of *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 631, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325, when, after reviewing a mass of decisions of courts and statements of text-writers, he notes the hopeless confusion, and says: "Any one wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing crops has become involved may profitably direct his attention to the legion of cases cited by the various text-writers to whom we have above referred. The field thus open to him is promising even unto distraction." For some of the confusion of opinion existing in this state the decision in *Scolley v. Pollock*, 65 Ga. 339, must be held responsible. In that case the plaintiff held an old judgment. The defendant in *fi. fa.* sold his crop before maturity to the claimant, who took possession and cultivated it to maturity, and the court held that the crop was not subject to the *fi. fa.*, which antedated the purchase. The headnote in that case is in the following language: "Cotton in the field, not matured, as early as the 28th day of July, is not the subject of levy and sale, and therefore the purchaser of the crop in its then condition from the defendant in execution obtains a good title." In the body of the decision, the court, after stating the facts, cites and sets out the Code section above, and immediately thereafter quotes from the case of *Pitts v. Hendrix*, 6 Ga. 455, as follows: "By law the growing crop could only be sold separately after maturity. Before maturity of the crops they are appurtenant to the land, constitute a part thereof, and pass by and with the land." And then further says: "Before maturity, the crops only constitute an element of value, and are not themselves distinct chattels." And then, by what seems to be a glaring non sequitur, holds as we have just shown in the quotation from the headnote of the case. It seems clear to us that, while the statute postpones the time of levy, it does not prevent the lien of the judgment attaching in the meantime. If for lack of "corporeal status competent for seizure," no lien can attach; for the same reason delivery, which is essential to a complete sale, would seem to be precluded. This and other apparent inconsistencies resulted in this case being brought under re-

view by the Supreme Court in the case of Phillips v. Dean, 76 Ga. 10. After distinguishing the case from the one then at bar, the court says: "We were asked to review that case, but it is unnecessary, as we think it differs widely from this. Some of the principles therein expressed, however, are doubted, and will hardly be extended beyond the facts therein, or similar facts to them." The Supreme Court having left the case of Scolley v. Pollock, *supra*, thus doubted, limited, and partially disapproved, we will treat it likewise. The present case, as well as the case of Phillips v. Dean, *supra*, is distinguishable from that case by reason of the fact that the defendant in *fi. fa.* there delivered possession of his inchoate property to the claimant, who by his cultivation brought it to maturity. Possibly in such cases the title of the purchaser should be superior to the lien of the judgment until he has been paid for the labor and expense incurred by him in bringing the crop to maturity, and that equitable procedure would be necessary to subject the inchoate interest formerly possessed by the defendant in *fi. fa.* In the case at bar no such state of facts exists. The opening sentences of Chief Justice Bleckley in the opinion in the case of Green v. Franklin, 86 Ga. 360, 12 S. E. 585, while excluding the decision of the question as not being in the case before him, bear an undercurrent of intimation that the lien of a judgment is superior to a subsequent sale of an immature crop. It is not necessary, however, to decide what would be the respective rights of the holder of a lien by judgment and of the holder of a bill of sale (whether absolute, or as security for a debt) prior to the maturity of the crop. The question is as to their rights after the crop has been matured by the defendant in *fi. fa.* While the lien of the judgment may not seize the crops prior to maturity, it ranks as of the date of the judgment, and not as of the date the crop became mature. This is plain; for, if the crop should be seized under two judgments or under a judgment and an ordinary mortgage, we would not, in determining priorities, declare the liens equal on the theory that both attached at the same instant, to wit, the moment the crop became mature, but would look only to their respective dates. The lien of the judgment is enforceable only after the crop is mature; but, under Civ. Code 1895, § 2779, when it is properly entered on the general execution docket, it takes precedence over the interest of all persons (holders of special liens declared superior by statute of course being necessarily excepted) who thereafter "may have acquired a transfer or lien binding the defendant's property." It follows that Hixon's judgment was superior to the bill of sale of the Tyrone Mercantile Company; and that the court erred in discharging the rule against the sheriff.

Judgment reversed.

(3 Ga. App. 686)

**SHERMAN v. STATE. (No. 699.)**

(Court of Appeals of Georgia. Oct. 22, 1907.)

**1. ARREST — WARRANT — EXECUTION — FUNCTUS OFFICIO.**

Where a warrant was placed in the hands of an officer of the law for execution, and subsequently the person against whom the warrant issued voluntarily appeared for commitment trial before the magistrate who issued the same, the officer having such warrant in his possession also being present, and the magistrate thereupon continued the case and allowed the defendant to go at large on his personal recognizance, such voluntary appearance of the defendant was tantamount to an arrest, and such disposition of the case by the magistrate constituted satisfaction of the warrant, and it became functus officio, and any subsequent arrest thereunder was illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 178.]

**2. ARREST—RELEASE ON BAIL—REARREST.**

To authorize the rearrest of a defendant for the same offense when he has been lawfully allowed his liberty on his personal bond for his appearance on a certain named day to stand his preliminary trial, a forfeiture of his bond must be duly declared and another warrant for said offense thereupon issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 178.]

**3. CRIMINAL LAW — EVIDENCE UNLAWFULLY OBTAINED—WEIGHT AND SUFFICIENCY.**

The only evidence incriminating the defendant having been obtained by an unlawful search and seizure of his person while he was in custody under an illegal arrest, his conviction was unlawful, and the verdict must be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 877.]

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

Ed Sherman was convicted of carrying concealed weapons, and he brings error. Reversed.

See 58 S. E. 393.

H. B. Simmons, for plaintiff in error.  
Zach Childers, Sol., for the State.

HILL, C. J. Sherman was convicted of the offense of carrying concealed weapons, and his motion for a new trial was overruled. The only evidence against the defendant was given by the deputy sheriff into whose custody he had been delivered by the arresting officer and the bailiff who made the arrest. The witnesses testified that while the defendant was in the custody of the deputy sheriff, before he was put in jail, the latter searched him and found a pistol concealed on his person. This testimony was objected to on the ground that the search and seizure of the defendant was unlawful as he was under an illegal arrest, and that he was compelled by an officer of the law to furnish incriminating evidence against himself.

In order to determine this assignment of error, it is necessary to consider the facts and circumstances of the defendant's arrest. It appears from the brief of the evidence in the record that there were several warrants



issued against the defendant by a justice of the peace of said county for different offenses; that these warrants had been placed in the hands of the bailiff for execution. Before any of the warrants had been executed by the bailiff, the defendant appeared before the justice who issued said warrants for a preliminary trial, and said justice without a trial allowed the defendant to go at large on his own recognizance until the next term of the court. The bailiff who had the warrants in his possession did not make any formal execution of any of them, but was present and heard the order of the court permitting the defendant to go on his own recognizance. The defendant did not appear at the next term of the court, but the prosecutor, the constable, and the defendant's counsel were present in court, and an agreement was made between them, which agreement was approved by the court, that the defendant should remain at large on his personal recognizance until the court heard from defendant's attorney. Before the court had heard from his attorney, without any order of the court revoking his previous order that the defendant should remain at large on his personal bond, and without any forfeiture of said bond, the bailiff arrested the defendant on one of the warrants issued by said justice and from which the defendant had been released by the order of the justice, discharging him on his own recognizance as above set forth. On the day the bailiff arrested the defendant, he delivered him into the custody of the deputy sheriff of the county, and this officer before putting him in jail, and while having him in such custody, searched his person and found concealed thereon a pistol.

Under these facts, which are not disputed, was the testimony obtained by such search and seizure admissible against the defendant on his trial, for carrying concealed weapons? We think, under the foregoing facts, the arrest of the defendant by the bailiff was illegal. When the defendant appeared before the justice who had issued the warrants against him for the purpose of having a commitment trial, and the bailiff who had the warrants in his possession was also present, this constituted an arrest under said warrants. *Courtoy v. Dozier*, 20 Ga. 369. It amounted to a waiver of the defendant's right to see said warrant, and was a voluntary surrender thereunder to the court. The court, having legal custody therefore under these warrants, was authorized to hold the commitment trial, or to postpone the trial, and, in the latter event, to require an appearance bond to be executed with or without security. Allowing the defendant to go on his own bond until the next term of the court, and when that day arrived, again postponing the commitment trial and allowing the defendant to remain at large on his own recognizance, rendered the warrant upon which such action was taken by the court functus

officio; and the defendant could not thereafter be legally arrested for the offense covered by said warrant until his personal recognizance had been forfeited, and a new warrant issued for said offense. An arrest on a warrant and a bond thereunder satisfies the warrant, and there can be no other arrest thereunder. If a defendant, after an arrest, has been allowed to give bond, such bond must be forfeited, and another warrant issued, before he can be lawfully arrested for the offense covered by the first warrant. The arrest of the defendant, therefore, by the bailiff under the warrant which had become functus by the previous action of the justice, was an unwarranted exercise of authority, and such arrest was illegal. His search and seizure by the deputy sheriff while in his custody by virtue of such illegal arrest was unlawful, and the testimony obtained by such unlawful search and seizure following the illegal arrest was not admissible against him on his trial for carrying concealed weapons, and, these facts clearly appearing from the evidence, such testimony should have been excluded by the court. *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66; *Hughes v. State* (Ga. App.) 58 S. E. 390; *Sherman v. State*, 2 Ga. App. 48, 58 S. E. 393.

Judgment reversed.

(3 Ga. App. 711)

#### BONNER v. STATE. (No. 733.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

##### 1. INTOXICATING LIQUORS—WRONGFUL SALE—EVIDENCE.

On a trial for the unlawful sale of spirituous liquors, evidence that the accused had on several occasions received packages or boxes through the express office, with physical marks thereon indicating that their contents was whisky, is relevant and admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 293, 295.]

##### 2. SAME—INSTRUCTIONS.

The charge of the court upon which error was assigned was objectionable for the reasons stated in the opinion.

##### 3. CRIMINAL LAW—VERDICT—EVIDENCE.

A verdict wholly unsupported by any evidence must be set aside as contrary to law.

(Syllabus by the Court.)

Error from Superior Court, Early County; W. C. Worrill, Judge.

Davis Bonner was convicted of selling whisky in prohibition territory, and he brings error. Reversed.

Park & Collins, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

HILL, C. J. Davis Bonner was convicted of the offense of selling whisky in Early county, where the sale of spirituous liquors is prohibited by law. His motion for a new trial being overruled, he brings the case to this court.

Error is assigned upon the ruling of the

court in admitting, over the objection of the defendant, the following testimony: "That on several occasions packages or boxes had come through the express office addressed to Davis Bonner, and on looking through the cracks of the boxes bottles were seen that looked like they might be quarts of whisky; that on two different occasions the defendant, Davis Bonner, had carried from the express office two large boxes weighing about 60 lbs., having printed thereon 'Seventy-two half pints White Oak Whisky, Chattanooga.'" We think the testimony was admissible as against the objection that it was irrelevant and immaterial, while it was not a violation of law to purchase whisky outside of the county and ship it thereto, yet, where the defendant is charged with selling whisky in the county in violation of the statute, evidence that he was receiving whisky was a relevant fact in connection with the charge. Considered alone, of course, it would not be sufficient and would have to be supplemented by evidence showing that a sale had been consummated in the county by the defendant.

The following charge we think is justly assigned as error: "If you believe, gentlemen of the jury, that the defendant, Davis Bonner, received of Dock Knight money and went off and in a short time returned and furnished Dock Knight with whisky, that would make him guilty, unless he has given the jury satisfactory information as to how he got the whisky, and that his connection therewith was lawful." We think that these facts would be evidence of more or less probative value to be determined by the jury. But the charge that this fact "would make him guilty," even if unexplained by him, expresses too strongly the inference arising from said facts. This charge leaves out of consideration entirely that the money must have been given by the defendant to Dock Knight for the purpose of buying whisky, which he subsequently delivered to him. The case relied upon by the solicitor general in support of this charge is *Billups v. State*, 107 Ga. 766, 33 S. E. 659. In that case, the Supreme Court said, in substance, that if the state proved by a witness that he (the witness) had given the accused money with which to buy whisky, and that the accused was absent about half an hour, and when he returned he brought back a bottle of whisky and delivered it to the witness, that this made out a prima facie case for the state; but the important fact that the money must have been given by the witness to the accused for the purpose of buying whisky is entirely omitted from the charge complained of.

The most serious objection to this verdict, however, is that there is no evidence in the record which in any measure gives it support. The only fact proved by the state was that a witness had given the accused 25 cents for the purpose of going to the express office and getting a package of whisky for him, paying the express thereon with the 25 cents, and

that subsequently the party who gave the 25 cents to the accused for this purpose went to the house of the accused and got this whisky. The witness who testified to this fact was introduced by the state, and his testimony is as follows: "I saw Davis Bonner down about the store of Rob Knight, and handed him a quarter, and told him to go down to the express office and get me a package of whisky, and that day when I started hunting I went by Davis Bonner's house, and he handed it to me; that is, the bottle of whisky. I never paid Davis Bonner for the whisky, but I bought it myself from the Albany Whiskey House in Albany, Ga. Davis Bonner never sold it to me, but I gave him a quarter to go to the express office and get it for me and pay the express on it." Another witness for the state testified that he saw the witness who had testified about giving the 25 cents to the accused, go into the house of the accused when he started out hunting and come back with a bottle of whisky. This is all the testimony in the record except that mentioned in the first part of this opinion, that the accused had received express boxes at the express office indicating that they contained whisky, and it is clearly insufficient to prove the defendant's guilt. The verdict is therefore set aside, and a new trial ordered.

Judgment reversed.

(2 Ga. App. 675)

#### HINES v. McCOMBS et al. (No. 495.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

##### 1. LIFE ESTATES—RIGHTS OF LIFE TENANT—LEASES—DURATION.

One who by will is made not only the devisee of a life estate in the lands of the testator, but is also made executor of the will and trustee of the fee, and is given full power of disposition as to all property, real, personal, or mixed, to the end that an income may be derived for the support of himself and children, may lawfully execute a lease of reasonable duration upon the lands of the estate, and such a lease will not expire upon his death, even though it occur before the last year of such lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 47.]

##### 2. SAME—RENT NOTES—RIGHTS OF REMAINDERMEN.

In such a case the executor or trustee may transfer to another by assignment the rent notes taken as consideration for the lease, and the rights of the transferee in the rents will be superior to that of the remainderman, even after the death of the life tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 47.]

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by J. R. Hines against J. W. McCombs and another. From a judgment for plaintiff, plaintiff brings error. Reversed.

Isabella Hendrix died leaving a will. So far as they are material to this controversy, the provisions of the will are substantially

as follows: Her husband, H. E. Hendrix, is appointed executor and trustee, and in both capacities he is relieved from accountability to any court for his conduct. To said trustee, H. E. Hendrix, is devised all the testator's property, real, personal, and mixed. "Said H. E. Hendrix, as trustee as aforesaid, shall have absolute custody and control of each and all of said property, with power to sell or exchange any part thereof, as a change of investment for the purpose of this will, or to make advancements to our children, in his discretion, to provide for their maintenance and education, then especially to secure a maintenance to and for himself therefrom during his natural life. At the death of the said H. E. Hendrix, trustee, all of said property remaining, or those substituted therefor by exchange, shall be equally divided between my surviving children and their children, per stirpes, having regard to any advancements that may have been made to any."

In pursuance of his power under the will, H. E. Hendrix rented certain of the lands of the estate to Tom Legin for the years 1903 and 1904, and took from Legin a rent note therefor; the note being made payable to "H. E. Hendrix, Ext." On May 15, 1903, Hendrix transferred the note to G. T. Whilden, signing the transfer "H. E. Hendrix, Ext." In August, 1903, Whilden transferred the note to the plaintiff in error Hines. In May, 1903, H. E. Hendrix died. Hines collected the rents from Legin for the year 1903; but in December of that year the latter surrendered the possession to Mrs. McCombs and Mrs. Allen, who were the children of Mrs. Hendrix, and therefore remaindermen under her will, and who had also qualified as administrators de bonis non c. t. a. on her estate. They re-rented the land to Legin for the year 1904. This was done without Hines' knowledge or consent. In the fall of 1904 Legin brought the rent cotton and delivered it to Mrs. McCombs and Mrs. Allen in payment of his rent. Hines caused a distress warrant to be levied on the cotton, and it was resisted by Legin as well as by Mrs. McCombs and Mrs. Allen; their several rights being by a consent arrangement joined in one defense. To a judgment adverse to him Hines brings error.

Hines & Vinson, for plaintiff in error. D. B. Sanford and D. S. Sanford, for defendants in error.

POWELL, J. (after stating the facts as above). Under the will H. E. Hendrix was not only the executor and the holder of the life estate, but he was also the donee of an additional power not ordinarily attaching either to the office of the executor or to the estate of a life tenant. Viewed solely as a tenant for life, he would have possessed the statutory power of control over the entire es-

tate for the purpose of rentals and leases only to the end of the year of his death. See *Story v. Butt*, 2 Ga. App. 119, 58 S. E. 388. However, a review of the English cases will show that long before the enactment of St. 14 & 15 Vict. c. 25 (from which our section 3093 of the Civil Code of 1895 was adopted), which gives the statutory power to the life tenant of making a rent contract binding to the end of the year of his death, or of the British land settlement acts, which have further extended this power, it was not uncommon for grantors and testators to confer upon life tenants or trustees for life estates the power of making leases which would be binding after the death of the life tenant; and the right of grantors and testators to make the grant of such powers has never been questioned either before or since the passage of the statutes referred to above. Under the will before us, H. E. Hendrix had not only the right to enjoy the estate for life, but also to dispose of any or all of it, and especially to derive an income therefrom; and the remaindermen by express terms of the will took an estate in only the "property remaining" undisposed of at his death. We do not mean to say that, if he had attempted to sell any of the lands, he would not have been compelled to expose it at public outcry under Civ. Code 1895, § 3460; but to rent lands for two years is not to sell them. *Hutcheson v. Hodnett*, 115 Ga. 990, 42 S. E. 422. The terms of the will in that case are very similar to those of the will now in question, and we quote the headnote there as pertinent here: "A trustee in possession of land, charged with the duty of managing and controlling it and using the income therefrom for the maintenance, support, and education of the beneficiaries of the trust, may grant leases of the same, provided the time fixed for the duration of the leases is not unreasonable, and the amount stipulated to be paid as rental is a reasonably fair compensation for the use of the land for the time specified in the leases; they being otherwise reasonable in their terms." The rent contract between Hendrix and Legin was a valid contract for the full term. We probably should call attention to the fact that in the case just cited the trustee was expressly forbidden to encroach upon the corpus for the purpose of raising income for the maintenance of the beneficiaries, while in the present case Hendrix was expressly authorized to do so. The legal fee stood in him as trustee, and "trustees who have the legal fees in lands may lease them to any extent; the right being incident to the legal estate." 1 Wash. Real Prop. (6th Ed.) 629, cited approvingly in *Hutcheson v. Hodnett*, supra. Possibly in this state this general statement should be limited to leases under which only a usufruct passes.

The further question that arises is: Did Hendrix have the right to transfer the rent note, which we have just held was lawfully taken by him? This rent note under the law

was income. *Manget v. Hightower*, 63 Ga. 217. He had full power of disposition over the income. The note was not payable to his intestate, but to himself either personally or in his representative capacity. In either event, section 3449 of the Civil Code of 1895, regulating the mode of sale of insolvent papers of estates, is not applicable; but the common-law rule, which gives the trustee power to transfer a paper payable to himself, though taken in his representative capacity, applies. See *Thompson v. Thompson*, 77 Ga. 697, 8 S. E. 261. If, instead of taking a note, he had been paid in advance in cash for the rents for the full term, he could have spent the cash without accountability. He had a similar right to take a note, instead of cash, and to convert the note into money and use it. The tenant by attorning to the remaindermen could not divest Hines of his lien upon the crops raised on the rented premises.

Judgment reversed.

(2 Ga. App. 704)

**GLAZE v. STATE (No. 729.)**

(Court of Appeals of Georgia. Oct. 22, 1907.)

**1. CRIMINAL LAW — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.**

In a criminal case, where the guilt or innocence of the defendant is wholly dependent upon circumstantial evidence, the jury should be instructed, without request, that the guilt of the accused must be shown to the exclusion of every other reasonable hypothesis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1887.]

**2. SAME.**

The controlling issue in a case must be submitted to the jury with such appropriate instructions as will not only call the attention of the jury to the existence of such issue, but the charge of the court must further contain such clear, apt, and definite exposition of the specific principles of law applicable to the case as will enable the jury to deal with the real issue in the case and to properly decide it; and this is true whether a specific request be made or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1803-1809.]

**3. SAME.**

Where there is only one defense on which a party relies, failure to instruct the jury as to this defense so specifically that the jury will be not only required to pass upon it, but will be able to do so intelligently under pertinent rules of law and evidence, practically withdraws that defense, and is, in effect, tantamount to directing a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1806-1807.]

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

Alexander Glaze was convicted of larceny from the house, and he brings error. Reversed.

Shipp & Sheppard and J. A. Hixon, for plaintiff in error. Zach Childers, Sol., for the State.

RUSSELL, J. Plaintiff in error was tried and convicted for the offense of larceny from

the house. The evidence showed that Glaze went into the store of E. A. Luke, in the presence of a clerk and a customer who was at that time being waited upon by the clerk, and that he claimed to want to buy a gun. The clerk was busy waiting on the other customer, and Glaze, while in plain view of the clerk, went to the gun rack and took down the gun alleged to have been stolen, and began to examine it, simultaneously speaking to the clerk, who was also the brother of the prosecutor. The clerk was, at that time, cutting off a piece of meat for his customer, and only 10 or 15 feet from the defendant. The clerk, the customer, and the defendant were the only persons in the store. Before the clerk finished waiting on the other customer, a noise was heard on the outside, and a buggy passed. The defendant started out hurriedly, carrying the gun with him, and the clerk called to him to "put down that gun." The buggy which was passing was the buggy of the defendant, which he had previously refused to lend to one of the parties whom he found in the buggy and who was driving away. When the clerk called out, "Put down that gun," the defendant immediately dropped it, or, as he claims, stood it against the store immediately outside the store door and ran on and took possession of his buggy, which was being rapidly driven off by the parties in it.

There was practically but little difference between the state and the defendant as to any of the material facts. The defendant claimed that he set the gun down and pursued the parties who were attempting to carry off his buggy. The state insists that the defendant ran off with the gun and only dropped it because his theft was discovered. The prosecutor immediately pursued the defendant and overtook him before he had succeeded in overtaking his buggy, and when the prosecutor seized the defendant the latter jerked loose, saying he had done nothing, and continued running until he overtook his buggy. It is not necessary to consider the evidence, however, as to the pursuit of the defendant, because his conduct would be just as consistent with the theory that he was trying to overtake his buggy, if he were innocent, as that he was trying to escape, if he were guilty, for he was well known both to the prosecutor and to his brother, the clerk in the store. The only question in the case, therefore, which the jury had to determine, was whether at the time that the defendant went out of the store he had the intention of stealing the gun, or, having only the intention of getting possession of his buggy, he thoughtlessly took the gun with him without any intention of converting it to his own use. The question of the defendant's intention is the only question in the case. It is the paramount, the only, issue. The accusation alleged that "Alex. Glaze on the 20th day of October, 1906, and with force and arms, the house, to wit, the storehouse of E. A. Luke,

in said county situate, enter, and having entered, one double-barrel breach loading shotgun of the personal goods of E. A. Luke in the said house then and there found of the value of \$15.00, did wrongfully, fraudulently, and privately take therefrom and carry away with intent to steal the same."

The accusation is good under either section 178 or section 182 of the Penal Code of 1895. As the offense is denominated "misdemeanor," it was perhaps intended to be brought under section 182; but, whether brought under section 178 or section 182 there is no allegation that the defendant entered the storehouse with intent to steal. "Larceny from the house is the breaking or entering any house with the intent to steal or after breaking or entering said house stealing therefrom anything of value." Section 178, Pen. Code 1895. Under the statute the offense can be committed in four different ways. It may consist in the breaking a house with intent to steal, provided the offense is not burglary; entering any house with intent to steal; breaking a house and stealing therefrom, where it can be accomplished without entry or entering and stealing. The offense can be stated therefore in more than one way in the accusation, but in this accusation only one method is charged, to wit, that the defendant, after entering the house, carried away the gun with intent to steal it. And if the offense be based upon section 182, the same thing is true, for the state's case as set out in the bill of indictment limited the charge to entering the store and stealing therefrom.

Section 182 of the Penal Code of 1895 defines two classes of larceny from the house and distinguishes them. It says: "Any person breaking and entering any house or building (other than a dwelling house or its appurtenances) with intent to steal, but is detected and prevented from carrying such intent into effect." This is the first class. It is directed against those who break and enter a certain class of houses with intent to steal, but are detected before they succeed in stealing any of the articles therein contained. The section then proceeds in the following language: "Any person breaking or entering any such house or building and stealing therefrom any money, goods, chattels, wares or merchandise or any other article of value shall be guilty of a misdemeanor." Of course, this second division of the section is itself subdivided into thefts where there is a breaking and entering in order to accomplish the theft, and where there is no breaking, but merely an entrance into the building and a theft is accomplished. But in both cases a theft must actually be committed. Under the first portion of section 182, as in the first clause of section 178, where a house other than a dwelling house and its appurtenances is broken and entered with intent to steal, and the offender is de-

tected, he is guilty of larceny from the house, though nothing be taken.

Whether the accusation, therefore, be construed as based upon section 178 or section 182 of the Penal Code of 1895, the state relied for conviction solely upon proof that the defendant, after having entered the store, formed the intent to steal, and upon the sole charge that the gun was carried away with the intent to steal the same. The distance of the asportation would make no difference if the defendant in carrying away the gun intended to steal it. That he dropped the gun, instead of carrying it with him, would afford him no excuse or defense if before he dropped it he had intended to steal it. The intention of the defendant therefore becomes a matter of most paramount importance to be considered by the jury. If the jury should find that he carried the gun out of the store with the intent to steal it, he would be guilty; if, on the contrary, the evidence does not establish this fact, the defendant should be acquitted. The intention is always a material element in the offense of larceny. In this case it is especially material, in view of the fact that the taking was admitted, and the defendant's only defense was that there was no intention to steal it. The defendant's complaint is that not only was his defense practically withdrawn from the jury by the charge of the court, but, further, that the jury should have been fully instructed upon the law on the subject of intent, so as to enable them to intelligently weigh and consider the testimony in the case.

It is also insisted by the plaintiff in error that the verdict is contrary to the evidence. The plaintiff in error insists that the court should have charged the jury the law relative to circumstantial evidence as applicable to the circumstances of the case and to the intention of the defendant at the time of the taking. In his motion for new trial the defendant further contends that there was no issue between the state and the defendant as to the taking or the manner of the taking. The only contested issue being, as to the intention of the defendant at the time of the taking, and the court having failed to charge the jury with reference to intention in this connection, was failure on the part of the court to charge the jury with the law touching the material issue involved in the case. The trial judge, in his charge, made no reference to the subject of intention, other than by quoting section 178, Pen. Code 1895, and giving the following explanatory instruction: "Now, gentlemen of the jury, if you are satisfied beyond a reasonable doubt that Alex. Glaze, in Sumter county, at the time alleged in the accusation, wrongfully, fraudulently, and privately took and carried away from the storehouse of E. A. Luke, one double-barrel breach loading shotgun, the property of E. A. Luke, and the gun had any value, with the intent to steal the same, he would have vio-

lated the law, and you should find him guilty of the offense charged. On the contrary, if you do not believe this, or if you have reasonable doubt of it, he would not be guilty, and you should acquit him."

We think the complaint of the plaintiff in error is well founded. The charge of the court is correct in so far as it goes, but it does not go far enough. The jury should have been instructed that the intention of the defendant in taking the gun was the matter especially to be considered by them, and, in view of the fact that this could be shown only by circumstantial evidence, the jury should further have been instructed that where the guilt of the defendant was dependent entirely upon circumstantial evidence the guilt of the accused must be shown to the exclusion of every other reasonable hypothesis. *Riley v. State*, 57 S. E. 1031.<sup>1</sup> There was only one material issue in the case, to wit, whether there was an intent to steal the gun, existing in the mind of the defendant at the time that he carried it away. This issue was not dependent upon the defendant's statement for its existence. It necessarily arose, regardless of the statement from the other evidence in the case, and the jury should have been more fully instructed with reference to this issue, than by mere reference to the intent in the language of the statute. It is not only error to submit to the jury an issue which has no foundation in the evidence, or give instructions which are not applicable to the evidence, or to present a contention which is not urged by the party. It seems to have been uniformly held by the Supreme Court that the omission to submit the controlling issue in the case to the jury was such an error as demanded the grant of a new trial. And such issue must be submitted with such appropriate instructions as will not only call the attention of the jury to the existence of the issue; but the charge of the court must contain such clear, apt, and definite exposition of the specific principles of law applicable to the case as will enable the jury to deal with the real issue in the case and properly to decide it. And this is true whether a specific request be made or not. Where there is only one defense on which a party relies, to fail to instruct the jury as to this defense so specifically that the jury will be not only required to pass upon it, but will be able to do so intelligently under pertinent rules of law and evidence, virtually withdraws that defense, and is in effect to direct a verdict. When the only real contention in a case is only mentioned en passant, and then dismissed, as it were, with a wave of the hand, it is worse than ignored. To use the language of Justice Lumpkin, in *Smith v. State*, 109 Ga. 485, 35 S. E. 61, the defense is "chilled by judicial oversight or blighted by implied judicial disapproval."

In *Railroad Co. v. Voils*, 113 Ga. 362, 38 S. E. 819, the Supreme Court granted a new

trial solely upon the ground that the judge did not submit to the jury the main defense relied upon by the defendant. In the opinion the court says: "Where the company relies mainly upon one defense, and introduces evidence to sustain it [and the same thing would be true if the evidence introduced by the opposite party sustains it], it is error demanding a new trial to call the attention of the jury to this defense. This is true whether or not he is requested by counsel to do so. Unless the judge charges upon such defense, and thereby calls the attention of the jury to it, the case is not properly tried." It is true that the *Voils* Case was a civil suit, but, unless the right of personal liberty is inferior to the right of property, the same rule must govern in a case wherein a citizen is charged with crime, especially where the defense is not dependent alone upon the statement of the defendant.

In *Central R. R. v. Harris*, 76 Ga. 509, the point was made that a plaintiff in error could not use the same exception as that now insisted upon in the present case, because "he did not call the attention of the court below to the omission of which he now complains"; but Chief Justice Jackson, reviewing all of the former decisions of the Supreme Court, says: "The cases cited, and the principles on which they rest, do not apply to the clear omission to notice in the charge a plain defense of the company arising out of the evidence so as not to escape the observation of the judge. \* \* \* The courts will not allow a party to lie in wait for the judge when he charges substantially the law of the case, and then object to the insufficiency of a part of it; but in every case the law of it must be given in substance to the jury, because, if it is not given, the general verdict they give is not upon the law of the case, but on facts without instructions on the law of the case. The ship is at sea without chart or pilot, and can never reach the port to which it is bound without their guidance. The verdict can never be a legal verdict unless instructions on the law of the case be given by him who presides for that purpose." 76 Ga. 510. See, also, 76 Ga. 511, citations. The judgment was reversed, as expressly stated, solely because the charge ignored the defense set up by the defendant.

In view of the fact, as it appears from the record, that the defendant had and could not have any other defense other than that his taking (which was admitted) was not with intent to steal, we think that an instruction to the jury to the effect, first, that they should consider what was the intention at the time that he took the gun and carried it out of the store, and that, secondly, unless the jury were satisfied to the exclusion of every other reasonable hypothesis or supposition that when the defendant took the gun, if he took it, he intended to steal

<sup>1</sup> 1 Ga. App. 651.

it, they should acquit him, was demanded even without request.

In *Horton v. State*, 120 Ga. 307, 47 S. E. 969, the judgment was reversed, and it was held that the defendant was entitled to a charge on the subject of manslaughter, although his counsel (so far from requesting that the law of manslaughter be charged) actually insisted at the trial that there was "no manslaughter in the case." Our opinion is further confirmed by the rulings in *Phenix Mfg. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67; *Seymour v. State*, 102 Ga. 806, 30 S. E. 263; *Mays v. Shields*, 117 Ga. 817, 45 S. E. 68; *Whelchel v. Electric Ry. Co.*, 116 Ga. 431, 42 S. E. 776 (3); and *Whedon v. Knight*, 112 Ga. 642, 643, 37 S. E. 972.

The publicity of the taking, the delay of more than two months in beginning the prosecution, and the admission of the prosecutor that negotiations were meanwhile being carried on with reference to the payment of an indebtedness of \$150 due him by a brother-in-law of the defendant, as well as the undisputed fact that one of the main witnesses for the state had settled with the prosecutor for a stolen gun and had never been prosecuted for the theft, render us the less reluctant to order a new trial in which the guilt of this defendant, if he be guilty, can be established beyond legal question.

Judgment reversed.

(2 Ga. App. 713)

**FOUNTAIN v. CITY OF FITZGERALD.**  
(No. 734.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

**DISORDERLY CONDUCT—ELEMENTS OF OFFENSE—POINTING GUN—JURISDICTION.**

There was no error in refusing to sanction the petition for certiorari in this case.

(a) That a charge that the defendant pointed a gun at another is included as one of the acts constituting the offense of disorderly conduct under a city ordinance does not subject such accusation to the objection that an offense of which the state has jurisdiction is charged and that the municipal court is for that reason without jurisdiction.

(b) In an affidavit in which it is alleged that the defendant did commit the offense of disorderly conduct by fighting, cursing, using profane language, pointing a gun at one Bullard to intimidate said Bullard, and generally conducting himself in a tumultuous and riotous manner on the streets of Fitzgerald, Ga., the statement that the defendant pointed a gun may properly be included to authorize proof that the defendant acted in a disorderly manner, without in any way affecting the guilt or innocence of the defendant of the offense of pointing a weapon at another, under the terms of section 343 of the Penal Code of 1895.

(c) The demurrer to the accusation was also properly overruled for the reason that the language used with reference to pointing the gun was not sufficient to set forth a violation of section 343 of the Penal Code of 1895, and for that reason could neither create conflict between the authority of the state and municipal courts nor put the defendant twice in jeopardy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1270, 1277, 1284.]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Charles Fountain was convicted of disorderly conduct by the mayor of the city of Fitzgerald, and from an order of the superior court, refusing a writ of certiorari, he brings error. Affirmed.

O. H. Elkins and McDonald & Quincey, for plaintiff in error. E. W. Ryman, for defendant in error.

RUSSELL, J. The plaintiff in error was found guilty of disorderly conduct by the mayor of Fitzgerald. He then presented a petition for certiorari to the judge of the superior court, who refused to sanction the petition. The order of the judge refusing the issuance of the writ of certiorari is excepted to. The accusation (or, rather, the affidavit, which seems to have taken the place of an accusation) alleged that "Charlie Fountain did, on the 3d day of August, 1907, within the limits of the city of Fitzgerald, commit the offense of disorderly conduct by fighting, cursing, using profane language, pointing a gun at one Bullard to intimidate said Bullard, and generally conducting himself in a tumultuous and riotous manner on the streets of Fitzgerald, Ga., contrary to the good order of the said city of Fitzgerald." The defendant demurred to the accusation, insisting that the portion charging him with pointing weapons at said Bullard set forth no offense against the city ordinances, and that the defendant cannot be tried for same by the mayor, nor fined for the same, for that it sets forth an offense against the laws of the state of Georgia; and, secondly, because the allegation that the acts were to intimidate said Bullard constitutes no offense against the city laws. The defendant also moved to strike that part of the accusation which charged Charlie Fountain with pointing a gun, upon the ground that same was a state offense; and that part of the accusation which charged him with conducting himself in a tumultuous and riotous manner he moved to strike, because it was not specific enough to put the defendant on notice with what he was charged. Both the demurrer and the motion to strike were overruled in the mayor's court. The evidence in behalf of the city established the charge as laid in the accusation, though some of the acts alleged were contradicted by testimony in behalf of the defendant.

We find no error in the judgment of the judge of the superior court in refusing to sanction the certiorari. The errors alleged by the defendant in his petition for certiorari are: (1) That the court erred in overruling the motion to strike certain parts of the accusation. (2) That the court erred in overruling the demurrer. (3) That the finding and judgment are contrary to law, contrary to the evidence, and without evidence to support it. The motion to strike and the de-

murrer may be considered together. Thus considered, three objections were made to the accusation: (1) That the offense was not cognizable by the mayor's court of Fitzgerald, because it charged an offense against the laws of the state, the city could not proceed against him, and the ordinance would be void. (2) That the allegation that the acts were to intimidate Bullard constituted no offense against the city laws. (3) That the charge that defendant conducted himself in a tumultuous and riotous manner is not sufficiently specific.

1. (a) The charge made against the defendant was disorderly conduct, and the reference in the accusation to the pointing of a gun does not charge that as a separate offense, but is merely a part of the description of how the offense of disorderly conduct was committed; nor was there any attempt in the accusation to charge more than the one offense of disorderly conduct. Proof of the same act may supply the basis for a prosecution by both municipal and state authorities, and yet the offense may not be the same. An illustration of this is found in the ordinances of many cities in this state, which affix penalties to the keeping of intoxicating liquors for sale, and yet the only evidence of the violation of the city ordinance—the only proof that the liquor was kept for sale oftentimes is—may be testimony showing a sale. It is true that a municipality, without an express and specific legislative grant of authority, cannot deal with any criminal offense which is the subject-matter of the penal statutes of the state. But, while a municipal court could not try A. B. for murder, it could try A. B. for disorderly conduct in murdering C. D., if, in murdering C. D., A. B. disturbed the public peace and tranquility. A safe test to apply is whether the language of the municipal ordinance and of the accusation drawn in pursuance therewith contain the same essentials for the creation of a criminal act as the penal statutes of the state. Judged by this standard, the statement that defendant pointed a gun at Bullard to intimidate him would not sufficiently charge the offense defined in section 343 of the Penal Code of 1895. The fact that a charge that a defendant pointed a gun at another is included as one of the acts committed by the defendant which, considered together, constituted the offense of disorderly conduct under the terms of a city ordinance, will not subject the accusation for disorderly conduct to the objection that an offense against the state, of which the municipal court has no jurisdiction, has been charged.

(b) Nor is there any merit in the second ground of the demurrer, when considered (as it must be for the purposes of the demurrer) in connection with the accusation. Whether a gun or a stick were used, the intimidation of a citizen, in the peace of the state, by the defendant, would properly come within the definition of disorderly conduct; and it is on-

ly in the description of the acts constituting the disorderly conduct on the part of the defendant that the language employed is used. The same may be stated of the objection to the accusation that the defendant acted in a tumultuous and riotous manner is not sufficiently specific. Even if it is not specific enough to authorize conviction when considered alone, it is immaterial when considered in connection with the other descriptive averments of the defendant's alleged disorderly conduct, and therefore the error, if any, in failing to strike it, would be immaterial and harmless.

It is insisted that there was no proof of a proper ordinance of the city of Fitzgerald on the subject of disorderly conduct. If there was no such ordinance, it would devolve upon the defendant to show that fact. In *Chambers v. Mayor and Council of Barnesville*, 89 Ga. 739, 15 S. E. 634, it was held: "There being no ordinance in the record, and no complaint that a sufficient ordinance, if the mayor and council had power to pass it, did not exist, the court will presume that such ordinance did exist." When it was alleged that the defendant committed the offense of disorderly conduct, in the absence of proof to the contrary, the court would presume the passage of a legal ordinance defining, forbidding, and punishing disorderly conduct; and in connection with the other statements in the accusation the averment that the defendant pointed a gun, as has already been stated, may properly be included to authorize proof that the defendant acted in a disorderly manner, without in any way affecting the guilt or innocence of the defendant of the offense of pointing a weapon at another, in the terms of section 343, Pen. Code 1895. In the present case, under the accusation now under consideration, the proof would be limited to whether the defendant pointed a gun at Bullard, as to whether such pointing was for the purpose of intimidating Bullard, and as to whether such intimidation was, under the circumstances, disorderly conduct. As already intimated, however, the allegation with reference to the gun contained in this accusation falls far short of what would be required to be stated in an indictment against the defendant for pointing a weapon at another in the terms of section 343, Pen. Code 1895. For that reason the accusation in the city court could neither create a conflict between the authorities of the state and municipal courts, nor put the defendant twice in jeopardy.

It is insisted that the finding of the mayor was contrary to the evidence, and two points were urged. It is insisted in the first place that there was failure to prove the venue. Though not personally fully concurring in the strictness of the Supreme Court upon the subject of venue as evidenced in the *Gosha Case*, 56 Ga. 38, the case of *Futch v. State*, 90 Ga. 472, 16 S. E. 102, the case of *Cooper v. State*, 106 Ga. 119, 32 S. E. 23, and various



other cases which might be cited, this court has more than once followed these decisions, as we are bound to do, in all their strictness; and, if this were a case in which it were necessary to prove that the offense was committed in a definite county in order to give the court jurisdiction, we would be bound by the decisions before cited, and especially the Cooper Case. But inasmuch as the mayor's court of the city of Fitzgerald is confined as to its jurisdiction to the limits of the city, and the testimony of one of the witnesses establishes unequivocally the fact that the defendant was at a certain place "in this city, on the corner of Pine and Sherman streets," there is no trouble whatever about the venue. It is true that the witness and the father of defendant went a few feet away to hold a conference; and, as held in the Gosha Case, this might leave the inference that they, even in that short distance, went outside of the city limits. But the defendant, according to the testimony, who was talking and singing in a loud tone of voice, and attempting, apparently, to get an excuse to shoot the witness; did not move from the spot which was fixed in the testimony as being in the city of Fitzgerald.

The point is also made that the testimony described the date of the offense as August 3d, without fixing the year. The language employed by witness, as all other language, should be given a reasonable intendment. No point was made before the lower court that the evidence showed that the offense, if any, was barred by the statute of limitations, or that it was committed after the accusation. The warrant was sworn out the 5th of August, 1907. From all of the evidence it appears that the transaction was recent; that the difficulty started the previous Saturday afternoon about some costs due for the arrest of a negro. It was plain from the testimony that the origin of the difficulty was in 1907, and consequently no other inference can be entertained but that, when the difficulty itself was testified to have occurred on August 3d, it meant August 3, 1907.

Judgment affirmed.

(2 Ga. App. 663)

**THOMAS & McCAFFERTY v. SIESEL.**  
(No. 304.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

**1. WRIT OF ERROR—DISMISSAL.**

Under the decision of the Supreme Court in the certified case of Lyndon v. Georgia Railway & Electric Company (Ga.) 58 S. E. 1047, wherein former contrary rulings are modified and overruled, the writ of error in the present case is not subject to dismissal.

**2. SAME—RECORD.**

Where exception is taken to the refusal of the court to allow an amendment to pleadings, the proffered amendment should be set out, literally or in substance, in the bill of exceptions, or attached as a duly authenticated exhibit thereto. This court cannot consider it, if it be brought up in the transcript of record. Walker

v. Equitable Mortgage Company, 114 Ga. 862 (7), 40 S. E. 10.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2347.]

**3. PLEADING—EVASIVE ANSWER—MOTION TO STRIKE.**

It is not error for the court to strike on demurrer an ambiguous and evasive answer to a suit on promissory notes. Brinson v. Birge, 102 Ga. 802, 30 S. E. 261.

**4. SAME—NON EST FACTUM.**

A plea of non est factum is subject to be stricken on demurrer which does not unequivocally deny that the notes sued on are the act and deed of the defendant. Lester v. McIntosh, 101 Ga. 675, 29 S. E. 7.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1514-1518.]

**5. PAYMENT—PLEA—REQUISITES.**

A plea of payment, which fails to allege when, how, and to whom the payment was made, is properly stricken on demurrer. Wortham v. Sinclair, 98 Ga. 173, 25 S. E. 414; O'Neal v. Phillips, 83 Ga. 556, 10 S. E. 352; Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. —, 58 S. E. 316 (3).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 144-149; vol. 7, Bills and Notes, § 1535.]

**6. BILLS AND NOTES—TITLE OF HOLDER—DEFENSES.**

The title of the holder of a note cannot be inquired into, unless it is necessary for the protection of the defendant, or to let in a defense which he seeks to make. Civ. Code 1895, § 3698.

**7. PLEADING—MOTION TO STRIKE.**

Where, in an answer by paragraphs to a petition bringing suit on promissory notes, the defendant makes, in answer to one of the paragraphs, a general denial of the indebtedness, but such answer nowhere sets up any legal defense, the answer is properly stricken on demurrer. Johnson v. Cobb, 100 Ga. 139 (2), 28 S. E. 72. (Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Thomas & McCafferty against S. Siesel, as survivor, etc. From a judgment for defendant, plaintiff brings error. Affirmed.

Roland Ellis, Richard Curtt, Anderson, Felder, Rountree & Wilson, for plaintiff in error. Nottingham & Cabaniss, for defendant in error.

POWELL, J. Judgment affirmed.

(2 Ga. App. 665)

**NATIONAL SURETY CO. OF NEW YORK**  
et al. v. MEDLOCK. (No. 478.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

**1. BANKRUPTCY—DISCHARGE—LIBEL.**

A liability on account of a libel is not released by a discharge in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 787.]

**2. CORPORATIONS — DISSOLUTION — BANKRUPTCY.**

A corporation is not dissolved by an adjudication that it is bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2388; vol. 6, Bankruptcy, § 142.]

ment proceeding, sued out within four months of the adjudication in bankruptcy against the defendant in the main suit, which was an action upon a debt from which a discharge in bankruptcy would be a release. In that case the court held that, the original action being founded on a debt dischargeable in bankruptcy, no judgment could be rendered against the defendant in the main action, and that, the lien of the garnishment upon the funds in the hands of the garnishee having arisen within four months prior to the adjudication in bankruptcy, no judgment could be had upon the answer of the garnishee without working a preference under the bankruptcy act; hence, neither of the two preliminary judgments essential to a judgment on the dissolving bond being obtainable, the third or final judgment, necessary to fix the liability of the surety on the bond, could not be rendered. A very exhaustive discussion of the garnishment proceedings of this state appears in that case. The gist of the decision is contained in this extract: "The liability of the surety on the dissolving bond is not altered by the discharge of the bankrupt defendant, but the discharge prevents the happening of the contingency on which liability depends." The decision of our Supreme Court in the case of *Odell v. Wooten*, 38 Ga. 225, to the same effect, is quoted approvingly. Compare *Phillip Carey Co. v. Viaduct Place*, 1 Ga. App. 707, 58 S. E. 274.

In the case at bar the contingency on which the liability of the surety depends has happened. Judgment has been regularly obtained both against the defendant in the main action and against the fund impounded by the garnishment; and, as the court says in the *Klipstein Case*, the liability of the surety is not altered by the bankruptcy of the principal. See *Bankr. Act*, § 16. The judgment against the surety on the dissolving bond was therefore properly rendered. If the enforcement of the judgment has the effect of giving to this plaintiff a preference over the other creditors of the bankrupt corporation, in that she will receive a higher percentage of her debt than they will receive, the answer is that such preference, in the first place, is not being enforced against the assets of the bankrupt estate; and, in the second place, it arises, not in contravention of the bankruptcy act, but through its very terms, which render debts of the character of the one held by the plaintiff not discharged, and which do not prevent a creditor of the bankrupt from taking full satisfaction from a personal surety.

Very ably it has been argued to us that under the laws of this state a summons of garnishment creates no lien, and that the lien arises only when the judgment is entered on the answer of the garnishee, and that, since the judgment against the funds admitted by the garnishee was dated subsequently to the adjudication in bankruptcy, such judgment immediately falls as being in contraven-

tion of the bankruptcy act. In support of this contention we are cited to the case of *Willis v. Parsons*, 13 Ga. 335, wherein the court, in the discussion, says of a garnishment founded on a pending proceeding, not an attachment: "It is true that the act intended to afford a new remedy in certain cases therein specified, by authorizing summons of garnishment to issue 'as in cases of attachment,' but not to create a lien as in cases of attachment." In that case the court was merely discussing the peculiar rule existing in this state in the distribution of funds brought into court between creditors whose respective rights are based upon attachment, garnishment, and common-law judgments. That case merely holds that, by the terms of the statutes regulating priorities under a rule to distribute the priority between a garnishing creditor and a creditor by common-law suit is to be determined by a comparison of the dates of their respective main judgments; and the fact that the fund came into court by reason of the service of a summons of garnishment on behalf of one of the creditors prior to the date of the other judgment will not give the former the superior right, unless his judgment in the main action be also the first obtained. Compare, in this connection, the case of *Andrews v. Kaufman*, 60 Ga. 273, wherein it is held that, upon rule to distribute, a creditor who holds a common-law judgment prior in date to the main judgment of another creditor who has proceeded by attachment is to be preferred to the latter, although the action in which the common-law judgment was obtained was instituted subsequently to the levy of the attachment; yet it will not be disputed that the levy of the attachment creates a lien. See *Civ. Code* 1895, §§ 4577, 4578. It may be noted that by an amendment (*Laws Ga.* 1890-91, p. 75), now incorporated as a part of the Code section last cited, an attachment will have priority over an ordinary judgment obtained on a suit instituted after the levy.

In *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S. E. 865, a case wherein the summons of garnishment was sued out within four months of the bankruptcy of the defendant, although the garnishment was predicated upon a prior judgment more than four months old, the court held that the lien on the funds in the hand of the garnishee was "obtained through a legal proceeding instituted within four months prior to the filing of the petition in bankruptcy," and was rendered void by section 67 (f) of the bankruptcy act. In the opinion in that case the following (which is plainly obiter) appears: "It has been several times held, where an ordinary action has been brought and a garnishment summons is served, and a judgment is obtained by the plaintiff against the defendant within four months of the filing of the petition in bankruptcy, and a like judgment is obtained thereafter against the gar-

nishee, that the lien of the garnishment is rendered null, even though it may have provisionally attached by being served more than four months before the filing of the petition in bankruptcy. In *re Lesser* (D. C.) 108 Fed. 201; In *re McCartney* (D. C.) 109 Fed. 621, 6 Am. Bankr. Rep. 387." The learned justice who wrote the opinion manifestly overlooked the fact that the *Lesser* Case, on which this statement is predicated, had been reversed by the Supreme Court of the United States in the case of *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 38.

Whether the summons of garnishment creates a lien depends upon the particular shade of meaning given to the word "lien." If it be used in the old common-law sense of the right to immediately grasp or hold in manual possession a chattel till something be performed or done by the owner, then a summons of garnishment does not create a lien on the funds in the hands of the garnishee. But the word has also a broader meaning. "The term 'lien' in a narrow and more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand; but it has a more extensive meaning, and in common acceptation is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is still a lien on the property, although the property be not in the possession of him to whom the debt or duty is due." "A lien is defined to be a hold or claim which one has upon the property of another as security for some debt or charge. At common law there could be no lien without possession. It is therein defined as a right in one man to retain that which is in possession and belonging to another. In maritime law, liens exist independently of possession, either actual or constructive; and in the courts of equity the term 'lien' is used as synonymous with a charge or incumbrance upon the thing, where there is neither *jus in re* nor *ad rem*, nor possession of the thing." See *Words & Phrases Judicially Defined*, vol. 5, p. 4144 et seq., where these and a variety of similar definitions are given. See, also, In *re Byrne* (D. C.) 97 Fed. 762, 764; *Downer v. Brackett*, 21 Vt. 599, 602, Fed. Cas. No. 4,043; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

Whether the service of a summons of garnishment creates a technical lien on the funds in the hands of the garnishee or not, still, especially when the garnishee admits liability and pays the fund into court, or in lieu of such

actual payment a statutory bond is substituted, the court acquires such a hold upon the money or the res, such a right to retain and administer the fund, or what has been substituted for the fund, the bond, that the subsequent adjudication in bankruptcy, made more than four months thereafter, will not disturb it. *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, 9 Am. Bankr. Rep. 47, sub nom. *Pickens v. Dent*, 106 Fed. 653, 45 C. C. A. 522. In that case the court, reasserting the rule that the court which first obtains rightful jurisdiction over the subject-matter shall hold it, quotes approvingly from *Frazier v. Southern Loan & Trust Co.*, 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710, as follows: "The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy." See, also, in the same connection *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *Collier on Bankruptcy* (6th Ed.) 571; *Boston Mercantile Co. v. Ould-Carter Co.*, 123 Ga. 453, 51 S. E. 466.

Judgment affirmed.

(78 S. C. 294)

ARMOUR & CO. v. ROSS et al.

(Supreme Court of South Carolina. Nov. 4, 1907.)

Petition for rehearing denied.

For former opinion, see 58 S. E. 941.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(78 S. C. 433)

McMILLAN et al. v. INSURANCE CO. OF NORTH AMERICA.

SAME v. INSURANCE CO. OF NORTH AMERICA et al.

(Supreme Court of South Carolina. Nov. 2, 1907.)

On petition for rehearing. Denied.

For former opinion, see 58 S. E. 1020.

PER CURIAM. After careful consideration of the petition for rehearing herein, the court is satisfied that no material issue of law or fact has been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the stay of remittitur heretofore granted be, and is hereby, revoked.

















